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Maritime Delimitation in the Area between Greenland and Jan Mayen, Denmark v Norway, Judgment, Merits, [1993] ICJ Rep 38, ICGJ 94 (ICJ 1993), 14th June 1993, United Nations [UN]; International Court of Justice [ICJ]

Date: 14 June 1993
Citation(s): [1993] ICJ Rep 38 (Official Citation)
ICGJ 94 (ICJ 1993) (OUP reference)
Content type: International court decisions
Product: Oxford Reports on International Law [ORIL]
Module: International Courts of General Jurisdiction [ICGJ]
Jurisdiction: United Nations [UN]; International Court of Justice [ICJ]

Parties: Denmark
Norway

Judges/Arbitrators: Sir Robert Jennings (President); Shigeru Oda (Vice-President); Roberto Ago; Stephen M Schwebel; Mohammed Bedjaoui; Ni Zhengyu; Jens Evensen; Nikolai Konstantinovitch Tarassov; Gilbert Guillaume; Mohamed Shahabuddeen; Andrés Aguilar-Mawdsley; Christopher Gregory Weeramantry; Raymond Ranjeva; Prince Bola Adesumbo Ajibola; Paul Henning Fischer (Judge ad hoc)

Procedural Stage: Judgment, Merits

Subject(s):

Jurisdiction — Equity — Fisheries — Sovereignty — Continental shelf — Islands and artificial islands — Delimitation — Treaties, interpretation — Customary international law — State practice — Boundaries — Territory, title

Core Issue(s):

How to delimit the continental shelf and the fisheries zones as between Denmark and Norway, taking into consideration the Agreement between Denmark and Norway concerning the Delimitation of the Continental Shelf, the 1958 Geneva Convention on the Continental Shelf, and special circumstances such as state practice, geophysical characteristics, population and economy, and access to resources.

Decision - full text

Paragraph numbers have been added to this decision by OUP

Present: President Sir Robert Jennings; *Vice-President* Oda; *Judges* Ago, Schwebel, Bedjaoui, Ni, Evensen, Tarassov, Guillaume, Shahabuddeen, Aguilar Mawdsley, Weeramantry, Ranjeva, Ajibola; *Judge* Ad Hoc Fischer; *Registrar* Valencia-Ospina.

In the case concerning maritime delimitation in the area between Greenland and Jan Mayen,

between

the Kingdom of Denmark,

represented by

Mr. Tyge Lehmann, Ambassador, Legal Adviser, Ministry of Foreign Affairs,

Mr. John Bernhard, Ambassador, Ministry of Foreign Affairs,

as Agents ;

Mr. Per Magid, Attorney,

as Agent and Advocate ;

Mr. Eduardo Jiménez de Aréchaga, Professor of International Law, Law School, Catholic University of Uruguay,

Mr. Derek W. Bowett, C.B.E, Q.C., F.B.A., Emeritus Whewell Professor of International Law in the University of Cambridge,

as Counsel and Advocates ;

Mr. Finn Lynge, Expert-Consultant for Greenland Affairs, Ministry of Foreign Affairs,

Ms Kirsten Trolle, Expert-Consultant, Greenland Home Rule Authority,

Mr. Milan Thamsborg, Hydrographie Expert,

as Counsel and Experts ;

Mr. Jakob Høyrup, Head of Section, Ministry of Foreign Affairs,

Ms Aase Adamsen, Head of Section, Ministry of Foreign Affairs,

Mr. Frede Madsen, State Geodesist, Danish National Survey and Cadastre,

Mr. Ditlev Schwanenflüugel, Assistant Attorney,

Mr. Olaf Koktvedgaard, Assistant Attorney,

as Advisers ;

and

Ms Jeanett Probst Osborn, Ministry of Foreign Affairs,

Ms Birgit Skov, Ministry of Foreign Affairs,

as Secretaries,

and

the Kingdom of Norway,

represented by

Mr. Bjørn Haug, Solicitor-General,

Mr. Per Tresselt, Consul-General, Berlin,

as Agents and Counsel;

Mr. Ian Brownlie, Q.C., D.C.L., F.B.A., Chichele Professor of Public International Law, University of Oxford; Fellow of All Souls College, Oxford,

Mr. Keith Highet, Visiting Professor of International Law at the Fletcher School of Law and Diplomacy and Member of the Bars of New York and the District of Columbia,

Mr. Prosper Weil, Professor Emeritus at the Université de droit, d'économie et de sciences sociales de Paris,

as Counsel and Advocates ;

Mr. Morten Ruud, Director-General, Polar Division, Ministry of Justice,

Mr. Peter Gullestad, Director-General, Fisheries Directorate, Commander P. B. Beazley, O.B.E., F.R.I.C.S., R.N. (Ret'd),

as Advisers ;

Ms Kristine Ryssdal, Assistant Solicitor-General,

Mr. Rolf Einar Fife, First Secretary, Permanent Mission to the United Nations, New York,

as Counsellors ;

Ms Nina Lund, Junior Executive Officer, Ministry of Foreign Affairs,

Ms Juliette Bernard, Clerk, Ministry of Foreign Affairs,

Ms Alicia Herrera, The Hague,

as Technical Staff,

The Court,

composed as above,

after deliberation,

delivers the following Judgment :

1. On 16 August 1988 the Chargé d'affaires *ad interim* of the Embassy in The Hague of the Kingdom of Denmark filed in the Registry of the Court an Application instituting proceedings against the Kingdom of Norway in respect of a dispute concerning maritime delimitation between the Danish territory of Greenland and the Norwegian island of Jan Mayen. In order to found the jurisdiction of the Court the Application relied on declarations made by the Parties accepting the compulsory jurisdiction of the Court under Article 36, paragraph 2, of its Statute.

2. Pursuant to Article 40, paragraph 2, of the Statute of the Court, the Application was forthwith communicated by the Registrar to the Government of Norway. In accordance with paragraph 3 of that Article, all other States entitled to appear before the Court were notified by the Registrar of the Application.

3. By Orders made by the Court on 14 October 1988 and by the President of the Court on 21 June 1990, time-limits were fixed for a Memorial and a Counter-Memorial and for a Reply and a Rejoinder, respectively; these pleadings were duly filed within the time-limits fixed therefor.

4. Since the Court included upon the bench a judge of Norwegian nationality, but no judge of Danish nationality, the Government of Denmark, in exercise of its right under Article 31, paragraph 2, of the Statute, chose Mr. Paul Henning Fischer to sit as judge *ad hoc*.

5. Between the date of filing of the Reply of Denmark and the opening of the oral proceedings a series of supplemental documents were filed in turn by Denmark, by Norway, again by Denmark and again by Norway. After the closure of the written proceedings, the other Party was consulted in each case in accordance with Article 56 of the Rules of Court, and indicated that it had no objection to the production of the documents.

6. In accordance with Article 53, paragraph 2, of the Rules of Court, the Court, after ascertaining the views of the Parties, decided that copies of the pleadings and annexed documents should be made accessible to the public from the opening of the oral proceedings.

7. At public hearings held between 11 and 27 January 1993, the Court heard oral arguments addressed to it by the following :

For the Kingdom of Denmark : Mr. Tyge Lehmann,

Mr. John Bernhard,

Mr. Per Magid,

Mr. Eduardo Jiménez de Aréchaga,

Mr. Derek W. Bowett, Q.C.,

Mr. Finn Lynge,

Ms Kirsten Trolle,

Mr. Milan Thamsborg.

For the Kingdom of Norway : Mr. Bjørn Haug,

Mr. Per Tresselt,

Mr. Ian Brownlie, Q.C.,

Mr. Keith Highet,

Mr. Prosper Weil.

8. During the hearings, questions were addressed to both Parties by a Member of the Court, and replies were given in writing after the close of the hearings in accordance with Article 61, paragraph 4, of the Rules of Court.

* *

9. In the course of the written proceedings, the following submissions were presented by the Parties :

On behalf of the Kingdom of Denmark:

in the Memorial :

“In view of the facts and arguments presented in Parts I and II of this Memorial,

May it please the Court:

To adjudge and declare that Greenland is entitled to a full 200-mile fishery zone and continental shelf area vis-à-vis the island of Jan Mayen; and consequently

To draw a single line of delimitation of the fishing zone and continental shelf area of Greenland in the waters between Greenland and Jan Mayen at a distance of 200 nautical miles measured from Greenland's baseline” ;

in the Reply :

“In view of the facts and the arguments presented in the Memorial and this Reply,

May it please the Court:

(1) To adjudge and declare that Greenland is entitled to a full 200-mile fishery zone and continental shelf area vis-à-vis the island of Jan Mayen ; and consequently

(2) To draw a single line of delimitation of the fishery zone and continental shelf area of Greenland in the waters between Greenland and Jan Mayen at a distance of 200 nautical miles measured from Greenland's baseline, the appropriate part of which is given by straight lines (geodesies) joining the following points in the indicated order * :

Point No.	***Designation***	***Latitude N***	***Longitude W***
1	At Cape Russel	69° 59′38″3	22° 19′18″2
2	At Cape Brewster	70° 07′24″0	22° 03′55″5

Point No.	*Designation*	*Latitude N*	*Longitude W*
3	At Cape Lister	70° 29′33″5	21° 32′28″7
4	At Cape Hodgson	70° 32′16″7	21° 28′51″0
5	Rathbone Island SE	70° 39′53″4	21° 23′01″4
6	Rathbone Island NE	70° 40′14″7	21° 23′01″8
7	At Cape Topham	71° 19′56″0	21° 37′57″0
8	Murray Island	71° 32′45″3	21° 40′00″0
9	Rock	72° 16′09″4	22° 00′17″6
10	Franklin Island	72° 38′57″2	21° 40′04″7
11	Bontekoe Island	73° 07′15″9	21° 12′09″0
12	Cape Broer Ruys SW	73° 28′57″9	20° 25′05″9
13	At Cape Broer Ruys	73° 30′30″9	20° 23′02″6
14	Arundel Island	73° 45′49″4	20°03′28″9
15	At Cape Borlase Warren	74° 15′58″1	19° 22′11″4
16	At Clark Bjerg	74° 20′34″3	19°11 ′04″7
17	Lille Pendulum	74° 36′43″9	18°22 ′33″0
18	At Cape Philip Broke	74° 57′15″2	17° 31′08″5
19	Cape Pansch S	75° 00′34″8	17° 22′20″4
20	At Cape Pansch	75° 08′37′5	17° 19′01″6
21	Cape Børgen SE	75° 21′26″1	17° 50′52″2.″

On behalf of the Kingdom of Norway:

in the Counter-Memorial :

> “*Having regard to* the considerations set forth in this Counter-Memorial and, in particular, the evidence relating to the relations of the Parties at the material times,

May it please the Court to adjudge and declare that:

(1) The median line constitutes the boundary for the purpose of delimitation of the relevant areas of the continental shelf between Norway and Denmark in the region between Jan Mayen and Greenland ;

(2) The median line constitutes the boundary for the purpose of delimitation of the relevant areas of the fisheries zones between Norway and Denmark in the region between Jan Mayen and Greenland;

(3) The Danish claims are without foundation and invalid, and that the Submissions contained in the Danish Memorial are rejected";

in the Rejoinder:

"*Having regard to* the considerations set forth in the Norwegian Counter-Memorial and this Rejoinder, in particular, the evidence relating to the relations of the Parties at the material times, and maintaining without change the submissions presented in the Counter-Memorial,

May it please the Court to adjudge and declare that:

(1) The median line constitutes the boundary for the purpose of delimitation of the relevant areas of the continental shelf between Norway and Denmark in the region between Jan Mayen and Greenland;

(2) The median line constitutes the boundary for the purpose of delimitation of the relevant areas of the adjoining fisheries zones in the region between Jan Mayen and Greenland;

(3) The Danish claims are without foundation and invalid, and that the Submissions contained in the Danish Memorial are rejected."

10. In the course of the oral proceedings, the following submissions were presented by the Parties :

On behalf of the Kingdom of Denmark:

Submissions (1) and (2) identical to those in the Reply, reproduced in paragraph 9 above, together with the following additional submission :

"(3) If the Court, for any reason, does not find it possible to draw the line of delimitation requested in paragraph (2), Denmark requests the Court to decide, in accordance with international law and in light of the facts and arguments developed by the Parties, where the line of delimitation shall be drawn between Denmark's and Norway's fisheries zones and continental shelf areas in the waters between Greenland and Jan Mayen, and to draw that line."

On behalf of the Kingdom of Norway:

Submissions (1) and (2) identical to those in the Rejoinder, reproduced in paragraph 9 above, and submission (3) revised to read :

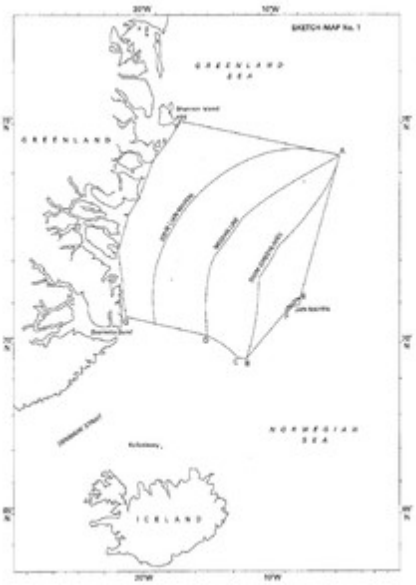
> "(3) The Danish claims are without foundation and invalid, and that the Danish submissions and claims are rejected."

* * *

11. The maritime area which is the subject of the present proceedings before the Court is that part of the Atlantic Ocean lying between the east coast of Greenland and the island of Jan Mayen, north of Iceland and the Denmark Strait between Greenland and Iceland, as indicated on sketchmap No. 1 on page 45 of the present Judgment. The distance between Jan Mayen and the east coast of Greenland is some 250 nautical miles (463 kilometres). The depth of the sea in the area between them is for the most part rather less than 2,000 metres; it varies however between 3,000 metres in the north of the area and 1,000 metres in the south, and there are a few sea-bed elevations, west of the southernmost part of Jan Mayen, where the depth is no more than 500 metres. A number of geographical, economic or other facts have been presented to the Court by the Parties as pertaining to the region with which the Court is to deal; it will be for the Court in due course to decide whether any of these in law affect the delimitation, as "special" circumstances or "relevant" circumstances.

12. The whole of the area with which the Court is concerned lies north of the Arctic Circle : the waters off the northern part of the east coast of Greenland are permanently covered by compact ice. The area is much affected by drift ice the extent of which varies according to the time of year.

13. Sovereignty over Greenland and Jan Mayen appertains to Denmark and to Norway respectively. Greenland, which had previously been a Danish colony, has since 1953 been an integral part of the Kingdom of Denmark. A Danish Act of Parliament of 1978, and a referendum held in Greenland in 1979, introduced home rule for Greenland. Jan Mayen, which was used from 1922 on by the Norwegian Meteorological Institute, was annexed by Norway in 1929, when Norwegian sovereignty over the island was proclaimed. In 1930 the island was integrated into the Kingdom of Norway as an inalienable part of the Realm.



View full-sized figure

SKETCH-MAP No.1

14. The total population of Greenland is about 55,000 of whom about 6 per cent live in East Greenland. The fisheries sector in Greenland employs about one-quarter of the labour force, and accounts for approximately 80 per cent of total export earnings. The sea area with which the Court is concerned comprises an important fishing ground for summer capelin, the only fish which is commercially exploited in the area (paragraph 73 below).

15. Jan Mayen has no settled population ; it is inhabited solely by technical and other staff, some 25 in all, of the island's meteorological station, a LORAN-C station, and the coastal radio station. The island has a landing field, but no port; bulk supplies are brought in by ship and unloaded principally in Hvalrossbukta (Walrus Bay). Norwegian activities in the area between Jan Mayen and Greenland have included whaling, sealing, and fishing for capelin and other species. These activities are carried out by vessels based in mainland Norway, not in Jan Mayen.

16. In 1976 the Danish Parliament enacted legislation empowering the Prime Minister to extend the existing Danish fishery zone so as to comprise waters “along the coasts of the Kingdom of Denmark” delimited by a fishing limit 200 miles from the relevant baselines ; such extension might be for one area at a time. A limited extension of the Greenland fishery zone was brought into force on 1 January 1977 ; off the east coast of Greenland it only applied as far north as latitude 67° N. According to Denmark, among the reasons for this limitation was that extension further north might cause certain difficulties in relation to the delimitation of the fishery zones vis-à-vis Iceland and Jan Mayen. By an Executive Order effective 1 June 1980, Denmark extended to 200 miles the fishery zone off the east coast of Greenland north of latitude 67° N. It was there provided that vis-à-vis Jan Mayen, fisheries jurisdiction would not, “until further notice”, be exercised beyond the median line. By an Executive Order dated 31 August 1981, jurisdiction was asserted over the full 200 miles (see paragraph 36 below).

17. The Norwegian Parliament in 1976 enacted legislation empowering the Norwegian Government to establish 200-mile “economic zones” around its coasts, and such a zone was established round mainland Norway with effect from 8 January 1977. By a Royal Decree taking effect on 29 May 1980, the Norwegian Government established a 200-mile fishery zone around Jan Mayen. This Decree provided that the zone should not extend “beyond the median line in relation to Greenland”. Between 1 June 1980 and 31 August 1981 the median

line was thus the *de facto* line between the areas where the two Parties exercised their respective fisheries jurisdictions.

18. It will be convenient now to indicate how the Court proposes to designate, for the purposes of the present Judgment, three maritime areas between Greenland and Jan Mayen which have featured in the arguments of the Parties. First there is the area bounded by the single 200-mile delimitation line claimed by Denmark and the two coincident median lines asserted by Norway; this area may for convenience be called the "area of overlapping claims", and is delineated on sketch-map No. 1. To the north, it is closed by the intersection of the delimitation lines proposed by the Parties; to the south it is limited by a line BCD on sketch-map No. 1 representing the limit of the 200-mile economic zone claimed by Iceland[1]. Denmark requests the Court to limit its decision to the areas north of that line, a position which is accepted by Norway.

19. A second area involved is as follows. Denmark claims an entitlement to a full 200-mile continental shelf and fishery zone off the east coast of Greenland. Norway limits its claim to the area on the eastern side of the median line, but this does not mean that it considers that Jan Mayen has any less entitlement to 200 miles of continental shelf and fishery zone than has the coast of Greenland. The area between the 200-mile line claimed by Denmark and a corresponding line drawn 200 nautical miles from the baselines on the north-west coast of Jan Mayen has been referred to by Norway as the "potential area of overlap of claims". This area, also shown on sketch-map No. 1, may for the purpose of the present Judgment conveniently be referred to as the "area of overlapping potential entitlement".

20. Thirdly, Denmark in its Memorial has put forward what it terms the "area relevant to the delimitation dispute", shown on sketch-map No. 1 as the area bounded by the lines HA; AE; the baselines along the coast of Jan Mayen between E and F; FB; BCDG; and the baselines along the coast of Greenland between G and H. Norway has denied that the term "relevant area" has any independent legal significance, and has contended that the area identified by Denmark is wholly irrelevant to any delimitation, bearing no relation either to the geography of the region or to legal principle. The Court notes however that the selection of points G and H, which define the extent of the Greenland coastline used by Denmark for comparison with the length of the coast of Jan Mayen, is not arbitrary. Point H is the point on the Greenland coast which determines, in conjunction with the appropriate point on the northern tip of Jan Mayen (point E), the equidistance line at its point of intersection with the Danish 200-mile line (point A). Similarly, point G is the point on the Greenland coast which determines, in conjunction with the southern tip of Jan Mayen (point F), the equidistance line at its point of intersection (point D) with the 200-mile line claimed by Iceland which the Parties have agreed to be the southern limit of the delimitation requested of the Court.

21. Denmark has calculated this "area relevant to the delimitation dispute" as comprising some 237,000 square kilometres. Denmark calculates further that, of this area, approximately 96,000 square kilometres would by a median line be allocated to Norway, and approximately 141,000 square kilometres to Denmark. These figures have not been challenged by Norway. If however one considers the area of overlapping potential entitlement, as defined in paragraph 19 above, between the 200-mile line off the coast of Greenland and the 200-mile line round the coast of Jan Mayen, the division of this area (totalling some 136,000 square kilometres) by the median line would, in the understanding of the Court, allot approximately 71,500 square kilometres to Denmark, and between 64,500 and 65,000 square kilometres to Norway.

* *

22. A principal contention of Norway is that a delimitation has already been established between Jan Mayen and Greenland. The effect of treaties in force between the Parties — a bilateral Agreement of 1965 and the 1958 Geneva Convention on the Continental Shelf — has been, according to Norway, to establish the median line as the boundary of the continental shelf of the Parties, and the practice of the Parties in respect of fishery zones has represented a recognition of existing continental shelf boundaries as being also applicable to the exercise of fisheries jurisdiction. Independently of this question of the effect of the treaties, the "conjoint conduct" of the Parties has, Norway maintains, long recognized the applicability of a median line delimitation in their mutual relations, in the context both of the continental shelf and of fishery zones. These contentions, that a boundary is already in place, will need to be examined at the outset.

23. Denmark and Norway concluded an Agreement on 8 December 1965 concerning the delimitation of the continental shelf. The authentic text of that Agreement was in the Danish and Norwegian languages : the Court was supplied with an English translation of the Agreement, which has not been questioned. The Parties however disagree as to the meaning and the effect of this Agreement. The Preamble and Article 1 of the Agreement read as follows :

> "The Government of the Kingdom of Denmark and the Government of the Kingdom of Norway, having decided to establish the common boundary between the parts of the continental shelf over which Denmark and Norway respectively exercise sovereign rights for the purposes of the exploration and exploitation of natural resources, have agreed as follows :
>
> ## Article 1
>
> The boundary between those parts of the continental shelf over which Norway and Denmark respectively exercise sovereign rights shall be the median line which at every point is equidistant from the nearest points of the baselines from which the breadth of the territorial sea of each Contracting Party is measured."

Article 2 provides that "In order that the principle set forth in Article 1 may be properly applied, the boundary shall consist of straight lines" which are then defined by eight points, enumerated with the relevant geodetic co-ordinates and as indicated on the chart thereto annexed; the lines so defined lie in the Skagerrak and part of the North Sea, between the mainland territories of Denmark and Norway.

24. It is clear that the Agreement contains no provision for the definition of the position of a median line specifically between Greenland and Jan Mayen. Norway's contention is however that the Agreement is a general one between the two countries to treat the median line as the line of delimitation of all continental shelf boundaries between them and that the Agreement is accordingly unrestricted in its area of operation. Denmark, on the other hand, contends that it is not an Agreement of such a general application, but one relating exclusively to the Skagerrak and part of the North Sea. It submits that this limitation is evident from the terms of Article 2 of the Agreement, which provides that "the boundary shall consist of straight lines" passing through eight points in the Skagerrak and part of the North Sea.

25. Norway accordingly contends that the text of Article 1 is general in scope, unqualified and without reservation, and that the natural meaning of that text must be “to establish definitively the basis for all boundaries which would eventually fall to be demarcated” between the Parties. In its view Article 2, which admittedly relates only to the continental shelves of the two mainlands, “is concerned with *demarcation*”. Norway deduces that the Parties are and remain committed to the median line principle of the 1965 Agreement, and that as and when the need for a more precise definition of a continental shelf boundary between them in another area might arise, they are bound to “demarcate” or delineate any such boundary on that basis. Moreover since no reference is to be found in the 1965 Agreement to special circumstances, such as might affect the “demarcation” of their continental shelf boundaries, Norway submits that it is to be concluded that both Parties at that time found that there were no “special circumstances”. Denmark on the other hand argues that the object and purpose of the Agreement is solely the delimitation in the Skagerrak and part of the North Sea on a median line basis.

26. The Court has to pronounce upon the interpretation to be given to the 1965 Agreement. The Preamble to the Agreement states that the two Governments have decided to establish “the common boundary” between the parts of the continental shelf over which Denmark and Norway respectively exercise sovereign rights for the purposes of exploration and exploitation of natural resources. Similarly, Article 1 also refers to “the boundary between those parts of the continental shelf …”. Consistently, the Agreement also provides in Article 2 that “the boundary shall consist of straight lines&rdquo passing through eight points in the North Sea. The words “the boundary” in all these three parts of the Agreement, expressed in the singular, must refer to the one boundary defined in Article 2. If the intention had been otherwise, Article 2 would have been so worded as to make it clear that it is providing for only a part of the total boundary contemplated by the Preamble and Article 1. Considered in the light of Article 2 of the Agreement, the principle laid down in Article 1 is valid only as regards the area mentioned in Article 2.

27. The 1965 Agreement has in any event to be read in its context, in the light of its object and purpose. The Geneva Convention on the Continental Shelf, adopted in 1958, defined the term “continental shelf, in Article 1, as referring:

> “*(a)* to the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas ; *(b)* to the seabed and subsoil of similar submarine areas adjacent to the coasts of islands”.

By 1965 both Parties had incorporated that definition of the continental shelf given in the Convention into their domestic legislation (Danish Decree of 7 June 1963, Art. 2 (1); Norwegian Decree of 31 May 1963 and Law of 21 June 1963, Art. 1). Denmark has therefore argued that in 1965 the two Parties could not have had the area between Greenland and Jan Mayen in mind as the subject of a potential future delimitation : both Parties were asserting shelf rights under the definition of the shelf in the 1958 Convention (200 metres depth or the limit of exploitability). The Court considers that the object and purpose of the 1965 Agreement was to provide simply for the question of the delimitation in the Skagerrak and part of the North Sea, where the whole sea-bed (with the exception of the “Norwegian Trough”) consists of continental shelf at a depth of less than 200 metres, and that there is nothing to suggest that the Parties had in mind the possibility that a shelf

boundary between Greenland and Jan Mayen might one day be required, or intended that their Agreement should apply to such a boundary.

28. It is also appropriate to take into account, for purposes of interpretation of the 1965 Agreement, the subsequent practice of the Parties. The Court first notes the terms of a Press Release issued by the Ministry of Foreign Affairs of Norway on 8 December 1965, which refers to the Agreement of that date as "the second Agreement entered into by Norway *concerning the delimitation of the continental shelf in the North Sea*" (emphasis added) (the first having been an agreement of 10 March 1965 with the United Kingdom). More significant is a subsequent treaty in the same field. On 15 June 1979, Denmark and Norway concluded an Agreement "concerning the Delimitation of the Continental Shelf in the Area between the Faroe Islands and Norway and concerning the Boundary between the Fishery Zone around the Faroe Islands and the Norwegian Economic Zone". According to that Agreement the continental shelf boundary between the Faroe Islands and Norway was to be "the median line" (Art. 1), and the "boundary between the fishery zone near the Faroe Islands and the Norwegian economic zone" (Art. 4) was to follow the boundary line which had been defined in Article 2 "in the application of the median line principle referred to in Article 1". No reference whatever was made in the 1979 Agreement to the existence or contents of the 1965 Agreement. The Court considers that if the intention of the 1965 Agreement had been to commit the Parties to the median line in all ensuing shelf delimitations, it would have been referred to in the 1979 Agreement.

29. This absence of relationship between the 1965 Agreement and the 1979 Agreement is confirmed by the terms of the official communication of the latter text to Parliament by the Norwegian Government. Proposition No. 63 (1979–1980) to the Storting states that:

> "On 8 December 1965 Norway and Denmark signed an agreement concerning the delimitation of the continental shelf between the two States.
>
> The agreement did not cover the delimitation of the continental shelf boundary in the area between Norway and the Faroe Islands."

Since, as noted above, the 1965 Agreement did not contain any specific exclusion of the Faroe Islands area, or of any other area, this statement is consistent with an interpretation of the 1965 Agreement as applying only to the region for which it specified a boundary line defined by coordinates and a chart, i.e., the Skagerrak and part of the North Sea.

30. The Court is thus of the view that the 1965 Agreement should be interpreted as adopting the median line only for the delimitation of the continental shelf between Denmark and Norway in the Skagerrak and part of the North Sea. It did not result in a median line delimitation of the continental shelf between Greenland and Jan Mayen.

31. The Court therefore turns to the Norwegian argument based on the 1958 Geneva Convention on the Continental Shelf (hereafter referred to as "the 1958 Convention"). Both Denmark and Norway are parties to that Convention, and recognize that they remain bound by it ; but they disagree as to its interpretation and application. The 1958 Convention, which came into force on 10 June 1964, was signed by Denmark on 29 April 1958. Subsequently, Denmark ratified the 1958 Convention on 12 June 1963 and later Norway acceded to it on 9 September 1971. The issue on the purport of Article 6, paragraph 1, of the 1958 Convention, which reads :

> “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.”

Norway contends that a delimitation of the continental shelf boundary — specifically, a median line boundary — is already “in place” as a result of the effect of this Article of the 1958 Convention. It considers that the effect of the 1965 Agreement, which provides for such a boundary and omits any mention of “special circumstances”, is declaratory of the interpretation by the Parties of the 1958 Convention, in its application to their geographical situations, i.e., that no special circumstances were present, or alternatively that the Parties have “renounced the proviso of Article 6” relating to special circumstances. It will however be apparent that this Norwegian argument rests on the contention, already rejected by the Court, that the 1965 Agreement was intended to apply generally, to delimitation other than that specifically provided for, in the Skagerrak and part of the North Sea.

32. Thus, in the view of the Court, the 1965 delimitation Agreement does not constitute an agreement that there were no special circum stances, and therefore does not have the result that, pursuant to Article 6, paragraph 1, of the 1958 Convention, the median line would be the boundary. Apart from its argument based on the 1965 Agreement, Norway further argues that there are in fact no special circumstances within the meaning of Article 6; and that, in the absence of an agreement, and of special circumstances, that Article operates on a prescriptive and a self-executing basis to establish the median line as the boundary. The validity of this argument will depend on whether the Court finds that there are indeed special circumstances, a matter which will be dealt with below. The Court will therefore now turn to the arguments which Norway bases on the conduct of the Parties and of Denmark in particular.

33. Norway contends that, up to some ten years ago at least, the Parties by their “conjoint conduct” had long recognized the applicability of a median line delimitation in their mutual relations. In the contention of Norway,

> “(a) the Danish Government has by its various public acts expressly recognized and adopted a median line boundary in its relations with Norway both in the context of continental shelf delimitation and in the context of fisheries zone delimitation ;
>
> (b) the general pattern of conduct on the part of the Danish Government constitutes acquiescence in, or tacit recognition of, a median line boundary in its relations with Norway ;
>
> (c) the consistent pattern of Danish conduct, together with knowledge of the long-standing position of the Norwegian Government in the matter of maritime delimitation, prevents Denmark from challenging the existence and validity of the median line boundary between Greenland and Jan Mayen, which boundary is consequently opposable to Denmark ;

(d) the consistent pattern of Danish conduct, together with knowledge of the long-standing position of the Norwegian Government in the matter of maritime delimitation, prevents Denmark from asserting the existence and validity of a delimitation in the form of the outer limit of a 200-mile fishery zone and continental shelf area vis-à-vis the island of Jan Mayen: in other words, the claim presented in the Danish Memorial is not opposable to Norway".

While Norway lays some emphasis on the consistency, both chronological and substantial, of the legislation and other actions of the two Parties during the period to be examined, it is the conduct of Denmark which has primarily to be examined in this connection.

34. On 7 June 1963, the Government of Denmark issued a Royal Decree concerning the Exercise of Danish Sovereignty over the Continental Shelf, Article 2, paragraph 2, of which provided that

> "The boundary of the continental shelf in relation to foreign States whose coasts are opposite the coasts of the Kingdom of Denmark or are adjacent to Denmark shall be determined in accordance with Article 6 of the Convention, that is to say, in the absence of special agreement, 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."

Norway draws attention to the omission in this text of any reference to the provision of Article 6 of the 1958 Convention, "unless another boundary line is justified by special circumstances" and infers that, in the course of the Danish legislative process, the geographical situation of the Kingdom of Denmark had been examined and no special circumstances had been found that would call for delimitation on any other basis than a median line. Denmark however observes that the Decree was, according to its Preamble, promulgated in accordance with the 1958 Convention, and expressly extended the Danish claim to continental shelf as far as the Convention allowed; it explains that special circumstances had in fact been under contemplation in 1963, but were not mentioned specifically, the intention being that they were comprised in the reference to the 1958 Convention. In support of this it cited *inter alia* a passage of the legislative history of a Danish Act of 9 June 1971 laying down regulations for the continental shelf. In the light of these indications, the Court is not persuaded that the Decree of 7 June 1963 supports the argument which Norway seeks to base on conduct.

35. A Danish Act of 17 December 1976 empowered the Prime Minister of Denmark to proclaim 200-nautical-miles fishery zones in "waters along the coasts of the Kingdom of Denmark", and Article 2 of that Act provided that, in the absence of agreement,

> "the delimitation of the fishing territory relative to foreign States whose coasts are situated at a distance of less than 400 nautical miles opposite the coasts of the Kingdom of Denmark or adjacent to Denmark, shall be a line which at every point is equidistant from the nearest points on the baselines at the coasts of the two States (the median line)".

In the view of the Court, this provision is explained, in particular, by the Parties' concern not to aggravate the situation pending a definitive settlement of the boundary. The Danish Government was of the view that it was inexpedient then to raise the question of delimitation, and the 200-mile fishing limit was therefore not extended beyond 67° N off the east coast of Greenland. Norway itself had doubts whether a 200-mile zone around Jan Mayen would be internationally acceptable, as is shown by a parliamentary reply in 1980 during a debate on a proposed agreement between Norway and Iceland. The Court does not therefore consider that the terms of the Danish legislation of 1976 imply recognition of the appropriateness of a median line vis-à-vis Jan Mayen.

36. Danish fisheries jurisdiction was extended to the area between Greenland and Jan Mayen by an Executive Order of 14 May 1980, issued pursuant to the Act of 17 December 1976, and providing that “the fishing territory in the waters surrounding Greenland”, north of latitude 67° on the east coast, should, “except where otherwise provided” in the Order, extend to 200 miles from the baselines. The Order also provided that :

> “Where the island of Jan Mayen lies opposite Greenland at a distance of less than 400 nautical miles, jurisdiction of fisheries shall not, until further notice, be exercised beyond the line which everywhere is equidistant from the nearest points of the baselines of the coasts concerned (median line).”

Norway argues that in view of the reference to the median line as boundary in the 1976 Act, quoted above, by virtue of which the Executive Order was issued, the claims to 200 nautical miles went beyond the enabling authority conferred by the Act. Apart from the question whether this issue of *vires* is one for the Court, the internal validity of the Order is irrelevant to its possible significance as an indication of Denmark's attitude to delimitation. But Norway also suggests that the Order itself recognized that it would be inappropriate to implement the extension for which it purported to provide. Denmark however explains that the reason for showing restraint in the enforcement of its fishing regulations in this area was to avoid difficulties with Norway. From earlier diplomatic exchanges it was clear that Norway contemplated an equidistance line delimiting the waters between Jan Mayen and Greenland, and Denmark had indicated that this would not be acceptable. The Court cannot regard the terms of the 1980 Executive Order (which was amended on 31 August 1981 to remove the restraint on exercising jurisdiction beyond the median line), either in isolation or in conjunction with other Danish acts, as committing Denmark to acceptance of a median line boundary in the area.

37. Mention has already been made (paragraph 28 above) of the Agreement of 15 June 1979 between the Parties concerning the delimitation between Norway and the Faroe Islands. Norway has emphasized that this Agreement employed the median line both for the delimitation of continental shelf and for the boundary affecting fisheries. As the Court has explained, the conclusion of the 1979 Agreement militates against the hypothesis that by the 1965 Agreement the Parties had agreed to employ the median line for all future delimitations. The use of the median line in the Agreement relating to the delimitation between Norway and the Faroe Islands does not support the Norwegian interpretation of the 1976 Danish Act on fishery zones; nor does it commit Denmark to a median line boundary in a quite different area.

38. Norway relies also on diplomatic contacts and exchanges between the Parties, particularly in the period 1979–1980, recorded in letters, notes and minutes of discussions presented to the Court as annexes to the pleadings. It is true that Danish references in the course of these diplomatic contacts to the unacceptability of a median line delimitation were somewhat unspecific, and in particular did not allude to legal arguments such as the provision in the 1958 Convention for “special circumstances”. The Danish statements were

however, in the view of the Court, sufficient to prevent the position of Denmark being prejudiced.

39. Norway invokes finally the positions expressed by the Parties on the question of maritime delimitation during the Third United Nations Conference on the Law of the Sea. Apart from the question whether a decision by the Court may be based on the positions expressed by a State at a diplomatic conference for the adoption of a multilateral convention, the Court would observe that the delimitation method subscribed to in the context of the Conference by Denmark, among other States, including Norway, was a rule of equidistance combined with special circumstances.

40. To sum up, the Agreement entered into between the Parties on 8 December 1965 cannot be interpreted to mean, as contended by Norway, that the Parties have already defined the continental shelf boundary as the median line between Greenland and Jan Mayen. Nor can the Court attribute such an effect to the provision of Article 6, paragraph 1, of the 1958 Convention, so as to conclude that by virtue of that Convention the median line is already the continental shelf boundary between Greenland and Jan Mayen. Nor can such a result be deduced from the conduct of the Parties concerning the continental shelf boundary and the fishery zone. In consequence, the Court does not consider that a median line boundary is already “in place”, either as the continental shelf boundary, or as that of the fishery zone. The Court will therefore now proceed to examine the law applicable at present to the delimitation question still outstanding between the Parties.

* *

41. It will be convenient in this connection to refer first to a disagreement between the Parties as to the nature of the task conferred on the Court. Denmark asks the Court to draw a delimitation line, and has indeed indicated, with precise co-ordinates, where it considers that that line should be. Norway however submits that the adjudication should result in a judgment which is “declaratory as to the basis of delimitation, and which leaves the precise articulation (or demarcation) of the alignment to negotiation between the Parties”. This argument will be dealt with at a later stage of the present Judgment (paragraphs 88 ff.). The Parties also differ on the question whether what is required is one delimitation line or two lines, Denmark asking for “a single line of delimitation of the fishery zone and continental shelf area”, and Norway contending that the median line constitutes the boundary for delimitation of the continental shelf, and constitutes also the boundary for the delimitation of the fishery zone, i.e., that the two lines would coincide, but the two boundaries would remain conceptually distinct. In the pleadings of the Parties, and especially in the oral argument of Norway, some importance has been attached to this difference between the ways in which the Parties have submitted their dispute to the Court; particularly the absence of any agreement of the Parties, of the kind to be found in the Special Agreement in the case concerning *Delimitation of the Maritime Boundary in the Gulf of Maine Area*, to ask the Court what was “the course of the single maritime boundary that divides the continental shelf and fishery zones of Canada and the United States of America” (*I.C.J. Reports 1984*, p. 253).

42. At first sight it might be thought that asking for the drawing of a single line and asking for the drawing of two coincident lines amounts in practical terms to the same thing. There is, however, in Norway's view, this important difference, that the two lines, even if coincident in location, stem from different strands of the applicable law, the location of the

one being derived from the 1958 Convention, and the location of the other being derived from customary law.

43. There is no agreement between the Parties for a single maritime boundary; the situation is thus quite different from that in the *Gulf of Maine* case. The Chamber of the Court was requested by the Special Agreement in that case to effect a single-line, dual-purpose delimitation; it indicated that in its view, on the basis of such an agreement, a delimitation valid for both continental shelf and the superjacent water column

> "can only be carried out by the application of a criterion, or combination of criteria, which does not give preferential treatment to one of these two objects to the detriment of the other, and at the same time is such as to be equally suitable to the division of either of them" (ibid., p. 327, para. 194).

The Chamber decided that Article 6 of the 1958 Convention could not, because of the Parties' agreement to ask for a single maritime boundary, be applied for the determination of such a boundary. It observed that in such a case Article 6 has no "mandatory force even between States which are parties to the Convention" (*ibid*., p. 303, para. 124). The Court in the present case is not empowered — or constrained — by any such agreement for a single dual-purpose boundary.

44. Furthermore, the Court has already found, contrary to the contention of Norway, that there is not a continental shelf boundary already "in place". The Court accordingly does not have to express any view on the legal situation which would have arisen if the continental shelf had been delimited, but the fishery zones had not. It is sufficient for it to note, as do the Parties, that the 1958 Convention is binding upon them, that it governs the continental shelf delimitation to be effected, and that it is certainly a source of applicable law, different from that governing the delimitation of fishery zones. The Court will therefore examine separately the two strands of the applicable law : the effect of Article 6 of the 1958 Convention applicable to the delimitation of the continental shelf boundary, and then the effect of the customary law which governs the fishery zone.

45. It may be observed that the Court has never had occasion to apply the 1958 Convention. In the *North Sea Continental Shelf* cases, the Federal Republic of Germany was not a party to the 1958 Convention; similarly, in the continental shelf cases between Tunisia and Libya and between Libya and Malta, Libya was not a party to the 1958 Convention. In the *Gulf of Maine* case, Canada and the United States of America were parties to the 1958 Convention; but they requested the Chamber to define "the course of the single maritime boundary that divides the continental shelf and fisheries zones", so that, as already noted, the Chamber considered that the 1958 Convention, being applicable to the continental shelf only, did not govern the delimitation requested. In the present case, both States are parties to the 1958 Convention and, there being no joint request for a single maritime boundary as in the *Gulf of Maine* case, the 1958 Convention is applicable to the delimitation of the continental shelf between Greenland and Jan Mayen.

46. The fact that it is the 1958 Convention which applies to the continental shelf delimitation in this case does not mean that Article 6 thereof can be interpreted and applied either without reference to customary law on the subject, or wholly independently of the fact that a fishery zone boundary is also in question in these waters. The Anglo-French Court of Arbitration in 1977 placed Article 6 of the 1958 Convention in the perspective of customary law in the much-quoted passage of its Decision, that:

> "the combined 'equidistance-special circumstances rule', in effect, gives particular expression to a general norm that, failing agreement, the boundary between States abutting on the same continental shelf is to be determined on equitable principles" (United Nations, *Reports of International Arbitral Awards (RIAA)*, Vol. XVIII, p. 45, para. 70).

If the equidistance-special circumstances rule of the 1958 Convention is, in the light of this 1977 Decision, to be regarded as expressing a general norm based on equitable principles, it must be difficult to find any material difference — at any rate in regard to delimitation between opposite coasts — between the effect of Article 6 and the effect of the customary rule which also requires a delimitation based on equitable principles. The Court in the case concerning the *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, where it was asked only to delimit the continental shelf boundary, expressed the view that

> "even though the present case relates only to the delimitation of the continental shelf and not to that of the exclusive economic zone, the principles and rules underlying the latter concept cannot be left out of consideration" ;

that "the two institutions — continental shelf and exclusive economic zone — are linked together in modern law"; and that the result is "that greater importance must be attributed to elements, such as distance from the coast, which are common to both concepts" (*I.C.J. Reports 1985*, p. 33, para. 33).

47. Regarding the law applicable to the delimitation of the fishery zone, there appears to be no decision of an international tribunal that has been concerned only with a fishery zone; but there are cases involving a single dual-purpose boundary asked for by the parties in a special agreement, for example the *Gulf of Maine* case, already referred to, which involved delimitation of "the continental shelf and fishery zones" of the parties. The question was raised during the hearings of the relationship of such zones to the concept of the exclusive economic zone as proclaimed by many States and defined in Article 55 of the 1982 United Nations Convention on the Law of the Sea. Whatever that relationship may be, the Court takes note that the Parties adopt in this respect the same position, in that they see no objection, for the settlement of the present dispute, to the boundary of the fishery zones being determined by the law governing the boundary of the exclusive economic zone, which is customary law; however the Parties disagree as to the interpretation of the norms of such customary law.

48. Denmark and Norway are both signatories of the 1982 United Nations Convention on the Law of the Sea, though neither has ratified it, and it is not in force. There can be no question therefore of the application, as relevant treaty provisions, of that Convention. The Court however notes that Article 74, paragraph 1, and Article 83, paragraph 1, of that Convention provide for the delimitation of the continental shelf and the exclusive economic zone between States with opposite or adjacent coasts to be effected

> "by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution".

That statement of an “equitable solution” as the aim of any delimitation process reflects the requirements of customary law as regards the delimitation both of continental shelf and of exclusive economic zones.

*

49. Turning first to the delimitation of the continental shelf, since it is governed by Article 6 of the 1958 Convention, and the delimitation is between coasts that are opposite, it is appropriate to begin by taking provisionally the median line between the territorial sea baselines, and then enquiring whether “special circumstances” require “another boundary line”. Such a procedure is consistent with the words in Article 6, “In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary is the median line.”

50. Judicial decisions on the basis of the customary law governing continental shelf delimitation between opposite coasts have likewise regarded the median line as a provisional line that may then be adjusted or shifted in order to ensure an equitable result. The Court, in the Judgment in the case concerning the *Continental Shelf (Libyan Arab Jamahiriya/Malta)* already referred to (paragraph 46 above), in which it took particular account of the Judgment in the *North Sea Continental Shelf* cases, said :

> “The Court has itself noted that the equitable nature of the equidistance method is particularly pronounced in cases where delimitation has to be effected between States with opposite coasts.” (*I.C.J. Reports 1985*, p. 47, para. 62.)

It then went on to cite the passage in the Judgment in the *North Sea Continental Shelf* cases where the Court stated that the continental shelf off, and dividing, opposite States “can … only be delimited by means of a median line” (*I.C.J. Reports 1969*, p. 36, para. 57; see also p. 37, para. 58). The Judgment in the *Libya/Malta* case then continues :

> “But it is in fact a delimitation exclusively between opposite coasts that the Court is, for the first time, asked to deal with. It is clear that, in these circumstances, the tracing of a median line between those coasts, by way of a provisional step in a process to be continued by other operations, is the most judicious manner of proceeding with a view to the eventual achievement of an equitable result.” (*I.C.J. Reports 1985*, p. 47, para. 62.)

51. Denmark has, it is true, disputed the appropriateness of drawing an equidistance line even provisionally as a first step in the delimitation process; and to this end it has recalled previous decisions of the Court: the case concerning the *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* (*I.C.J. Reports 1982*, p. 79, para. 110); the case concerning *Delimitation of the Maritime Boundary in the Gulf of Maine Area* (*I.C.J. Reports 1984*, p. 297, para. 107); and indeed the case concerning the *Continental Shelf (Libyan Arab Jamahiriya/Malta)* (*I.C.J. Reports 1985*, p. 37, para. 43). These cases were, as already observed (paragraph 45 above), not governed by Article 6 of the 1958 Convention, which specifically provides that the median line be employed “unless another boundary line is justified by special circumstances”. The 1977 Anglo-French Court of Arbitration, on the other hand, when applying Article 6 of the 1958 Convention to the delimitation between opposite coasts in the Atlantic region, after observing that “the obligation to apply the equidistance principle is always one qualified by the condition ‘unless another boundary line is justified by special circumstances’” (*RIAA*, Vol. XVIII, p. 45, para. 70), began by employing the equidistance

method, and then adjusting the result in the light of special circumstances, namely the existence of the Scilly Isles (*ibid.*, pp. 115–116, para. 248). In this respect it observed that

> "it seems to the Court to be in accord not only with the legal rules governing the continental shelf but also with State practice to seek the solution in a method modifying or varying the equidistance method rather than to have recourse to a wholly different criterion of delimitation" (*ibid.*, p. 116, para. 249).

In any event, all that need be said of the decisions cited by Denmark is that the Court considered that the provisional drawing of an equidistance line was not a necessary or obligatory step in every case ; yet in two of the cases mentioned (*Gulf of Maine* and the *Libya/Malta* case), where the delimitation was between opposite coasts, it was found entirely appropriate to begin with such a provisional line. Thus, in respect of the continental shelf boundary in the present case, even if it were appropriate to apply, not Article 6 of the 1958 Convention, but customary law concerning the continental shelf as developed in the decided cases, it is in accord with precedents to begin with the median line as a provisional line and then to ask whether "special circumstances" require any adjustment or shifting of that line.

52. Turning now to the delimitation of the fishery zones, the Court must consider, on the basis of the sources listed in Article 38 of the Statute of the Court, the law applicable to the fishery zone, in the light also of what has been said above (paragraph 47) as to the exclusive economic zone. Of the international decisions concerned with dual-purpose boundaries, that in the *Gulf of Maine* case — in which the Chamber rejected the application of the 1958 Convention, and relied upon the customary law — is here material. After noting that a particular segment of the delimitation was one between opposite coasts, the Chamber went on to question the adoption of the median line "as final without more ado", and drew attention to the "difference in length between the respective coastlines of the two neighbouring States which border on the delimitation area" and on that basis affirmed "the necessity of applying to the median line as initially drawn a correction which, though limited, will pay due heed to the actual situation" (*I.C.J. Reports 1984*, pp. 334–335, paras. 217, 218).

53. This process clearly approximates to that followed by the Court in respect of the *Libya/Malta* case in determining the continental shelf boundary between opposite coasts. It follows that it is also an appropriate starting-point in the present case; not least because the Chamber in the *Gulf of Maine* case, when dealing with the part of the boundary between opposite coasts, drew attention to the similarity of the effect of Article 6 of the 1958 Convention in that situation, even though the Chamber had already held that the 1958 Convention was not legally binding on the Parties. It thus appears that, both for the continental shelf and for the fishery zones in this case, it is proper to begin the process of delimitation by a median line provisionally drawn.

54. The Court is now called upon to examine every particular factor of the case which might suggest an adjustment or shifting of the median line provisionally drawn. The aim in each and every situation must be to achieve "an equitable result". From this standpoint, the 1958 Convention requires the investigation of any "special circumstances" ; the customary law based upon equitable principles on the other hand requires the investigation of "relevant circumstances".

55. The concept of “special circumstances” was discussed at length at the First United Nations Conference on the Law of the Sea, held in 1958. It was included both in the Geneva Convention of 29 April 1958 on the Territorial Sea and the Contiguous Zone (Art. 12) and in the Geneva Convention of 29 April 1958 on the Continental Shelf (Art. 6, paras. 1 and 2). It was and remains linked to the equidistance method there contemplated, so much so indeed that in 1977 the Court of Arbitration in the case concerning the delimitation of the continental shelf (United Kingdom/France) was able to refer to the existence of a rule combining “equidistance-special circumstances” (see paragraph 46 above). It is thus apparent that special circumstances are those circumstances which might modify the result produced by an unqualified application of the equidistance principle. General international law, as it has developed through the caselaw of the Court and arbitral jurisprudence, and through the work of the Third United Nations Conference on the Law of the Sea, has employed the concept of “relevant circumstances”. This concept can be described as a fact necessary to be taken into account in the delimitation process.

56. Although it is a matter of categories which are different in origin and in name, there is inevitably a tendency towards assimilation between the special circumstances of Article 6 of the 1958 Convention and the relevant circumstances under customary law, and this if only because they both are intended to enable the achievement of an equitable result. This must be especially true in the case of opposite coasts where, as has been seen, the tendency of customary law, like the terms of Article 6, has been to postulate the median line as leading prima facie to an equitable result. It cannot be surprising if an equidistance-special circumstances rule produces much the same result as an equitable principles-relevant circumstances rule in the case of opposite coasts, whether in the case of a delimitation of continental shelf, of fishery zone, or of an all-purpose single boundary. There is a further finding of the Anglo-French Court of Arbitration to this effect when, after referring to the rule in Article 6, and to the rule of customary law based upon equitable principles and “relevant” circumstances, it said that the double basis on which the parties had put their case,

> “confirms the Court's conclusion that the different ways in which the requirements of ‘equitable principles’ or the effects of ‘special circumstances’ are put reflect differences of approach and terminology rather than of substance” (*RIAA*, Vol. XVIII, p. 75, para. 148).

57. There has been much argument in the present case, both under the heading of “special circumstances” and that of “relevant circumstances”, as to what circumstances are juridically relevant to the delimitation process. It may be useful to recall the much-cited statement from the Court's Judgment in the *North Sea Continental Shelf* cases :

> “In fact, there is no legal limit to the considerations which States may take 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.” (*I.C.J. Reports 1969*, p. 50, para. 93.)

It is to be noted that the Court in 1969 was addressing the task of States in negotiation; indeed the entire 1969 Judgment was necessarily thus as a result of the terms of the special

agreement by which the cases were taken to the Court. In the *Libya/Malta* case the Court added the following caveat:

> "Yet although there may be no legal limit to the considerations which States may take account of, this can hardly be true for a court applying equitable procedures. For a court, although there is assuredly no closed list of considerations, it is evident that only those that are pertinent to the institution of the continental shelf as it has developed within the law, and to the application of equitable principles to its delimitation, will qualify for inclusion. Otherwise, the legal concept of continental shelf could itself be fundamentally changed by the introduction of considerations strange to its nature." (*I.C.J. Reports 1985*, p. 40, para. 48.)

58. A court called upon to give a judgment declaratory of the delimitation of a maritime boundary, and *a fortiori* a court called upon to effect a delimitation, will therefore have to determine "the relative weight to be accorded to different considerations" in each case ; to this end, it will consuit not only "the circumstances of the case" but also previous decided cases and the practice of States. In this respect the Court recalls the need, referred to in the *Libya/Malta* case, for "consistency and a degree of predictability" (*I.C.J. Reports 1985*, p. 39, para. 45).

* *

59. Having thus concluded that it is appropriate to have recourse to a median line provisionally drawn as a first stage in the delimitation process, the Court now turns to the question whether the circumstances of the present case require adjustment or shifting of that line, taking into account the arguments relied on by Norway to justify the median line, and the circumstances invoked by Denmark as justifying the 200-mile line. For that purpose, the Court will have to consider in greater detail the geographical context of the dispute, which has already been outlined above (paragraphs 11–21). The median line, shown on sketch-map No. 1 (p. 45 above) as the line AD, has to be seen in that context, and particularly in relation to the three areas defined in paragraphs 18–20 above. The "area of overlapping claims", defined in paragraph 18 above, between the two lines representing the Parties' claims, is of obvious relevance to any case involving opposed boundary claims. But maritime boundary claims have the particular feature that there is an area of overlapping entitlements, in the sense of overlap between the areas which each State would have been able to claim had it not been for the presence of the other State; this was the basis of the principle of non-encroachment enunciated in the *North Sea Continental Shelf* cases (*I.C.J. Reports 1969*, p. 36, para. 57; p. 53, para. 101 (C) (I)). It is clear that in this case a true perspective on the relationship of the opposing claims and the opposing entitlements is to be gained by considering both the area of overlapping claims and the area of overlapping potential entitlement (paragraph 19 above).

60. Both Parties have brought to the Court's attention various circumstances which they each regard as appropriate to be taken into account for the purposes of the delimitation. Neither Party has however presented these specifically in the context of the possible adjustment or shifting of a median line provisionally drawn: Norway, because it argues that the median line itself is the correct and equitable solution, and Denmark, because it contends that the median line should not be used, even as a provisional solution. Denmark does however assert that, on the basis of the 1958 Convention, it could contend

> “that the island of Jan Mayen, *par excellence*, falls within the concept of ‘special circumstances’ and should be given no effect on Greenland's 200-mile continental shelf area”.

The particular characteristics of Jan Mayen which Denmark regards as justifying this view are that it is small in relation to the opposite coasts of Greenland, and that it cannot sustain and has not sustained human habitation or economic life of its own (cf. Article 121, paragraph 3, of the 1982 Convention on the Law of the Sea); more broadly Denmark has referred in this connection to factors of geography, population, constitutional status of the respective territories of Jan Mayen and Greenland, socio-economic structure, cultural heritage, proportionality, the conduct of the Parties, and other delimitations in the region. The Court will therefore consider whether these are factors requiring an adjustment or a shifting of the median line.

61. A first factor of a geophysical character, and one which has featured most prominently in the argument of Denmark, in regard to both continental shelf and fishery zone, is the disparity or disproportion between the lengths of the “relevant coasts”, defined by Denmark as the coasts lying between points E and F on the coast of Jan Mayen, and G and H on the coast of Greenland, defined as explained in paragraph 20 above. The following figures given by Denmark for the coastal lengths have not been disputed by Norway. The lengths of the coastal fronts of Greenland and Jan Mayen, defined as straight lines between G and H, and between E and F, are : Greenland, approximately 504.3 kilometres ; Jan Mayen, approximately 54.8 kilometres. If the distances between G and H and between E and F are measured along the successive baselines which generate the median line, the total figures are approximately 524 kilometres for Greenland and approximately 57.8 kilometres for Jan Mayen (see sketch-map No. 2, p. 80 below). Thus the ratio between the coast of Jan Mayen and that of Greenland is 1 to 9.2 on the basis of the first calculation, and 1 to 9.1 on the basis of the second.

62. Denmark considers, on the basis of its analysis of the jurisprudence of the Court and arbitral decisions, that proportionality in the lengths of coasts is in the first instance a

> “relevant circumstance or factor to be taken into consideration together with other criteria in order to adopt a method appropriate for an equitable delimitation line”.

Secondly it contends that such proportionality is a determining factor, in the form of an arithmetical ratio, for testing the equity of the delimitation line arrived at. For Denmark, these two conceptions of the factor of proportionality are applicable concurrently. In the circumstances of the present case, Denmark argues that the disparity between the two relevant coastal lengths is obvious, and that even without taking into account the other relevant circumstances, a disparity of this nature should lead to a delimitation line which respects Greenland's right to a maritime zone of 200 miles. Denmark has observed in this respect that a geographical proportionality line which took into account the relationship between the relevant coastal lengths of Greenland and Jan Mayen, and allocated maritime areas in the same proportion, would be drawn more than 200 miles from the coast of Greenland. Denmark did not however suggest that such a line, which it considered to be “equitable in its result”, could be adopted, because it would be incompatible with the international legal régime governing the right of States to claim sea areas off their coasts, the maximum permissible Danish claim thus being a delimitation line 200 miles from the

baselines of Greenland. In Denmark's view, the application of Article 6 of the 1958 Convention would lead to the same result.

63. Norway contends that a comparison of coastal lengths would result in the present case in an arbitrary refusal to give full weight to the relevant circumstances which form part of the process of evolving an equitable solution, and that such a comparison is irrelevant to the achievement of equality of treatment of the parties in delimitation. Referring to the jurisprudence of the Court, Norway also argues that proportionality (in the form of a factor based on the ratio of the lengths of the respective coasts) is not an independent principle of delimitation, but a test of the equitableness of a result arrived at by other means. Furthermore, in Norway's view, there is no reason to require that the ratio of coastal lengths should be taken into consideration in delimitation as a relevant determinative circumstance, or even as a relevant circumstance *tout court*. Norway takes the view finally that differences in the length of coasts have never qualified as special circumstances for the purposes of Article 6 of the 1958 Convention.

64. Prima facie, a median line delimitation between opposite coasts results in general in an equitable solution, particularly if the coasts in question are nearly parallel. When, as in the present case, delimitation is required between opposite coasts which are insufficiently far apart for both to enjoy the full 200-mile extension of continental shelf and other rights over maritime spaces recognized by international law, the median line will be equidistant also from the two 200-mile limits, and may prima facie be regarded as effecting an equitable division of the overlapping area. However, as the Court observed, in relation to the continental shelf, in 1969, judicial treatment of maritime delimitation does not involve the sharing-out of something held in undivided shares :

> “Delimitation is a process which involves establishing the boundaries of an area already, in principle, appertaining to the coastal State and not the determination *de novo* of such an area. Delimitation in an equitable manner is one thing, but not the same thing as awarding a just and equitable share of a previously undelimited area, even though in a number of cases the results may be comparable, or even identical.” (*North Sea Continental Shelf, I.C.J. Reports 1969*, p. 22, para. 18.)

Thus the law does not require a delimitation based upon an endeavour to share out an area of overlap on the basis of comparative figures for the length of the coastal fronts and the areas generated by them. The task of a tribunal is to define the boundary line between the areas under the maritime jurisdiction of two States; the sharing-out of the area is therefore the consequence of the delimitation, not vice versa.

65. It is of course this prima facie equitable character which constitutes the reason why the equidistance method, endorsed by Article 6 of the 1958 Convention, has played an important part in the practice of States. The application of that method to delimitations between opposite coasts produces, in most geographical circumstances, an equitable result. There are however situations — and the present case is one such — in which the relationship between the length of the relevant coasts and the maritime areas generated by them by application of the equidistance method, is so disproportionate that it has been found necessary to take this circumstance into account in order to ensure an equitable solution. The frequent references in the case-law to the idea of proportionality — or disproportion — confirm the importance of the proposition that an equitable delimitation

must, in such circumstances, take into account the disparity between the respective coastal lengths of the relevant area.

66. One of the factors which the Court in the *North Sea Continental Shelf* cases indicated as to be taken into consideration in order to achieve an equitable solution was referred to by the Court as :

> "the element of a reasonable degree of proportionality, which a delimitation carried out in accordance with equitable principles ought to bring about between the extent of the continental shelf areas appertaining to the coastal State and the length of its coast measured in the general direction of the coastline" (*I.C.J. Reports 1969*, p. 54, para. 101(D)(3)).

The Anglo-French Court of Arbitration in 1977, which was applying the 1958 Convention, recalled, in reference to "an alleged principle of proportionality by reference to length of coastlines" (*RIAA*, Vol. XVIII, p. 115, para. 246), that "it is … a factor to be taken into account in appreciating the effects of geographical features on the equitable or inequitable character of a delimitation…" (*ibid*., p. 57, para. 99) and that "it is disproportion rather than any general principle of proportionality which is the relevant criterion or factor" (*ibid*., p. 58, para. 101). The relevance of this factor was reaffirmed by the Court in other cases involving continental shelf delimitation: *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment* (*I.C.J. Reports 1982*, pp. 43–44, para. 37); *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment* (*I.C.J. Reports 1985*, pp. 43–44, para. 55); and by the Chamber in the *Gulf of Maine* case in the context of a single maritime boundary for the continental shelf and the fishery zones. In that case the Chamber observed :

> "a maritime delimitation can … not be established by a direct division of the area in dispute proportional to the respective lengths of the coasts belonging to the parties in the relevant area, but it is equally certain that a substantial disproportion to the lengths of those coasts that resulted from a delimitation effected on a different basis would constitute a circumstance calling for an appropriate correction" (*Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, I.C.J. Reports 1984*, p. 323, para. 185).

67. The practical implementation of the principle may sometimes be complicated, as in the *Libya/Malta* case, by the presence of claims of third States, or by difficulties in defining with sufficient precision which coasts and which areas are to be treated as relevant. Such problems do not arise in the present case. The possible claims of Iceland appear to be fully covered by the 200-mile line (BCD on sketch-map No. 1, p. 45 above) which the Parties are treating as the southern limit of the delimitation requested of the Court. It is appropriate to treat as relevant the coasts between points E and F and between points G and H on sketch-map No. 1, in view of their role in generating the complete course of the median line provisionally drawn which is under examination. The question for the Court is thus the following. The difference in length of the relevant coasts is striking. Regard being had to the effects generated by it, does this disparity constitute, for purposes of the 1958 Convention, a "special circumstance", and as regards the delimitation of the fishery zones a "relevant circumstance" for purposes of the rules of customary law, requiring an adjustment or shifting of the median line ?

68. A delimitation by the median line would, in the view of the Court, involve disregard of the geography of the coastal fronts of eastern Greenland and of Jan Mayen. It is not a question of determining the equitable nature of a delimitation as a function of the ratio of the lengths of the coasts in comparison with that of the areas generated by the maritime projection of the points of the coast (cf. *Continental Shelf (Libyan Arab Jamahiriya/Malta), I.C.J. Reports 1985*, p. 46, para. 59), nor of "rendering the situation of a State with an extensive coastline similar to that of a State with a restricted coastline" (*North Sea Continental Shelf, I.C.J. Reports 1969*, pp. 49–50, para. 91). Yet the differences in length of the respective coasts of the Parties are so significant that this feature must be taken into consideration during the delimitation operation. It should be recalled that in the *Gulf Of Maine* case the Chamber considered that a ratio of 1 to 1.38, calculated in the Gulf of Maine as defined by the Chamber, was sufficient to justify "correction" of a median line delimitation (*I.C.J. Reports 1984*, p. 336, paras. 221–222). The disparity between the lengths of coasts thus constitutes a special circumstance within the meaning of Article 6, paragraph 1, of the 1958 Convention. Similarly, as regards the fishery zones, the Court is of the opinion, in view of the great disparity of the lengths of the coasts, that the application of the median line leads to manifestly inequitable results.

69. It follows that, in the light of the disparity of coastal lengths, the median line should be adjusted or shifted in such a way as to effect a delimitation closer to the coast of Jan Mayen. It should, however, be made clear that taking account of the disparity of coastal lengths does not mean a direct and mathematical application of the relationship between the length of the coastal front of eastern Greenland and that of Jan Mayen. As the Court has observed :

> "If such a use of proportionality were right, it is difficult indeed to see what room would be left for any other consideration ; for it would be at once the principle of entitlement to continental shelf rights and also the method of putting that principle into operation. Its weakness as a basis of argument, however, is that the use of proportionality as a method in its own right is wanting of support in the practice of States, in the public expression of their views at (in particular) the Third United Nations Conference on the Law of the Sea, or in the jurisprudence." (*Continental Shelf (Libyan Arab Jamahiriya/Malta), I.C.J. Reports 1985*, p. 45, para. 58.)

70. Nor do the circumstances require the Court to uphold the claim of Denmark that the boundary line should be drawn 200 miles from the baselines on the coast of eastern Greenland, i.e., a delimitation giving Denmark maximum extension of its claim to continental shelf and fishery zone. The result of such a delimitation would be to leave to Norway merely the residual part (the polygon ABFEA on sketch-map No. 1, p. 45 above) of the "area relevant to the delimitation dispute" as defined by Denmark. The delimitation according to the 200-mile line calculated from the coasts of eastern Greenland may from a mathematical perspective seem more equitable than that effected on the basis of the median line, regard being had to the disparity in coastal lengths ; but this does not mean that the result is equitable in itself, which is the objective of every maritime delimitation based on law. The coast of Jan Mayen, no less than that of eastern Greenland, generates potential title to the maritime areas recognized by customary law, i.e., in principle up to a limit of 200 miles from its baselines. To attribute to Norway merely the residual area left after giving full effect to the eastern coast of Greenland would run wholly counter to the rights of Jan Mayen and also to the demands of equity.

71. At this stage of its analysis, the Court thus considers that neither the median line nor the 200-mile line calculated from the coasts of eastern Greenland in the relevant area should be adopted as the boundary of the continental shelf or of the fishery zone. It follows that the boundary line must be situated between these two lines described above, and located in such a way that the solution obtained is justified by the special circumstances contemplated by the 1958 Convention on the Continental Shelf, and equitable on the basis of the principles and rules of customary international law. The Court will therefore next consider what other circumstances may also affect the position of the boundary line.

72. The Court now turns to the question whether access to the resources of the area of overlapping claims constitutes a factor relevant to the delimitation. So far as sea-bed resources are concerned, the Court would recall what was said in the *Continental Shelf (Libyan Arab Jamahiriya/Malta)* case :

> "The natural resources of the continental shelf under delimitation 'so far as known or readily ascertainable' might well constitute relevant circumstances which it would be reasonable to take into account in a delimitation, as the Court stated in the *North Sea Continental Shelf* cases (*I.C.J. Reports 1969*, p. 54, para. 101 (D) (2)). Those resources are the essential objective envisaged by States when they put forward claims to sea-bed areas containing them." (*I.C.J. Reports 1985*, p. 41, para. 50.)

Little information has however been given to the Court in that respect, although reference has been made to the possibility of there being deposits of polymetallic sulphides and hydrocarbons in the area.

73. With regard to fishing, both Parties have emphasized the importance of their respective interests in the marine resources of the area. The Court is informed that the principal exploited fishery resource of the area between Greenland and Jan Mayen is capelin. This is a migratory species, and its migratory pattern varies with climatic conditions. In general, the capelin spawn off the south coast of Iceland in March and April ; the young capelin remain primarily in Icelandic waters, but in summer and autumn some of the two- and three-year-old capelin extend their migratory range to the waters between Greenland and Jan Mayen, returning to Icelandic waters in October. Norwegian records of capelin catches for the years 1980, 1981 and 1984–1989 show concentrations of stocks generally in the southern part of the area of overlapping claims, though sometimes as far east as the waters round Jan Mayen itself; no geographical data for catches in areas to the west of the median line (where Norwegian vessels do not fish) have been produced, but it is agreed that capelin stocks generally extend also west of the southern part of the area of overlapping claims.

74. An Agreement was concluded between Greenland/Denmark, Iceland and Norway on 12 June 1989 requiring the co-operation of the three parties on the conservation and management of the capelin stock in the whole of the waters between Greenland, Iceland and Jan Mayen (Art. 1), and providing for the fixing by agreement of a total allowable catch for each season (Art. 2), which is then distributed between Greenland, Iceland and Norway in the proportions 11 per cent, 78 per cent and 11 per cent. Under a Fishery Agreement with the European Community, Greenland allocates annually 40,000 tons of capelin to the Community, of which 10,000 tons is reallocated by it to the Faroe Islands, and the remainder has been traded away by the European Community to Iceland against a redfish quota in Icelandic waters. Payment is made by the European Community to Greenland whether the quota is fished or not. The remainder of the capelin quota attributed to Greenland by the 1989 Agreement is allotted to Greenland shipowners who charter Faroese vessels to fish the capelin for a fee per kilo of fish taken. Denmark has emphasized that this

method of exploitation of fishery resources should be viewed as a temporary arrangement pending the build-up of the capacity of the Greenland fishing fleet. Denmark has stressed that independently of the quotas allocated to various foreign States, the quotas established for East Greenland account for over half the total quotas fixed for all Greenland waters, and stated that Greenland benefits economically from all fishing within the Greenland zone. Denmark has also stressed the dependence of the Inuit population of Greenland on the exploitation of the resources of the east coast of Greenland, particularly where sealing and whaling are concerned. Norway has indicated that the waters between Jan Mayen and Greenland have long been the scene of Norwegian whaling, sealing and fishing, and that the various fishing activities in the Jan Mayen area account for more than 8 per cent of the total quantity of Norwegian catches, and that they contribute to the fragile economy of the Norwegian coastal communities.

75. As has happened in a number of earlier maritime delimitation disputes, the Parties are essentially in conflict over access to fishery resources : this explains the emphasis laid on the importance of fishing activities for their respective economies and on the traditional character of the different types of fishing carried out by the populations concerned. In the *Gulf of Maine* case, which concerned a single maritime boundary for continental shelf and fishery zones, the Chamber dealing with the case recognized the need to take account of the effects of the delimitation on the Parties' respective fishing activities by ensuring that the delimitation should not entail “catastrophic repercussions for the livelihood and economic well-being of the population of the countries concerned” (*I.C.J. Reports 1984*, p. 342, para. 237). In the light of this case-law, the Court has to consider whether any shifting or adjustment of the median line, as fishery zone boundary, would be required to ensure equitable access to the capelin fishery resources for the vulnerable fishing communities concerned.

76. It appears to the Court that the seasonal migration of the capelin presents a pattern which, north of the 200-mile line claimed by Iceland, may be said to centre on the southern part of the area of overlapping claims, approximately between that line and the parallel of 72° North latitude, and that the delimitation of the fishery zone should reflect this fact. It is clear that no delimitation in the area could guarantee to each Party the presence in every year of fishable quantities of capelin in the zone allotted to it by the line. It appears however to the Court that the median line is too far to the west for Denmark to be assured of an equitable access to the capelin stock, since it would attribute to Norway the whole of the area of overlapping claims. For this reason also the median line thus requires to be adjusted or shifted eastwards (cf. paragraph 71 above).

77. In this context the Court has to consider another factor of a geophysical character brought to its attention, namely the presence of ice in the waters of the region. The waters off the northern segment of the east coast of Greenland are permanently covered by compact ice, and the East Greenland Current runs south along that coast, carrying with it enormous quantities of drifting polar ice. As a result, first, direct access to coastal waters from that coast north of Cape Brewster (point G) is practically impossible throughout the year, so that fishing vessels operating in the region have to be based on other parts of the coast. Secondly, the area of overlapping claims is itself affected by drift ice : at its minimum extension, the drift ice reaches about half-way between the Greenland coast and Jan Mayen, and then extends over virtually the whole of the area during the months of February to May, decreasing again from June to September. Maps produced by both Parties, based on statistical evaluation of long-term satellite observations, are consistent in indicating the extent to which the region is affected by ice. It is common ground between the Parties that a 40 per cent cover of drift ice renders ordinary navigation and all fishing activities impossible. Denmark argues accordingly that the 200-mile zone off the Greenland coast which it claims would not in fact provide Greenland with 200 miles of exploitable sea, and

that the median line proposed by Norway would in effect leave to Denmark only 10 per cent of the waters in which fishing is made possible by the absence of ice. Neither party has commented on the possible significance of the presence of ice for the practical exploration and exploitation of the sea-bed of the area of overlapping claims.

78. In the present case the question has been argued of the effect on access to marine resources of the presence of drift ice ; especially within the Arctic Circle, this geophysical feature does of course have a substantial impact on human activity. Perennial ice may significantly hinder access to the resources of the region, and thus constitute a special geographical feature of it. However, in the present case, the Court is informed that capelin, if found in a given year in fishable quantities in the southern part of the area of overlapping claims, are so found at the time of year (July–September) when the drift ice cover has retreated north-westwards. In April, when the ice cover is most extensive, there is no capelin and no other known fishable species in the waters between Jan Mayen and Greenland. The Court is therefore satisfied that while ice constitutes a considerable seasonal restriction of access to the waters, it does not materially affect access to migratory fishery resources in the southern part of the area of overlapping claims.

79. Denmark considers as also relevant to the delimitation the major differences between Greenland and Jan Mayen as regards population and socio-economic factors. It has pointed out that Jan Mayen has no settled population, as only 25 persons temporarily inhabit the island for purposes of their employment (paragraph 15 above); indeed, in Denmark's view, Jan Mayen cannot sustain and has not sustained human habitation or economic life of its own. As already noted (paragraph 14 above) the total population of Greenland is 55,000, of which some 6 per cent live in East Greenland. As regards socio-economic factors, Denmark has emphasized the importance for Greenland of fishing and fisheries-related activities, which constitute the mainstay of its economy; Norwegian fishing interests in the waters surrounding Jan Mayen are however the interests of mainland Norway, not of Jan Mayen as such, where there are no fishermen. Denmark has also relied on what it refers to as the “cultural factor”, the attachment of the people of Greenland to their land and the surrounding sea, in the light of which it would, Denmark contends, be difficult if not impossible for the Greenlanders to accept that the sea area within the 200-mile zone off their coast should be curtailed in deference to the interests of the people of a remote and highly developed industrial State.

80. Although Denmark has employed the terminology of Article 121, paragraph 3, of the 1982 United Nations Convention on the Law of the Sea, which provides that “rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf, it does not argue that Jan Mayen has no entitlement to continental shelf or fishery zones, but that when maritime boundaries are to be established between that island and the territories of Iceland and Greenland, the island of Jan Mayen cannot be accorded full effect, but only partial effect, a contention which the Court has already found unacceptable (paragraph 70 above). Nor, in the view of the Court, does the “cultural factor” point to a different conclusion. The question is whether the size and special character of Jan Mayen's population, and the absence of locally based fishing, are circumstances which affect the delimitation. The Court would observe that the attribution of maritime areas to the territory of a State, which, by its nature, is destined to be permanent, is a legal process based solely on the possession by the territory concerned of a coastline. The Court finds relevant in the present dispute the observations it had occasion to make, concerning continental shelf delimitation, in the *Continental Shelf (Libyan Arab Jamahiriya/Malta)* case :

> "The Court does not however consider that a delimitation should be influenced by the relative economic position of the two States in question, in such a way that the area of continental shelf regarded as appertaining to the less rich of the two States would be somewhat increased in order to compensate for its inferiority in economic resources. Such considerations are totally unrelated to the underlying intention of the applicable rules of international law. It is clear that neither the rules determining the validity of legal entitlement to the continental shelf, nor those concerning delimitation between neighbouring countries, leave room for any considerations of economic development of the States in question. While the concept of the exclusive economic zone has, from the outset, included certain special provisions for the benefit of developing States, those provisions have not related to the extent of such areas nor to their delimitation between neighbouring States, but merely to the exploitation of their resources." (*I.C.J. Reports 1985*, p. 41, para. 50.)

The Court therefore concludes that, in the delimitation to be effected in this case, there is no reason to consider either the limited nature of the population of Jan Mayen or socio-economic factors as circumstances to be taken into account.

81. Norway has argued, in relation to the Danish claim to a 200-mile zone off Greenland, that

> "the drawing of a boundary closer to one State than to another would imply an inequitable displacement of the possibility of the former State to protect interests which require protection".

It considers that, while courts have been unwilling to allow such considerations of security to intrude upon the major task of establishing a primary boundary in accordance with the geographical criteria, they are concerned to avoid creating conditions of imbalance. The Court considers that the observation in the *Libya/Malta* Judgment (*I.C.J. Reports 1985*, p. 42, para. 51), that "security considerations are of course not unrelated to the concept of the continental shelf, constituted a particular application, to the continental shelf, with which the Court was then dealing, of a general observation concerning all maritime spaces. In the present case the Court has already rejected the 200-mile line. In the *Continental Shelf* (*Libyan Arab Jamahiriya/Malta*) case, the Court was satisfied that

> "the delimitation which will result from the application of the present Judgment is … not so near to the coast of either Party as to make questions of security a particular consideration in the present case" (*I.C.J. Reports 1985*, p. 42, para. 51).

The Court is similarly satisfied in the present case as regards the delimitation to be described below.

82. With regard to the conduct of the Parties concerning the relevant area, it is first to be noted that that conduct is characterized by the care they have taken not to aggravate the dispute and by their adherence to the positions of principle they have adopted for the delimitation. That conduct has already been considered by the Court (paragraphs 33–39) in relation to the argument of Norway that the Parties, by their conduct, have already recognized the applicability of a median line delimitation, a contention which the Court did not accept. The question of the conduct of the Parties has now to be considered in another context, that of a contention by Denmark, relating primarily to acts of Norway. The contention is that, as in the *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* case (*I.C.J. Reports 1982*, p. 84, para. 118), the conduct of the Parties is a highly relevant factor in the

choice of the appropriate method of delimitation where such conduct has indicated some particular method as being likely to produce an equitable result. In this respect, Denmark relies on the maritime delimitation between Norway and Iceland, and on a boundary line established by Norway between the economic zone of mainland Norway and the fishery protection zone of the Svalbard Archipelago (Bear Island — Bjørnøya).

83. By an Agreement concerning Fishery and Continental Shelf-Questions between Norway and Iceland dated 28 May 1980, a Conciliation Commission was set up to submit recommendations regarding the dividing line for the shelf area between Iceland and Jan Mayen (Art. 9). By a subsequent Agreement, dated 22 October 1981, Norway and Iceland indicated that by entering into the earlier agreement they had agreed

> "that Iceland's economic zone shall extend to 200 nautical miles also in the areas between Iceland and Jan Mayen where the distance between the baselines is less than 400 nautical miles" (Preamble);

the Agreement provided further that

> "the dividing line between the parties' sections of the continental shelf in the area between Iceland and Jan Mayen shall be the same as the dividing line for the parties' economic zones" (Art. 1).

As for Bear Island, the southernmost island in the Svalbard Archipelago, it is less than 400 nautical miles north of the Norwegian mainland. Although subject to the special provisions of the Spitsbergen Treaty of 9 February 1920, it is part of the Kingdom of Norway. On 3 June 1977 Norway, by a Royal Decree, established a fishery protection zone around Svalbard, including Bear Island, the outer limit of which was to be 200 miles from the baselines; the Decree however further provided that the zone "shall furthermore be delimited by the outer limit of the economic zone off the Norwegian mainland" (Sec. 1, para. 3). Denmark contends that Norway has thus accepted that Jan Mayen vis-à-vis Iceland, and Bear Island vis-à-vis mainland Norway, not only could not have a delimitation effected by a median line but should not cut into the respective 200-mile zones of Iceland and mainland Norway.

84. In this case Norway has denied that the Agreements between Norway and Iceland constitute relevant conduct or a precedent, arguing that they represent a political concession in favour of an island State heavily dependent on its fisheries and moreover enjoying special relations with Norway. It has recalled that Norway protested when Iceland first established its 200-mile zone, and that Iceland has traditionally been very active, particularly where fisheries were concerned, in the waters between its own coasts and Jan Mayen, which has not been the case of Greenland. With regard to the treatment of Bear Island, Norway has stressed that Svalbard, including Bear Island, is part of the Kingdom of Norway, so that there is no question of an international delimitation of overlapping areas.

85. So far as Bear Island is concerned, this territory is situated in a region unrelated to the area of overlapping claims now to be delimited. In that respect, the Court would observe that there can be no legal obligation for a party to a dispute to transpose, for the settlement of that dispute, a particular solution previously adopted by it in a different context. Even if the Svalbard delimitation be treated as international, Norway is no more bound by that solution than Denmark is bound to apply in the present dispute the method of equidistance

used to effect delimitation between Norway and Denmark in the Skagerrak and part of the North Sea or off the Faroe Islands.

86. Denmark's argument based on the Agreements concluded between Iceland and Norway for the delimitation of the areas south of Jan Mayen deserves particular consideration, inasmuch as those instruments directly concern Jan Mayen itself. By invoking against Norway the Agreements of 1980 and 1981, Denmark is seeking to obtain by judicial means equality of treatment with Iceland. It is understandable that Denmark should seek such equality of treatment. But in the context of relations governed by treaties, it is always for the parties concerned to decide, by agreement, in what conditions their mutual relations can best be balanced. In the particular case of maritime delimitation, international law does not prescribe, with a view to reaching an equitable solution, the adoption of a single method for the delimitation of the maritime spaces on all sides of an island, or for the whole of the coastal front of a particular State, rather than, if desired, varying systems of delimitation for the various parts of the coast. The conduct of the parties will in many cases therefore have no influence on such a delimitation. The fact that the situation governed by the Agreements of 1980 and 1981 shares with the present dispute certain elements (identity of the island, participation of Norway) is of no more than formal weight. For these reasons, the Court concludes that the conduct of the Parties does not constitute an element which could influence the operation of delimitation in the present case.

* *

87. Having thus completed its examination of the geophysical and other circumstances brought to its attention as appropriate to be taken into account for the purposes of the delimitation of the continental shelf and the fishery zones, the Court has come to the conclusion that the median line adopted provisionally for both, as first stage in the delimitation, should be adjusted or shifted to become a line such as to attribute a larger area of maritime space to Denmark than would the median line.The line drawn by Denmark 200 nautical miles from the baselines of eastern Greenland would however be excessive as an adjustment, and would be inequitable in its effects. The delimitation line must therefore be drawn within the area of overlapping claims, between the lines proposed by each Party. The Court will therefore now proceed to examine the question of the precise position of that line.

* *

88. In its Counter-Memorial, Norway argued that

> “the adjudication should result in a judgment which is declaratory as to the bases of delimitation, and which leaves the precise articulation (or demarcation) of the alignment to negotiation between the Parties”,

and its submissions were, and have remained, limited to a request for what it terms a “declaratory” judgment in favour of the median line. Since the Court does not consider that the median line constitutes the boundaries which result from the application of the relevant law, it is unable to uphold those submissions. The Court is also unable to uphold the submission of Denmark that a delimitation line should be drawn 200 miles from the baselines of eastern Greenland, according to specific co-ordinates supplied by Denmark. At the hearings however Denmark presented an additional and alternative submission (paragraph 10 above) whereby the Court is asked

> "to decide, in accordance with international law and in light of the facts and arguments developed by the Parties, where the line of delimitation shall be drawn between Denmark's and Norway's fisheries zones and continental shelf areas in the waters between Greenland and Jan Mayen, *and to draw that line*" (emphasis added).

At the final hearing it was stated — on behalf of Norway, in relation to the final Danish submissions, that Norway maintained the position expressed in its Counter-Memorial, and quoted above.

89. To give only a broad indication of the manner in which the definition of the delimitation line should be fixed, and to leave the matter for the further agreement of the Parties, as urged by Norway, would in the Court's view not be a complete discharge of its duty to determine the dispute. The Court is satisfied that it should define the delimitation line in such a way that any questions which might still remain would be matters strictly relating to hydrographie technicalities which the Parties, with the help of their experts, can certainly resolve. The area of overlapping claims in this case is defined by the median line and the 200-mile line from Greenland, and those lines are both geometrical constructs ; there might be differences of opinion over basepoints, but given defined basepoints, the two lines follow automatically. The median line provisionally drawn as first stage in the delimitation process has accordingly been defined by reference to the basepoints indicated by the Parties on the coasts of Greenland and Jan Mayen. Similarly the Court may define the delimitation line, now to be indicated, by reference to that median line and to the 200-mile line calculated by Denmark from the basepoints on the coast of Greenland. Accordingly the Court will proceed to establish such a delimitation, using for this purpose the baselines and co-ordinates which the Parties themselves have been content to employ in their pleadings and oral argument.

*

90. The Court has found (paragraph 44 above) that it is bound to apply, and it has applied, the law applicable to the continental shelf and the law applicable to the fishery zones. Having done so, it has arrived at the conclusion that the median line provisionally drawn, employed as startingpoint for the delimitation of the continental shelf and the fishery zones, must be adjusted or shifted so as to attribute a larger area of maritime spaces to Denmark. So far as the continental shelf is concerned, there is no requirement that the line be shifted eastwards consistently throughout its length : if other considerations might point to another form of adjustment, to adopt it would be within the measure of discretion conferred on the Court by the need to arrive at an equitable result. For the fishery zones, equitable access to the resources of the southern part of the area of overlapping claims has to be assured by a substantial adjustment or shifting of the median line provisionally drawn in that region. In the view of the Court the delimitation now to be described, whereby the position of the delimitation lines for the two categories of maritime spaces is identical, constitutes, in the circumstances of this case, a proper application both of the law applicable to the continental shelf and of that applicable to the fishery zones.

91. The delimitation line is to lie between the median line and the 200-mile line from the baselines of eastern Greenland. It will run from point A in the north, the point of intersection of those two lines, to a point on the 200-mile line drawn from the baselines claimed by Iceland, between points D and B on sketch-map No. 2 (p. 80 below). For the purposes of definition of the line, and with a view to making proper provision for equitable access to fishery resources, the area of overlapping claims will be divided into three zones, as follows. Greenland's 200-mile line (between points A and B on sketch-map No. 2) shows two marked changes of direction, indicated on the sketch-map as points I and J; similarly the median line shows two corresponding changes of direction, marked as points K and L. Straight lines drawn between point I and point K, and between point J and point L, thus

divide the area of overlapping claims into three zones, to be referred to, successively from south to north, as zone 1, zone 2 and zone 3.

92. The southernmost zone, zone 1, corresponds essentially to the principal fishing area referred to in paragraph 73 above. In the view of the Court, the two Parties should enjoy equitable access to the fishing resources of this zone. For this purpose a point, to be designated point M, is identified on the 200-mile line claimed by Iceland between points B and D, and equidistant from those points, and a line is drawn from point M so as to intersect the line between point J and L, at a point designated point N, so as to divide zone 1 into two parts of equal area. The dividing line is shown on sketch-map No. 2 as the line between points N and M. So far as zones 2 and 3 are concerned, it is a question of drawing the appropriate conclusions, in the application of equitable principles,

View full-sized figure

SKETCH-MAP No.2

from the circumstance of the marked disparity in coastal lengths, discussed in paragraphs 61 to 71 above. The Court considers that an equal division of the whole area of overlapping claims would give too great a weight to this circumstance. Taking into account the equal division of zone 1, it considers that the requirements of equity would be met by the following division of the remainder of the area of overlapping claims : a point (O on sketch-map No. 2) is to be determined on the line between I and K such that the distance from I to O is twice the distance from O to K; the delimitation of zones 2 and 3 is then effected by the straight line from point N to this point O, and the straight line from point O to point A.

93. The co-ordinates of the various points mentioned have beencalculated as follows on the basis of the information supplied by each Party to the Court as to the base points on the coasts of its territory, and are included here for the information of the Parties :

(World Geodetic System, 1984)

Latitude North	Longitude West		
74° 21′46.9″	5° 00′27.7″	=	A

Latitude North	Longitude West		
72° 28′35.9″	9° 23′09.4″	=	I
71° 32′58.4″	11° 11′23.6″	=	J
69° 34′43.3″	12° 09′25.5″	=	B
69° 38′26.8″	12° 43′21.1″	=	C
70° 12′50.5″	15° 10′21.8″	=	D
72° 07′16.0″	14° 40′25.4″	=	L
73° 01′42.5″	12° 25′23.2″	=	K
69° 54′26.9″	13°38′01.0″	=	M
71° 50′00.8″	12° 50′48.2″	=	N
72° 50′58.7″	11° 23′23.2″	=	O

All straight lines referred to in paragraphs 91 and 92 are geodetic lines.

* * *

94. For these reasons,

The Court,

By fourteen votes to one,

Decides that, within the limits defined

(1) to the north by the intersection of the line of equidistance between the coasts of Eastern Greenland and the western coasts of Jan Mayen with the 200-mile limit calculated as from the said coasts of Greenland, indicated on sketch-map No. 2 as point A, and

(2) to the south, by the 200-mile limit around Iceland, as claimed by Iceland, between the points of intersection of that limit with the two said lines, indicated on sketch-map No. 2 as points B and D,

the delimitation line that divides the continental shelf and fishery zones of the Kingdom of Denmark and the Kingdom of Norway is to be drawn as set out in paragraphs 91 and 92 of the present Judgment.

IN FAVOUR: *President* Sir Robert Jennings; *Vice-President* Oda; *Judges* Ago, Schwebel, Bedjaoui, Ni, Evensen, Tarassov, Guillaume, Shahabuddeen, Aguilar Mawdsley, Weeramantry, Ranjeva, Ajibola.

AGAINST : Judge *ad hoc* Fischer.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this fourteenth day of June, one thousand nine hundred and ninety-three, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Kingdom of Denmark and the Government of the Kingdom of Norway, respectively.

(Signed) R. Y. Jennings,

President.

(Signed) Eduardo Valencia-Uspina,

Registrar.

Vice-President Oda, Judges Evensen, Aguilar Mawdsley and Ranjeva append declarations to the Judgment of the Court.

Vice-President Oda, Judges Schwebel, Shahabuddeen, Weeramantry and Ajibola append separate opinions to the Judgment of the Court.

Judge *ad hoc* Fischer appends a dissenting opinion to the Judgment of the Court.

(Initialled) R.Y.J.

(Initialled) E.V.O.

Declaration of Vice-President Oda

Shigeru Oda

1 My view, as appears in my separate opinion, is that the Danish Application was misconceived and that the case should have been dismissed. As this view did not prevail, the Court has taken a decision on the substance of the case, drawing a particular line of delimitation the choice of which does not appear to me to be founded on any justifiable reasoning. Considering, however, that the line in question does lie within the infinite range of those possibilities which could have been selected by the Parties if they had reached agreement, I have decided that it is proper for me to vote with the majority despite my difference of opinion on several points.

(Signed) Shigeru Oda.

Declaration of Judge Evensen

Jens Evensen

1 The United Nations Convention on the Law of the Sea signed at Montego Bay, Jamaica, on 10 December 1982 endeavours to formulate in its text of 320 Articles, 9 Annexes and a Final Act the prevailing (to some extent emerging) principles of the modern law of the sea. Article 308, paragraph 1, of the Convention provides:

> “This Convention shall enter into force 12 months after the date of deposit of the sixtieth instrument of ratification or accession.”

2 The Convention has not yet entered into force. Some 54 States have at present (ratified) acceded to the Convention. However, a number of the main principles laid down in this instrument must presumably be accepted as established principles of the modern law of nations.

3 The Convention upholds the substantive distinction between islands and rocks. With regard to the régime of islands Article 121, paragraph 2, of the Convention provides that islands shall in principle be dealt with under the same legal régime as other land territories. Article 121, paragraph 2, of the Convention states :

> “the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf of an island are determined in accordance with the provisions of this Convention applicable to other land territory”.

However, in this respect a clear distinction has been made in the Convention between islands and rocks. Article 121, paragraph 3, provides with regard to rocks :

> “Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.”

4 Throughout their pleadings both Parties have referred to and qualified Jan Mayen as an island. In the written pleadings it has been stated that the length of the island is 53.6 kilometres and that the breadth varies between 2.5 and 16 kilometres forming a total area of 380 square kilometres. For comparison, it has been mentioned that “the total area of the Republic of Malta is 316 square kilometres” (Counter-Memorial of Norway, Vol. I, p. 23, para. 78). In this relation, it is also of interest to note that the mountain of Beerenberg with an altitude of 2,277 metres above sea level is the second or third highest mountain of the Kingdom of Norway.

5 Jan Mayen must obviously be taken into consideration in delimiting the maritime areas concerned. However, it should also be recognized that Greenland — of the size of a continent — is facing a rather small island, Jan Mayen. But it was emphasized in the case concerning the *Continental Shelf (Libyan Arab Jamahiriya/Malta)* that in principle “there can be no question of distributive justice” in such delimitation cases (*I.C.J. Reports 1985*, p. 40, para. 46), although application of the median line (equidistance line) approach in the circumstances of the present case might possibly lead to inequitable results.

6 As stated in paragraph 90 of this Judgment, it lies within the Court's measure of discretion in order to arrive at an equitable result to make proper provisions for establishing a system for equitable access to the fish eries resources in the “area of overlapping claims”. In paragraphs 91–92 and on sketch-map 2, the Judgment has outlined the detailed division between the two countries of the fishery zones in the area, giving the coordinates of the relevant basepoints and baselines concerned. I endorse these findings.

(Signed) Jens Evensen.

Declaration of Judge Aguilar Mawdsley

Andrés Aguilar-Mawdsley

1 I have voted for the Judgment because I concur with its reasoning. However, I am not persuaded that the delimitation line as drawn by the Court provides for an equitable result. In my opinion, the difference in the lengths of the coasts of Greenland and Jan Mayen is such that Greenland (Denmark) should have received a larger proportion of the disputed area. Given the importance attached to this factor in the Judgment, it would have been logical at least to make an equal distribution of zones 1, 2 and 3.

(Signed) Andrés Aguilar Mawdsley.

Declaration of Judge Ranjeva

Raymond Ranjeva

[Translation]

1 I have voted in favour of the operative part of the Judgment and subscribe to the arguments on which it is based. In my opinion, the solution adopted by the Court constitutes an equitable result, which pays due regard to the interests at stake. I would nevertheless have wished the Court to be more explicit in stating its reasons for drawing the delimitation line adopted. To be sure, like any judicial organ required to pronounce on a dispute such as the one it has adjudicated, the Court had available a margin of discretionary power to rule on the relevance of the circumstances of the case and on the equitable nature of the result of the delimitation. But the exercise of this discretionary power required the Court to be more specific in setting forth its grounds for proceeding as it did. The Parties were entitled to expect fuller explanations regarding the elements of the decision arrived at. But that is not all. In accordance with Article 59 of the Statute, the Judgment delivered by the Court "has no binding force except between the parties and in respect of that particular case". Nevertheless, in view of the solution adopted, the Judgment in this case is such that it may well influence case-law in the sphere of maritime delimitation. The authority of a decision of the Court cannot but be reinforced whenever, in stating the reasons for its judgment, it reveals the factors which shed light on the operative provisions, i.e., criteria, methods, rules of law, etc. True, the Court may not create law; but it must specify the law it applies. The proper administration of justice, as well as the legal security to which States aspire, depends, to a very considerable extent, on the certainty of the legal rule (*la certezza del diritto*, to use the phraseology of Italian legal theory).

2 Moreover, the reference in paragraph 39 of the Judgment to the positions taken by the two Parties at the Third United Nations Conference on the Law of the Sea does not, in my view, take due account of the procedural rules applied by that conference. The wording used in the present Judgment should be compared with the text adopted in 1982 in the case concerning the *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*:

> "the Court notes that Libya, while emphasizing that the de facto line between the concessions was 'at no time accepted by Libya as the legal line of delimitation', observed that it was one that did 'suggest the kinds of lines that, in the context of negotiations, might have been put forward for discussion' …" (*I.C.J. Reports 1982*, p. 84, para. 118.)

3 Thus, in 1982, the Court was unable to remain indifferent to the positions stated by the parties in a bilateral negotiation. At the Third United Nations Conference on the Law of the Sea, questions of delimitation were dealt with by the Negotiating Group 7. Under the procedural rules adopted, which were of an exceptional nature for the purposes of this important negotiation, proposals or draft provisions were regarded as unofficial and entirely non-committing. It was only on 28 August 1981 that, pursuant to the decision taken by the Conference, official status was acquired by a text concerning delimitation (of the continental shelf). (Cf. *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), I.C.J. Reports 1982*, p. 49, para. 49.) The Court was therefore wrong to take document NG 7/2 into account in substance. At all events, in the circumstances of this case the Court had no need to explore the legal scope of statements made by a State at the Third United Nations Conference on the Law of the Sea. This criticism, however, is entirely without prejudice to the proposition that the law of delimitation rests on the rule combining equidistance and special circumstances.

4 Lastly, I regret that paragraph 55 should have been limited to a mere description of the relation between “special circumstances” and “relevant circumstances”, without managing to pinpoint their precise meaning, which would have brought out their inherent unity. For it is important to specify that it is in relation to the rights of the Parties over their maritime spaces that these circumstances can — or, sometimes, should — be taken into account in a delimitation operation. Hence, special or relevant circumstances appear as facts which affect the rights of States over their maritime spaces as recognized in positive law, either in their entirety or in the exercise of the powers relating thereto.

(Signed) Raymond Ranjeva.

Separate Opinion Of Vice-President Oda

Shigeru Oda

3. Problem 2: The régime of the continental shelf is independent of the concept of the exclusive economic zone

(a) Emergence and evolution of the legal concept of the continental shelf

(b) Post-UNCLOS I

(c) Transition to a new situation due to new technological developments

(d) Transformation of the definition of the continental shelf

(e) Ignorance of the transformation of the concept of the con tinental shelf and the parallel existence of the exclusive economic zone and the continental shelf

4. Problem 3: Confusion of title to the exclusive economic zone and the continental shelf with the question of delimitation of overlapping entitlements

(a) Denmark's entitlement to an exclusive economic zone and a continental shelf in respect of Greenland

(b) Norway's entitlement to an exclusive economic zone and a continental shelf in respect of Jan Mayen

(c) Overlapping of entitlements or claims

Part II. The Possible Function of the Court in Cases of Maritime Delimitation

1. Law of maritime delimitation in the 1958 Convention on the Continental Shelf

(a) Delimitation of fisheries jurisdiction not at issue at UNCLOS I

(b) UNCLOS I: Adoption of the Convention on the Continen tal Shelf

(c) The North Sea as a practical case-study

(d) Implications of the Judgment in the *North Sea Continental Shelf* cases

(e) Article 6 of the 1958 Convention not applicable to the present case

2. The rules for maritime delimitation discussed at the Sea-Bed Committee and UNCLOS III, and their adoption in the 1982 United Nations Convention

(a) Drafting of Articles 74 and 83 of the 1982 Convention

(b) Interpretation of the provisions of Articles 74 and 83

(c) One or two delimitation lines?

3. Role of the third party in settling disputes concerning maritime delimitation

(a) Infinite variety of potential delimitation lines

(b) Role of the third party in the delimitation of maritime boundaries

(c) Arbitration *ex aequo et bono*

Introduction

1. I am somewhat concerned by the rather incorrect manner in which Denmark formulated its Application and submissions and the way in which the Court responded to them. I will accordingly begin my opinion by pointing out that Denmark appears to have misunderstood certain concepts of the law of the sea, such as the exclusive economic zone and the continental shelf, as reflected in its submissions (Part I of this opinion).

2. However, the principal reason why I am inclined to criticize the Judgment lies in my belief that, as a matter of principle, the delimitation of maritime boundaries, whether of the exclusive economic zone or of the continental shelf, does not fall within the sphere of competence of the Court unless the Court is specifically requested, by agreement of the parties, to effect a delimitation of that kind, applying equity within the law or determining a solution *ex aequo et bono*. Hence I believe that the Application unilaterally submitted by Denmark in the present case should have been dismissed (Part II).

3. Even assuming that the Court is competent to draw a line or lines of delimitation of the exclusive economic zone or the continental shelf, the single line drawn in the Judgment (paras. 91–92) does not appear to be supported by any cogent reasoning, although of course that line or another line could have been decided by agreement of the Parties (Part III).

Part I. Denmark's Misunderstanding of Certain Concepts of the Law of the Sea as Reflected in its Submissions

1. The Submissions of Denmark

4. In its Application of 16 August 1988, Denmark asked the Court

> "to decide, in accordance with international law, where a single line of delimitation shall be drawn between Denmark's and Norway's *fishing zones* and continental shelf areas in the waters between Greenland and Jan Mayen" (emphasis added).

In its submissions of 31 July 1989 contained in the Memorial, Denmark asked the Court

> "(1) To adjudge and declare that Greenland is entitled to a full 200-mile *fishery zone* and continental shelf area vis-à-vis the island of Jan Mayen; and consequently

> (2) To draw a single line of delimitation of the *fishing zone* and the continental shelf area of Greenland in the waters between Greenland and Jan Mayen at a distance of 200 nautical miles measured from Greenland's baseline" (emphasis added).

In the submissions presented on 31 January 1991 in its Reply, Denmark added concrete map references to submission (2). A further request, dated 25 January 1993, was added in the final submissions presented at the close of the oral phase, to the effect that

> "(3) If the Court, for any reason, does not find it possible to draw the line of delimitation requested in paragraph (2), Denmark requests the Court to decide, in accordance with international law and in light of the facts and arguments developed by the Parties, where the line of delimitation shall be drawn between Denmark's and Norway's *fisheries zones* and continental shelf areas in the waters between Greenland and Jan Mayen, and to draw that line" (emphasis added).

5. It appears to me that Denmark fails to appreciate certain concepts of the law of the sea. *In the first place*, it does not seem to grasp the proper concept of the exclusive economic zone, the concept adopted in the 1982 United Nations Convention on the Law of the Sea. As a matter of fact, this misunderstanding is not only displayed by Denmark but is also to be observed in the position taken by Norway in these proceedings as well as by some other countries in various contexts (Sec. 2 below). *Secondly*, Denmark seems to pay little heed to the régime of the continental shelf which is fated — at least under the contemporary law of the sea — to exist in parallel with the régime of the exclusive economic zone (Sec. 3 below). *Thirdly*, Denmark seems to confuse *title* to the continental shelf or the exclusive economic zone with the concept of *delimitation* of overlapping sea-areas (Sec. 4 below).

2. Problem 1: The Fishery Zone (However Called) Is Not Identical to the Exclusive Economic Zone

6. What exactly is meant by the "fishing zone", "fishery zone" or "fisheries zone" extending "200 miles from the coast", to which Denmark refers in its Application and submissions? Denmark indeed claimed a 200-mile "fishing territory" in its Act No. 597 of 1976, but it has never relied upon the concept of the exclusive economic zone, which was adopted in the 1982 United Nations Convention on the Law of the Sea. This consideration leads me to present some reflections on the development of the coastal State's exercise of jurisdiction over offshore areas.

(a) The period prior to the 1950s

7. Until the time of UNCLOS I in 1958, neither Denmark nor Norway had ever considered the possibility of jurisdiction over, or control of, offshore fisheries beyond a distance of 1 league (3 nautical miles) or at most 4 nautical miles from the coast.

8. While the post-war claims of some Latin American countries to wider offshore areas of maritime sovereignty (extending over a 200-mile distance from the coast) for exploitation as their own fishing grounds were eventually asserted jointly in the Santiago Declaration of 1952, both Denmark and Norway lodged their respective protests at the position being taken by those countries. The areas claimed by those Latin American countries were

sometimes referred to as “fishery zones” or “fishing zones”, but they never gained universal recognition in international law.

(b) UNCLOS I (1958)

9. One of the most important issues at UNCLOS I (a conference convened in 1958 in Geneva after being prepared over several years by the International Law Commission) consisted in the determination of the limit of the territorial sea. This problem was characterized at the Conference as a confrontation between the narrower limit (3 or 4 miles) and the wider limit (12 miles), and the concept of a “fishery zone” to be established outside the territorial sea but within 12 miles from the coast was proposed by States favouring the narrower territorial-sea limit as a compromise to be offered those wanting a 12-mile limit within which to exercise exclusive offshore fishing rights.

10. The very concept of the “fishery zone“ was thus proposed as a substitute for the extension of the territorial sea to 12 miles, which was not then acceptable to some States (mostly the Western States), and it is important to note that the outer limit of the fishery zone thus mooted was to be 12 miles from the coast. It cannot be over-emphasized, moreover, that the concept of the fishery zone discussed at UNCLOS I was different in nature from that of the maritime sovereignty straightforwardly claimed around 1950 by the Latin American States, to cover 200-mile offshore areas.

11. UNCLOS I narrowly failed in its attempt to fix the limit of the territorial sea, and for that reason there were no further references to the concept of the fishery zone, which had been put forward only in that connection.

(c) The 12-mile fishery zone in the period following UNCLOS I

12. In the upshot, UNCLOS I neither fixed a 12-mile limit to the territorial sea in the Convention on the Territorial Sea and the Contiguous Zone, nor introduced the concept of the 12-mile fishery zone as compensation for the retention of the narrower territorial sea. Nevertheless, the concept of the 12-mile “fishery zone” which had not been recognized in 1958 began to take root in the period after UNCLOS I.

13. One after the other, both Denmark and Norway unilaterally established a 12-mile zone for fishery purposes. However, the unilateral establishment of such a fishery zone at that time was, of course, not limited to Denmark and Norway. Indeed, States began increasingly to agree among themselves that they should be entitled to establish such a zone. The 1964 Fisheries Convention concluded among European countries including Denmark (but not Norway), represented a type of such an agreement in which each contracting State recognized the right of any other contracting party to establish a belt 6 miles wide in which the coastal State would have the exclusive right to fish and exclusive jurisdiction in matters of fisheries, together with an outer 6-mile belt in which the continuation of traditional foreign fishing would be guaranteed.

14. The concept of the 12-mile fishery zone, which was never accepted at UNCLOS I, had thus rapidly gained general recognition. By the mid-1970s, that same fishery zone, while not provided for in any of the universal documents concerning the law of the sea, existed as a firmly established institution.

15. Iceland was unique in claiming a 50-mile fishery limit by its 1971 policy statement and the 1972 resolution adopted by the Althing. That Icelandic claim occasioned objections by the Federal Republic of Germany and the United Kingdom, and was in issue in proceedings before the International Court of Justice in the *Fisheries Jurisdiction (United Kingdom v. Iceland)* and *Fisheries Jurisdiction (Federal Republic of Germany v. Iceland)* cases. In its Judgments, the Court found that the unilateral extension of the exclusive fishing rights of

Iceland to 50 miles was “not opposable to” the United Kingdom or the Federal Republic (*I.C.J. Reports 1974*, pp. 34 and 205).

(d) Emergence of the new concept of the exclusive economic zone

16. One of the new trends in UNCLOS III during the 1970s was that the claim to a 200-mile zone (which had been advanced by some Latin American nations as an area of maritime sovereignty in the post-war period but had met with strenuous objections from other countries), had now become recognized — but *only* in the form of the “exclusive economic zone”. In comparison with the progress made by the concept of the 200-mile “exclusive economic zone”, which rapidly gained world-wide support, the concept of a 12-mile “fishery zone” lost all its significance. However, the concept of the “exclusive economic zone”, which on the one hand was much wider in scope than that of the fishery zone because of the inclusion of control by the coastal State not only over fishing but also over various other activities, did on the other hand envisage for the coastal State certain obligations concerning the control and management of fisheries.

(e) Claims to a 200-mile fishery zone since the mid-1970s

17. While the régime envisaged for the exclusive economic zone was still in a chaotic state at the early stages of UNCLOS III (the Caracas session in 1974 and the Geneva session in 1975), a number of States, which had discerned the general trend of expansion of coastal jurisdiction over extended offshore areas, vied with each other, prior to the adoption of the Convention at the Conference in 1982, in bluntly claiming their fishery interests in those areas.

18. Denmark established a 200-mile “fishery territory” by Act No. 597 of 17 December 1976 to replace its Act No. 207 of 1964, and Norway established a 200-mile “economic zone” by its Act No. 91 of 17 December 1976 and its Royal Decree of the same date. Other States were meanwhile making haste to declare a 200-mile fishery zone in order to secure exclusive control of fishing in their respective offshore areas, disregarding the concept of the exclusive economic zone (which was to be suggested at UNCLOS III for incorporation into the as yet unfinalized Convention).

19. This unilateral process does not alter the fact that, under the 1982 United Nations Convention on the Law of the Sea, whose rules in most respects are widely held to have superseded earlier law, the claim to a distance of 200 miles is permissible only in respect of the exclusive economic zone (defined in detail and in strict terms in Part V of the Convention), in which due consideration is given to the common interest of the rest of the world — that is, to the conservation and optimum utilization of fishery resources.

(f) “Fishery zone” nota legal concept

20. There is certainly no provision in the 1982 Convention that relates to a 200-mile “fishery zone” as such. The “fishing zone” (or “fishery zone”) which Denmark and Norway established respectively (and which Denmark mentions in its Application) is *not* the exclusive economic zone as defined in that Convention.

21. However, it is undeniable that today a number of States have claimed a 200-mile “fishery zone” or “economic zone” — but *not* an “exclusive economic zone”. These States include Canada, Germany, Japan, the Netherlands and the United States, all of which would have been strongly opposed to the exercise of exclusive fishing rights by coastal States in offshore areas beyond the limit of the territorial sea even if the latter had been extended from its traditional 3-mile to a 12-mile limit. It may for this reason be contended that, thanks to these repeated claims made by certain States, including both developed and developing countries (many of which have been asserted during the past decade), the

concept of the 200-mile fishery zone has become customary international law quite independently of the 1982 Convention.

22. It is noted that the respondent State, Norway, has also and in the same manner laid claim to a 200-mile “fishing zone”. Thus I am ready to accept that the Court was bound, in these proceedings, to proceed with the “fishery zone” as an established concept, setting aside that of the “exclusive economic zone”.

(g) The Court's position on the 200-mile off shore fisheries

23. As the concept of the “fishery zone” has no standing, at least in the 1982 Convention, and still remains a merely *political* concept, I would have liked the Court to have taken a clear stance with respect to the confusion (by not only the Applicant but by both Parties) between the concepts of the “exclusive economic zone” and the “fishery zone”. Its failure to do so leads me to wonder what will become in future of the concept of the exclusive economic zone, as provided for in that Convention. I am afraid that the concept of the “exclusive economic zone” will appear completely obsolete, even before the 1982 Convention has come into force.

3. Problem 2: The Régime of the Continental Shelf Is Independent of the Concept of the Exclusive Economic Zone

24. In its Application, Denmark asked the Court to “decide … where a single line of delimitation shall be drawn between Denmark's and Norway's fishing zones and continental shelf areas” and in its subsequent submissions requested the Court “to draw a single line of delimitation of the fishing zone and the continental shelf area of Greenland … at …”.

25. How is it possible for Denmark to presuppose the identity of the boundary of the exclusive economic zone (for that is what it really alludes to) with that of the continental shelf, when both régimes originated against different backgrounds and exist in parallel ? Is it the intention of Denmark to contend that the original, or proper, régime of the continental shelf has completely crumbled away, to be replaced by the new régime of the exclusive economic zone ? An examination of the emergence and evolution of the concept of the continental shelf may be in order, given these considerations.

(a) Emergence and evolution of the legal concept of the continental shelf

26. There can be no doubt that the political concept of the continental shelf was initiated by the Truman Proclamation of 1945. At that time, neither Denmark nor Norway indicated any specific attitude either for or against it. In other words, they appeared indifferent to the problem of the continental shelf.

27. It was UNCLOS I that produced the legal concept of the continental shelf, defined as:

> “the sea-bed and subsoil of the submarine areas adjacent to the coast … to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas” (Convention on the Continental Shelf, Art. 1).

(In the last-quoted phrase, the word “admits” has been generally interpreted as meaning “ceases to admit”, which is of course a necessary gloss.) Later, the definition of the continental shelf seems to have been further affected by the 1969 Judgments in the *North Sea Continental Shelf* cases, in which it was seen as constituting a “natural prolongation of [the] land territory into and under the sea” (*I.C.J. Reports 1969*, p. 53).

28. The fact is that few States at UNCLOS I had any firm idea concerning the concept of the "exploitability test", and may well have entertained nothing more than a very vague notion that the exploitation of the submarine areas should be *permitted* somewhere — even beyond a depth of 200 metres — if the development of technology were to allow that possibility, and that it should remain subject to some degree of national control. If there was any question of delimitation at that time, what was really at issue related simply to submarine areas up to the 200-metre isobath. In 1958, at any rate, few delegates realized where the novel introduction of submarine technology into the debate might ultimately lead.

(b) Post-UNCLOS I

29. The Geneva Convention on the Continental Shelf became effective in June 1964; Denmark had ratified it in 1963 and Norway acceded to it in 1971. In 1968, Denmark also ratified the Optional Protocol of Signature concerning the Compulsory Settlement of Disputes; Norway neither ratified nor acceded to the Optional Protocol.

30. The concept of the continental shelf as a geographical entity subject to a special régime rapidly became established in customary international law. At all events, the actual institution in law of the continental shelf has not been challenged since the adoption of the Convention.

31. Whether the national continental shelf requires the specific claim of each State, or whether it now exists *ipso jure* in international law, remains to be examined. In 1963 Denmark issued a "Royal Decree concerning the Exercise of Danish sovereignty over the Continental Shelf", using terms similar to those used in the 1958 Convention: in the same year Norway issued a "Royal Decree relating to the Sovereign Rights of Norway over the Sea-Bed and Subsoil outside the Norwegian Coast", an "Act No. 12 relating to Exploration and Exploitation of Submarine Natural Resources" and an "Act No. 12 relating to Scientific Research and Exploration for and Exploitation of Resources other than Petroleum Resources".

32. I must add at this juncture, and it cannot be over-emphasized, that in the mid-1960s there did not exist any idea that the area between Greenland and Jan Mayen would constitute a part of the continental shelf of any State.

(c) Transition to a new situation due to new technological developments

33. In the mid-1960s, when it became apparent that the rapid development of technology would accelerate the exploitation of mineral resources beyond the 200-metre isobath and that the whole submarine area of the vast ocean might eventually become exploitable, two opposite interpretations were presented for the definition of the "exploitability test". One was that, as the whole area of the ocean would become exploitable (thus becoming a continental shelf within the meaning of the 1958 Convention), it should be divided by a median line throughout the world. The other idea was that, with the gradual advancement of technology throughout the world, the continental shelf of each State would gradually extend further, thus meeting the continental shelf of the opposite side at the deepest point.

34. In response to the median-line theory and the deepest-trench theory, which had in common their understanding that, in theory, the whole area of the world's ocean would, owing to the development of advanced technologies, soon have the status of the continental shelf of any and every State, Ambassador Pardo of Malta, in his epoch-making statement to the General Assembly on 1 November 1967, appealed for a halt to that expansion of the continental shelf, by suggesting that the sea-bed of the vast ocean should be considered as the "common heritage of mankind". The work towards a new régime of the ocean was

accordingly launched at the United Nations Sea-Bed Committee between 1968 and 1973, and was followed up by UNCLOS III, which commenced in 1974 in Caracas.

(d) Transformation of the definition of the continental shelf

35. In parallel with the appearance of the new concept of the "exclusive economic zone", the definition of the continental shelf also underwent a complete transformation. In order to apply a brake to the unlimited expansion of the continental shelf in terms of the "exploitability test", the outer edge of the continental margin as the natural prolongation of land territory in accordance with topographical and geological concepts (i.e., the original concept) was fixed as the outer limit of the "continental shelf".

36. On the other hand, the distance criterion of the 200-mile limit, which was quite irrelevant to the original concept and had been advocated only for fisheries purposes, was introduced into the field of the continental shelf although it had no relevance to submarine topography and geology — except in so far as that shelf could be further extended. The new definition of the continental shelf, as incorporated into the 1982 Convention, was simply the product of a compromise between the self-serving, and therefore conflicting, interests of each State at UNCLOS III.

37. Thus the concept of the continental shelf as the "natural prolongation of [the] land territory into and under the sea", which the International Court of Justice had properly applied in its 1969 Judgment to define the "continental shelf (and which had originally featured in the 1958 Convention), had been completely transformed by the new introduction of the 200-mile-distance criterion and the continental shelf had outgrown its original significance within the meaning of that Convention. It is, however, a remarkable fact (and a most unfortunate one) that, while the continental shelf was thus redefined (Art. 76), that transformation of the concept was scarcely discussed at UNCLOS III, so that the essential provisions in the 1958 Convention relevant to the basic concept of that area remained unaffected (Arts. 77–81).

(e) Ignorance of the transformation of the concept of the continental shelf and the parallel existence of the exclusive economic zone and the continental shelf

38. The concept of the continental shelf as understood today *is not* the same as the one which was adopted in the 1958 Convention and prevailed prior to UNCLOS III. The sea area in dispute in the present case between Greenland and Jan Mayen (or the area defined as the "relevant area" in the Judgment (para. 20)) is *not* the "continental shelf" within the meaning of the 1958 Convention, but may well be the continental shelf referred to in the 1982 United Nations Convention, or in the customary international law which may now be reflected in that Convention. This is an important point, but one which both the Applicant and the Court, in my view, have failed to appreciate fully.

39. Furthermore, throughout the meetings of the United Nations Sea-Bed Committee and UNCLOS III in the 1970s, the exclusive economic zone as a new concept and the continental shelf as a concept transformed from the 1958 Convention were considered as separate régimes, to be provided for in parallel in the final text of the Convention. In this respect the Danish submissions in its Application were misguided when the Court was asked "to decide … where a single line of delimitation shall be drawn", because Denmark presupposed a line which could not *a priori* exist. This is another point which did not receive the due attention of the Applicant and the Court.

4. Problem 3: Confusion of Title to the Exclusive Economic Zone and the Continental Shelf and the Question of Delimitation of Overlapping Entitlements

40. Denmark, in submission (1) in the Memorial and the Reply, asks the Court to declare its *entitlement* "to a full 200-mile fishery zone and continental shelf area vis-à-vis the island of Jan Mayen". In my view, when title to an area of maritime jurisdiction exists — be it to a continental shelf or *(arguendo)* to a fishery zone — it exists *erga omnes*, i.e., is opposable to all States under international law and is not limited to any specific geographical component of any one State. That being understood, it appears to me necessary to point to a certain conceptual confusion that emerges from Denmark's presentation of its claim.

(a) Denmark's entitlement to an exclusive economic zone and a continental shelf in respect of Greenland

41. Whether "Greenland" is entitled "to a full 200-mile fishery zone and continental shelf area" is a general question concerning Denmark's title to those areas. It is accordingly different from the question of the extent of the area in which its entitlement may be claimed and which needs to be delimited as it overlaps with the opposing entitlement of another State. What Denmark really seeks in submission (1), in its relation "vis-à-vis the island of Jan Mayen", is that the Court should effect a delimitation making no abatement of what would be its maximum theoretical entitlement in the absence of any competing title; submission (1) has no effective meaning if read on its own, i.e., without any reference to submission (2).

(b) Norway's entitlement to an exclusive economic zone and a continental shelf in respect of Jan Mayen

42. In the light of the drafting process of the 1958 and 1982 Conventions, the entitlements of Jan Mayen (or rather of Norway on its behalf) to the 200-mile exclusive economic zone and/or continental shelf need not, I submit, have been taken for granted. In the present case, however, Denmark did not dispute the entitlements of Jan Mayen as a singular island of smaller dimensions to an exclusive economic zone and/or a continental shelf.

43. Denmark only questioned the extent of the area to which Jan Mayen's entitlements extend. It is important to note, however, that Norway claimed theoretical entitlement up to the full 200-mile extent for the exclusive economic zone and continental shelf of Jan Mayen but, taking a rather modest approach, simply refrained from asserting its full entitlement vis-à-vis Greenland.

(c) Overlapping of entitlements or claims

44. As can be seen from its submissions, Denmark does not seem to grasp that, where the entitlements of two opposite States overlap in an area less than 400 miles apart, the question of delimitation arises in the area of overlapping entitlements of the two States. Unlike Norway, Denmark was not ready to have the area of overlap delimited but simply claimed the whole potential area of its entitlement. Denmark appears to believe that the possession of a maximum entitlement (in respect of Greenland) implies that the line of delimitation should be drawn without any regard to the maximum entitlement of Norway (in respect of Jan Mayen). In this respect, Denmark tends to ignore the distinction between determining the limits of entitlements to sea areas and the division of overlapping claims.

45. The Court likewise pays insufficent heed to this distinction. Despite the fact that at one point it suggests the "area of overlapping potential entitlement" as one of the three areas designated as relevant for the purpose of the Judgment (para. 19), it scarcely makes use of this area in its reasoning but relies mainly on the "area of overlapping claims", i.e., the overlapping of the maximum entitlement of Greenland, presented as a claim, and the

modest claim made on behalf of Jan Mayen (Judgment, para. 18), in order to justify the line which it has drawn.

46. I am afraid that this Judgment, which barely paid the requisite attention to Jan Mayen's potential entitlement and was too much concerned with the "area of overlapping claims" could well lead a State, at some future time, to claim its maximum entitlement in the initial stage of negotiations with its neighbouring State for the delimitation of maritime boundaries, either of the exclusive economic zone or the continental shelf.

Part II. The Possible Function of the Court in Cases of Maritime Delimitation

47. To define what roles it may or may not be open to the Court to assume in matters of maritime delimitation, it is necessary to review the principles on the subject that have evolved in international law.

1. Law of Maritime Delimitation in the 1958 Convention on the Continental Shelf

(a) Delimitation of fisheries jurisdiction not at issue at UNCLOS I

48. The offshore areas dealt with in UNCLOS I were primarily either the territorial sea or the contiguous zone. Agreement on the width of the territorial sea was not reached, except in the sense that it should not exceed 12 miles — the distance fixed for the contiguous zone. In such circumstances, the delimitation of the territorial sea and the contiguous zone as between adjacent or opposite States in rather narrow areas was not seen as a new or very significant issue. The focus in UNCLOS I was upon the delimitation of the continental shelf, extending further than those narrower areas but, in principle, as far as the 200-metre isobath. However, I must repeat that for fisheries purposes there did not exist any concept of further jurisdiction of the coastal State beyond 12 miles from the coast.

(b) UNCLOS I: Adoption of the Convention on the Continental Shelf

49. It is not necessary to follow the whole of the drafting process leading to Article 6 of the Convention governing the delimitation of the continental shelf. UNCLOS I accepted the need for the insertion into the Convention of a provision on the continental shelf, the text of which had been prepared by the International Law Commission in deliberations over a period of several years in the mid-1950s:

> "Where the same continental shelf is adjacent to the territories of two or more States [*(a)* whose coasts are opposite each other], [*(b)* 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, [*(a)* the boundary is the median line] [*(b)* the boundary of the continental shelf shall be determined by application of the principle of equidistance from the nearest points of the baseline] …" (Convention on the Continental Shelf, Art. 6.)

50. It is important to note, *firstly*, that when the delimitation of the continental shelf was under consideration prior to or at UNCLOS I, the area beyond the 200-metre isobath was scarcely considered. This preliminary understanding is essential when one is interpreting Article 6 of the Convention.

51. *Secondly*, the provision that "the boundary … shall be determined by agreement between [the States concerned]" may well have the status of a legal principle but it does not indicate any criteria for determining the boundaries of the (legal) continental shelf. In addition, the suggestion to employ as the boundary line, "in the absence of agreement [and] unless another boundary line is justified by special circumstances", (i) "a median line [in the case of the opposite States]" and (ii) a line to "be determined by the principle of equidistance [in the case of adjacent States]" gave not the slightest clue as to the "circumstances" which would be so "special" as to "justify" a line other than a median line (or the equidistance line).

52. Certainly, one State might have the view that no other line but the median line (or the equidistance line) would be justified in the absence of any "special circumstances" and the other State might point to the existence of some special circumstances which, in its view, did justify a departure from the median line (or the equidistance line). The question remained as to whether any *legal* criteria would have to be met by such justifying special circumstances.

(c) The North Sea as a practical case-study

53. The question of the delimitation of the continental shelf became of imminent importance in the mid-1960s, particularly in the areas of the North Sea. The discovery of reserves of oil or natural gas in this region necessitated the division, early in the 1960s, of the sea-bed of these shallow waters among the surrounding nations. The whole area of the North Sea is shallower than 200 metres (with the exception of the Norwegian Trough) and there was no doubt about the area being a continental shelf within the meaning of the 1958 Convention, irrespective of any interpretation of the definition of its "exploitability" as provided for in the Convention.

54. A number of bilateral agreements were successively concluded in the period 1964 — 1966 among States of the region, including Denmark and Norway, on the basis of a general application of the equidistance or the median line (Netherlands-United Kingdom, 1965; Norway-United Kingdom, 1965; Denmark-Germany, 1965; Germany-Netherlands, 1965; Denmark-United Kingdom, 1966; Denmark-Netherlands, 1966). It is important to bear in mind that the 1965 Agreement between Denmark and Norway, which has been much discussed in the present case, was simply one of a number[1]. As has already been stated (para. 32 above), in those days the area between Greenland and Jan Mayen was never deemed to be one covered by the concept of the continental shelf, so it is obvious that the 1965 Agreement did not apply to that area.

55. In 1967 the delimitation between Germany on the one hand and Denmark and the Netherlands on the other, which except for some areas extending over a short distance from their coasts had not been agreed upon through diplomatic negotiations, was brought jointly to the International Court of Justice. The *North Sea Continental Shelf* cases should be understood in the context of a chain of bilateral negotiations in the North Sea region in the 1960s.

56. Germany viewed the *mechanical* application of the equidistance-line rule as being unfavourable to its own interests in respect of the adjacent coasts of Denmark and the Netherlands. In that case before the Court, Germany presented various arguments contesting Denmark's/the Netherlands' positions based on the application of the equidistance-line rule. It was argued by Germany that, while the equidistance line was applicable, the base for measuring the distance should be determined in the case of adjacent States in such a way as to take account of macrogeographical factors, by taking a

rectified coastline, that is, the coastal front or "coastal facade" (see *I.C.J. Pleadings, North Sea Continental Shelf*, Vol. II, p. 193).

57. The International Court of Justice stated, in its 1969 Judgment, that:

> "delimitation is to be effected by agreement in accordance with equitable principles, and taking account of all the relevant circumstances, in such a way as to leave as much as possible to each Party all those parts of the continental shelf that constitute a natural prolongation of its land territory into and under the sea, without encroachment on the natural prolongation of the land territory of the other" (*I.C.J. Reports 1969, p. 53*, para. 101(C)(1)).

Thanks to that Judgment of the Court, the delimitation in the south-eastern part of the North Sea was subsequently agreed in 1971 between Denmark and Germany, as well as between the Netherlands and Germany.

(d) Implications of the Judgment in the North Sea Continental Shelf cases

58. There are a few points which must be given due consideration when the Judgment in the *North Sea Continental Shelf* cases is interpreted. Firstly, the Judgment referred to a sea not exceeding 200 metres in depth, hence one underlain by a continental shelf of the most unambiguous kind, and was delivered in 1969, at a time when jurists continued to conceive of the shelf primarily in a geological and topographical sense — hence in terms (to quote the Judgment) of the "natural prolongation of [the] land territory into and under the sea".

59. *Secondly*, the suggestion of *dividing* the shelf in:

> "such a way as to leave as much as possible to each Party all those parts of the continental shelf that constitute a natural prolongation of its land territory … without encroachment on the natural prolongation of the land territory of the other"

did not contain any concrete indication for the *delimitation* of the area and did not go beyond the simple suggestion of an "equitable solution", the expression later employed in the 1982 United Nations Convention.

60. *Thirdly*, one should try to be precise about the status of the indication given by the Court as to "the factors to be taken into account … in the course of the negotiation". Did this indication simply constitute a suggestion put forward by the Court in order to assist negotiations between the Parties, or did it amount to a determination of law on the basis of Article 38, paragraph 1, of the Court's Statute?

(e) Article 6 of the 1958 Convention not applicable to the present case

61. As has already been explained (para. 50 above), Article 6 of the 1958 Convention is applicable to the continental shelf in an orthodox sense, i.e., the sea-bed areas inside the 200-metre isobath. The area between Greenland and Jan Mayen is not a continental shelf in that sense, though it certainly is taken to be a continental shelf in accordance with the transformed concept. This is a point of which, in my view, the Applicant and the Court were not sufficiently aware. It seems to me that the Parties to this case and the Court erred in taking the 1958 Convention as the rule with regard to the delimitation of the continental shelf while the rule of the 1982 Convention is valid for the delimitation of the exclusive economic zone. What applies today to the delimitation of either the exclusive economic zone

or the continental shelf is the 1982 United Nations Convention — or customary international law which may be reflected in that Convention.

2. The Rules for Maritime Delimitation Discussed at the Sea-Bed Committee and UNCLOS III, and Their Adoption in the 1982 United Nations Convention

(a) Drafting of Articles 74 and 83 of the 1982 Convention

62. As has already been said (para. 16 above), the new concept of the exclusive economic zone has its own background and exists in parallel with the transformed concept of the continental shelf. The delimitations to be effected under each régime could have been separate. Nevertheless, as they had in common at least the 200-mile distance criterion (qualified, in the case of the continental shelf, by the possibility of a further extension as far as the outer edge of the continental slope), the delimitation issues of these two separate régimes were discussed together by the delegates at UNCLOS III. Article 74 (for the delimitation of the exclusive economic zone) and Article 83 (for the delimitation of the continental shelf) were drafted in the same fashion in the 1982 United Nations Convention on the Law of the Sea.

63. A detailed analysis of the background to these provisions may not be necessary, as only minimum information is required in this instance. In 1978, the conflict of the two schools of thought had become apparent with regard to the question of the delimitation of both the exclusive economic zone or the continental shelf at UNCLOS III. The median-line school proposed the following draft:

> "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"

and the equitable-principle school proposed that:

> "The delimitation of the exclusive economic zone [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."

64. The effort to reach a compromise between these two schools of thought was not successful[1]. In 1981, at the tenth session, Ambassador Koh of Singapore, who became President of UNCLOS III on the death of Ambassador Amerasinghe of Sri Lanka, held meetings with the chairmen of each group and then, on 28 August 1981 at the resumed tenth session, formulated a proposal for a solution. In the plenary meetings the chairmen of the two groups gave their respective support and that text constituted the provisions in the final version of the Draft Convention on the Law of the Sea (28 August 1981) which was finally adopted as Articles 74 and 83 of the 1982 United Nations Convention, which read:

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

Whether Articles 74 and 83 of the 1982 Convention (which has not yet entered into force) have any validity as customary international law or not may still be arguable, but this is a different problem.

(b) Interpretation of the provisions of Articles 74 and 83

65. It is not easy to give a proper interpretation to a text which, after the failure of negotiations over a lengthy period at the Conference, was drafted by one person (i.e., the President of UNCLOS III) and adopted without any further discussion. However, there can be no doubt that the whole concept of Articles 74 and 83 originated from Article 6 of the 1958 Convention and was a product of a compromise between the two opposite schools of thought, the median-line school and the equitable-principle school. Against this background, I would make the following suggestions.

66. *Firstly*, the words “in order to achieve an equitable solution” cannot be interpreted as indicating anything more than the target of the negotiation to reach an agreement. The text may indicate a frame of mind, but it is not expressive of a rule of law. It must be borne in mind that, while the reference to “special circumstances” in the 1958 Convention or to “all relevant circumstances” in the negotiations at UNCLOS III was finally dropped, those concepts were well reflected in the provision quoted above. In other words, the consideration of some relevant or special circumstances may be required if one is to arrive at an “equitable solution”.

67. *Secondly*, what is the meaning of this provision that agreement must be reached “on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice” ? Agreement between States is simply a result of diplomatic negotiations and is reached by the free will of the States concerned (cf. the doctrine of liberty of contract). The deciding factors in such diplomatic negotiations are simply negotiating powers and the skills of each State's negotiator as well as the position, geographical and other, of each State.

68. It may be contended that there can be a legal framework within which — and only within which — the content of an agreement is justifiable under international law and that any agreement contrary to *jus cogens* should be regarded as invalid. For example, an agreement obtained by duress might be open to challenge. Except in that very general sense, there does not in my view exist any *jus cogens* governing the delimitation of overlapping maritime titles. The parties can freely negotiate and can reach an agreement on whatever they wish, employing all possible elements and factors to strengthen their own position. In other words, there is *no* legal constraint, hence no rule, which guides the negotiations on delimitation, even though the negotiations should be directed “to achiev[ing] an equitable solution”. Disagreement over the points arising during the effort to reach agreement cannot constitute a “legal dispute”, because law is not involved in choosing the line among infinite possibilities.

69. *Thirdly*, in spite of the practical identity between Article 74 and Article 83, there is, of course, no guarantee that the delimitation of the exclusive economic zone and the delimitation of the continental shelf will necessarily be identical. The “equitable solution” to be reached by negotiation in the delimitation of the exclusive economic zones and that of the continental shelf areas can certainly be different, as the “special” or “relevant” circumstances to be taken into account when defining a delimitation line may well be different in each case.

(c) One or two delimitation lines ?

70. Whether the boundary of the continental shelf areas and the boundary of the exclusive economic zone are or are not identical will depend quite simply on the result of each delimitation, which can well be different with respect to the two different areas. In the absence of an agreement between the States concerned, one cannot presuppose a single delimitation for two separate and independent régimes, the exclusive economic zone and the continental shelf, although the possibility of an eventual coincidence of the two lines may not be excluded.

71. I have however some sympathy with the Danish attitude and with the Court's tendency to prefer a single maritime boundary, since, if the acceptance of wider claims to coastal jurisdiction over offshore fisheries had been seen as inevitable, those two régimes should have been amalgamated in the new law of the sea. What is deplorable about the new order in the oceans (which was being prepared in UNCLOS III) is the fact that an immature concept of the exclusive economic zone has been introduced to coexist with the previously accepted concept of the continental shelf which has been re-defined and thus transformed, and that the concept of the exclusive economic zone has in fact had the effect of ousting the latter concept. Article 56, paragraph 3, which provides that

> "[t]he rights set out in this article [rights, jurisdiction and duties of the coastal State in the exclusive economic zone] with respect to the seabed and subsoil shall be exercised in accordance with Part VI [continental shelf]",

which was incorporated without discussion, seems to be an extremely misguided provision and is difficult to understand.

72. If UNCLOS III was set upon instituting the exclusive economic zone, it ought frankly to have first wound up the original concept of the continental shelf. Thus the régime under the 1982 Convention remains immature in some respects, such as the exclusive economic zone and the continental shelf. At all events, the transformed concept of the continental shelf espoused by the 1982 Convention still remains unclear, particularly in its relation to the parallel régime of the exclusive economic zone, and does not stand up to criticism from a purely legal standpoint. As has already been said (para. 37 above), the continental shelf (which should have been examined more cautiously with the introduction of its new definition) was scarcely discussed at UNCLOS III.

73. However, in spite of all I have said, the two régimes of the exclusive economic zone and the continental shelf exist separately and in parallel in the 1982 United Nations Convention, hence in existing international law, and the delimitation for each is different.

74. Having said all this, I do not rule out the possibility that, from the practical standpoint of the exercise of their respective jurisdictions over the offshore areas for the purpose of the control of maritime resources, States in negotiation may prefer to have a single boundary rather than two separate boundaries, but then they should be in agreement on this point as in the case concerning the *Delimitation of the Maritime Boundary in the Gulf of Maine Area*.

3. Role of the Third Party in Settling Disputes concerning Maritime Delimitation

(a) Infinite variety of potential delimitation lines

75. While the entitlement to areas is erga omnes, the delimitation of areas is solely related to the drawing of a line between two conflicting entitlements, which remains a matter for the States concerned. This is why the 1958 Convention provides in the case of the continental shelf that "the boundary of the continental shelf appertaining to … States shall be determined by agreement between them" (Art. 6) and the 1982 United Nations Convention provides in relation to the exclusive economic zone and the continental shelf that "[t]he delimitation of [the exclusive economic zone] [the continental shelf] between States with opposite or adjacent coasts shall be effected by agreement" (Arts. 74 and 83).

76. In reality the delimitation of a line to be effected by agreement may vary in an infinite number of ways within a certain range, and the choosing of one of these variations after consideration of "special circumstances", "relevant circumstances" or "factors to be taken into account" etc., does not belong to the function of law. No line thus drawn can be illegal or contrary to rules of international law.

(b) Role of the third party in the delimitation of maritime boundaries

77. When a question is to be resolved by agreement, if that agreement cannot be achieved because of a divergence of views on various relevant elements governing the negotiation, that failure to reach agreement — assuming good faith — will not have been due to a difference in the interpretation of international law but to a difference in the concepts of equity upheld by each party.

78. The function of the third party in assisting the parties in dispute could be either to suggest concrete guidelines for the evaluation of each of the above-mentioned relevant elements in order to assign them a proper place in the negotiations or to proceed itself to choose a line by weighing up the relevant factors or elements from among an infinite variety of possibilities so that an equitable solution may be reached.

79. The most that can be done by this Court, *as a judicial tribunal applying international law*, is to declare that the lines of delimitation for the exclusive economic zone and the continental shelf, respectively, must be drawn by agreement between the Parties, as provided for in the 1982 United Nations Convention, from among the infinite possibilities lying *somewhere* between the line asked for by Denmark and the other line asked for by Norway. This is, however, not what Denmark asked the Court to do in the present case. Denmark asked the Court to draw "a … line of delimitation … at a distance of 200 nautical miles" (submission (2)) or to draw simply "the line of delimitation" (submission (3)).

(c) Arbitration ex aequo et bono

80. The delimitation of a maritime boundary line which "shall be effected by agreement" is not a matter to be decided by the International Court of Justice unless it is jointly requested to do so by the States concerned. With the exception of the *Aegean Sea Continental Shelf* case which was also concerned with the title of islands to a continental shelf but which did not proceed to the merits phase, this is the first case in the history of the Court concerning maritime delimitation to have been brought by unilateral application.

81. The Court is competent under Article 36, paragraph 1, to be seised of "all cases which the parties refer to it", but does not have jurisdiction under Article 36, paragraph 2, to deal with a dispute of this kind, which is neither "the interpretation of a treaty" nor "any question of international law". Let me, for the sake of argument, assume (in the light of the different ways in which Norway, as a respondent State, argued its case before the Court) that Norway had consented to join Denmark in asking the Court to draw a boundary line

and that the present case therefore fell to be considered as one in which the Court had been requested *jointly* by the Parties to decide on maritime delimitation.

82. Here it is once again important to be clear about the distinction between the invocation of declarations made under Article 36, paragraph 2, of the Statute, which cannot enlarge the Court's powers beyond the strict application of law to the case concerned, and the submission of a case by special agreement — one of the methods of seisin available under Article 36, paragraph 1 — which does enable the parties, by consent, to confer on the Court an arbitral, i.e., quasi-political, role whereby equity may be applied where no law exists.

83. It may be interesting to note that the initial draft of the provision relevant to the delimitation of the continental shelf, that is, the provision adopted by the International Law Commission in 1951, read as follows:

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

and the commentary attached to this provision read, in part:

> "It is not feasible to lay down any general rule which States should follow; … It is proposed … that if agreement cannot be reached and a prompt solution is needed, the interested States should be under an obligation to submit to arbitration *ex aequo et bono*. The term 'arbitration' is used in the widest sense, and includes possible recourse to the International Court of Justice." (*Yearbook of the International Law Commission*, 1951, Vol. II, p. 143[1].)

84. Another important factor to be remembered is that in the 1982 United Nations Convention, an independent part of which contains the detailed provisions on dispute settlement, disputes concerning the interpretation or application of Articles 74 and 83 relating to sea boundary delimitations may, by the declaration of a State party, be excluded from compulsory procedures entailing binding decisions, provided that the matter is submitted to conciliation as provided in Annex V of that Convention.

(d) Limited function of the International Court of Justice in a maritime delimitation

85. Accordingly, and on the premise that there are in fact no rules of law for effecting a maritime delimitation in the presence of overlapping *titles* (not overlapping *claims*), it follows that if the Court is requested by the parties to decide on a maritime delimitation in accordance with Article 36, paragraph 1, of the Statute, it will not be expected to apply rules of international law but will simply "decide a case *ex aequo et bono*".

86. In other words, the presentation of a case of maritime delimitation by agreement between the States in dispute in accordance with Article 36, paragraph 1, means by implication that the parties are requesting the Court "to decide a case ex aequo et bono" in accordance with Article 38, paragraph 2, of the Statute. For instance, in my view, the Judgment of the Court in the case concerning the *Continental Shelf (Libyan Arab Jamahiriya/Malta)* must be interpreted as having been given on that basis, even though the Court never expressly stated as much. It certainly is not a convincing exposition of the law.

87. However, there is no escaping the fact that the rendering of a decision *ex aequo et bono* is only admissible with the consent of the parties. This was not a big problem in earlier delimitation cases, because the consent derived or could be inferred from the special agreement concerned. But if the Court intended *in this case* to apply equitable considerations, it should, in my view, first have decided that the submissions or, alternatively, the arguments of the Parties, in particular Norway, permitted the conclusion that a consent had emerged between them amounting to a special agreement to the effect that the Court was not bound to adhere to strict law. In this way the case could conceivably have been, so to speak, transferred from the ambit of Article 36, paragraph 2, to that of Article 36, paragraph 1, as a very special case of *forum prorogation*.

(e) Effecting a delimitation ex aequo et bono

88. Only in a case in which the parties in dispute have asked the Court by agreement to effect a maritime delimitation *ex aequo et bono* is it qualified to examine what factors or elements should be taken into account as relevant, and to what degree such factors or elements should be evaluated when it is determining the line to be drawn or indicating a concrete line based on its own evaluation of the relevant factors and elements.

89. I must add furthermore that, if a single maritime delimitation for the continental shelf and the exclusive economic zone is to be effected by the Court in response to a joint request by the parties in dispute, then the parties have to agree which factors or elements relevant to either the exclusive economic zone or the continental shelf (or, in other words, relevant to either fishery resources or mineral resources), are to be given priority. The Court is not competent even as an arbitrator to decide the priority of either the exclusive economic zone or the continental shelf unless expressly requested to do so by the parties.

Part III. Lack of Valid Grounds for the Line Drawn in the Judgment

90. The Court has drawn "the delimitation line that divides the continental shelf and fishery zones of the Kingdom of Denmark and the Kingdom of Norway". Holding as I do the view that the Court is not competent to determine the delimitation line at all unless requested jointly by the Parties to decide the case *ex aequo et bono*, I am in no position to comment on the actual course of the delimitation effected by the Court.

91. I am concerned, however, that, even supposing that the Court had been requested by agreement to draw a single maritime boundary on the basis of Article 38, paragraph 2, of the Statute, it did not present any convincing statement of its reasons for having drawn the particular single maritime boundary line shown on sketch-map No. 2 attached to the Judgment. The line drawn by the Court may well be one of an infinite number of possibilities which could have been indicated if the Court had thought any one of them would lead to an equitable solution. However, in choosing this line rather than any other, the Court seems to have taken a purely arbitrary decision.

(a) Unsatisfactory "justification" by special (relevant) circumstances

92. *Firstly*, the Court seems to take the view that the disparity in the lengths of the coastlines of the opposite States must necessarily be reflected in an adjustment or shifting of the median line taken as a line of departure. However, the Court appears to overlook one geometrical fact, namely that, in the case of opposite coasts of disparate lengths, even an unadjusted median line leaves a greater portion to the State with the longer coastline. What is more, the Court does not indicate the reasoning that has led it to conclude that the longer coastline should automatically lead to an even larger portion of the maritime area.

93. Even supposing that the State with the longer coastline is to be entitled to a much larger portion than the median line would confer, the drawing of the line connecting points A, O, N and M, as proposed in sketch-map No. 2 in the Judgment, is not, in my view, supported by any reasons that can be described as objective or convincing.

94. *Secondly*, I can accept that, just as in the *North Sea Continental Shelf* cases where the "natural resources of the continental shelf areas involved" were suggested as a factor to be taken into account, the "fishing resources" may well be a relevant factor in the delimitation of the exclusive economic zone. However, no reason is given in the Judgment as to why "equitable access" to the fishing resources is a relevant factor and the Court does not explain what the words "equitable" access can be taken to mean. Does the Court intend that Greenland's inhabitants or Danish fishermen, together with Norwegian fishermen (there are no inhabitants on Jan Mayen), should be entitled to "equitable access" to the fishing resources in one specific area, the area east of the median line, a long way from Greenland but close to Jan Mayen? Why is only that specific area taken up for the consideration of "equitable access to the fishing resources" ? In fact capelin fishing has been controlled under an international arrangement without any reference to the division of the sea areas concerned.

95. In spite of repeated references to the concept of "equitable access to the fishing resources", the Court does not give the slightest hint in its reasoning as to why the median line as a line of departure should be adjusted or shifted so as to allot one-half of the southern part of the "area of overlapping claims" to Greenland (or Denmark) while leaving the other half to Jan Mayen (or Norway).

(b) Unjustified choice of the line

96. In taking not only "the disparity of coastal lengths" but also "equitable access to the fishing resources" as factors for the purpose of adjusting or shifting the median line as a line of departure, the Court was too much concerned with "the area of overlapping claims" when it divided the area between Greenland and Jan Mayen. The Court was incorrect in unduly concerning itself with the "area of overlapping claims" while neglecting the rest of the "relevant area", when allocating the areas to each State.

97. The task confronting the Court was *not* to delimit the boundary of the "area of overlapping claims" but to do so *of* the maritime area between Greenland and Jan Mayen, in other words the "relevant area" as defined in the Judgment (para. 20), although the line had of course to be located *in* the "area of overlapping claims". Its manipulation of the delimitation line, choosing points M, N and O on a ratio of 1:1 or 1:2 between the two lines, i.e., the maximum 200-mile line of the Danish entitlement and the median line, the line of Norway's modest assertion, can only be described as misguided.

98. I accept that the median line may be taken as a line of departure and then adjusted or shifted, with special (relevant) circumstances or relevant factors (elements) being given due consideration. In my concept of equity, it is not merely the simple disparity of opposite coastlines which must be taken into account but also disparity of geographical (natural or socioeconomic) situations, for example, population, socio-economic activity, existence of communities behind the coastline and the distance of an uninhabited island from the nearest community of the mainland or main territory. The existence, quality and quantity of marine resources (either fishery or mineral) are relevant, but equity surely requires that any decision as to how these resources should be allotted to each party should take account not only of such relatively objective ecological facts but also of their relative significance, perhaps amounting to dependence, to the communities appertaining to either party. Certainly, it is impossible to calculate and balance up these elements mathematically in

order to draw a line with total objectivity. Thus the drawing of a line must depend upon the conscientious but infinitely variable assessment of those drawing it.

(c) Mistaken definition of a single maritime boundary

99. I must also add that the Court failed to discern the possible differences in the special (relevant) circumstances which need to be taken into consideration in order to achieve an equitable solution, depending on whether one is effecting the delimitation of the exclusive economic zone or that of the continental shelf. If the marine resources constitute a factor to be taken into account, it is unthinkable to draw a single maritime boundary without having a clear idea as to which particular circumstances ought to predominate (i.e., those relating either to the exclusive economic zone or to the continental shelf). The Court does not give any good reason why equitable access to the "fishing resources" should have also been taken into account when it drew the line constituting the boundary not only of the exclusive economic zone but also of the continental shelf. The Court has apparently erred in this respect after taking it for granted that there ought to be such a single boundary.

(d) Conclusion

100. As I have already pointed out, the line connecting points M, N, O and A, which is drawn eastwards of the median line as a result of adjustment and shifting, *cannot* be categorized as *mistaken* because it represents one choice from an infinite number of potential lines of delimitation in this area, but I venture to suggest that it was drawn in an arbitrary manner, unsupported by any sufficiently profound analysis. That the effort of the Court was conscientiously directed towards the finding of an equitable solution is something which, however, I readily acknowledge.

(Signed) Shigeru Oda.

Separate Opinion Of Judge Schwebel

Stephen M Schwebel

1 I am in substantial but not full agreement with the Court's Judgment. There is no need to specify the several holdings of the Court with which I agree. The questions whose treatment by the Court is in my view questionable are the following.

I. Should the Law of Maritime Delimitation Be Revised to Introduce and Apply Distributive Justice?

2 The Judgment quite rightly observes that the real interests immediately at stake in this case are fishing rights, restricted to a southerly, relatively ice-free zone of the disputed area. It decides that equal access to the capelin resources of the southern part of the area of overlapping claims has to be assured by a substantial adjustment or shifting eastwards of the median line. The Court concludes that the two Parties "should enjoy equitable access to the fishing resources of this zone, which should accordingly be divided into two equal parts".

3 While the Court may be commended for the simplicity of its conclusion, a principled consistency with its earlier case-law is less conspicuous. In this Judgment, the Court recalls "the need, referred to in the *Libya/Malta* case, for 'consistency and a degree of predictability'". But in this, the most critical holding of the Judgment on the real assets at

stake, the Court jettisons what its case-law, and the accepted customary law of the question, have provided.

4 In its seminal Judgment in the *North Sea Continental Shelf* cases, the Court held that delimitation of the continental shelf is "not the same thing as awarding a just and equitable share of a previously undelimited area". It held that:

> "the doctrine of the just and equitable share appears to be wholly at variance with what the Court entertains no doubt is the most fundamental of all the rules of law relating to the continental shelf, enshrined in … the 1958 Geneva Convention, … namely that the rights of the coastal State in respect of the area of continental shelf … exist *ipso facto* and *ab initio*, by virtue of its sovereignty over the land …
>
> It follows that …, the notion of apportioning an as yet undelimited area, considered as a whole (which underlies the doctrine of the just and equitable share), is quite foreign to, and inconsistent with, the basic concept of continental shelf entitlement, … The delimitation itself must indeed be equitably effected, but it cannot have as its object the awarding of an equitable share, or indeed of a share, as such, at all, — for the fundamental concept involved does not admit of there being anything undivided to share out." (*I.C.J. Reports 1969*, p. 22, paras. 19 and 20.)

The Court consequently rejected the claim of the Federal Republic of Germany to a "'just and equitable' share of the shelf areas involved" (*ibid.*, p. 29).

5 In the *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* case, the Court concluded that:

> "these economic considerations cannot be taken into account for the delimitation of the continental shelf areas appertaining to each Party. They are virtually extraneous factors since they are variables which unpredictable national fortune or calamity, as the case may be, might at any time cause to tilt the scale one way or the other. A country might be poor today and become rich tomorrow as a result of an event such as the discovery of a valuable economic resource." (*I.C.J. Reports 1982*, p. 77, para. 107.)

6 In the case concerning *Delimitation of the Maritime Boundary in the Gulf of Maine Area*, the Chamber of the Court observed that fishing, oil exploration and other such considerations advanced by the Parties diverged from the crux of the matter. The Chamber was bound "not to take a decision *ex aequo et bono*, but to achieve a result on the basis of law" (*I.C.J. Reports 1984*, p. 278, para. 59). When it approached what it characterized as "the real subject of the dispute between the United States and Canada in the present case, the principal stake in the proceedings", Georges Bank (*ibid.*, p. 340, para. 232), the Court confronted the question of whether the line which it had drawn on geographical grounds should be affected by considerations of human and economic geography. The Chamber held that such considerations were "ineligible for consideration as criteria to be applied in the delimitation process itself" *(ibid.)*. It concluded:

> "It is, therefore, in the Chamber's view, evident that the respective scale of activities connected with fishing — or navigation, defence or, for that matter, petroleum exploration and exploitation — cannot be taken into account as a relevant circumstance or, if the term is preferred, as an equitable criterion to be applied in determining the delimitation line. What the Chamber would regard as a legitimate scruple lies rather in concern lest the overall result, even though achieved through the application of equitable criteria and the use of appropriate methods for giving them concrete effect, should unexpectedly be revealed as

> radically inequitable, that is to say, as likely to entail catastrophic repercussions for the livelihood and economic well-being of the population of the countries concerned." (*Ibid.*, p. 342, para. 237.)

7 In the *Continental Shelf (Libyan Arab Jamahiriya/Malta)* case, the Court reaffirmed "the principle that there can be no question of distributive justice" (*I.C.J. Reports 1985*, p. 40, para. 46). A court applying equitable considerations may take into account "only those that are pertinent to the institution of the continental shelf as it has developed within the law" (*ibid.*, p. 40, para. 48). Thus the Court rejected the economic considerations advanced by Malta as "totally unrelated to the underlying intention of the applicable rules of international law" (*ibid.*, p. 41, para. 50).

8 In the light of this jurisprudence, why should Denmark be accorded equal access with Norway to the section of the area of overlapping claims in which, in season, the presence of capelin and the absence of drift ice provide a valuable fishing ground ? Why must what the Court describes as "equitable access to the fishing resources" of this zone be shared? It was not claimed or shown that, if Greenland were not to be accorded fuller access to the ice-free area in which capelin may be fished in season, Greenland would be confronted by catastrophic economic repercussions, so even that "legitimate scruple" did not come into play.

9 It follows that the Court by this holding of distributive justice has departed from the accepted law of the matter, as fashioned pre-eminently by it. It is not suggested that this departure from principle and precedent is legally fatal. If what is lawful in maritime delimitation by the Court is what is equitable, and if what is equitable is as variable as the weather of The Hague, then this innovation may be seen as, and it may be, as defensible and desirable as another. It may be more defensible and desirable than that concerning the length of coastlines.

II. Should the Differing Extent of the Lengths of Opposite Coastlines Determine the Position of the Line of Delimitation?

10 The Court observes that it has never before had occasion to apply the 1958 Geneva Convention on the Continental Shelf. In the *North Sea Continental Shelf* cases, Germany was not a party to the Convention; similarly, in the continental shelf cases between Tunisia and Libya and between Libya and Malta, Libya was not a party. In the *Gulf of Maine* case, Canada and the United States were parties to the 1958 Convention, but they requested the Chamber to define "the course of the single maritime boundary that divides the continental shelf and fisheries zones", so that, as the Court notes, the Chamber considered that the 1958 Convention, being applicable only to the continental shelf, did not govern the delimitation at issue. The Court consequently and rightly now holds that:

> "In the present case, both States are parties to the 1958 Convention and, there being no joint request for a single maritime boundary as in the *Gulf of Maine* case, the 1958 Convention is applicable to the delimitation of the continental shelf between Greenland and Jan Mayen." (Judgment, p. 58, para. 45.)

It follows that, since the Convention is applicable, and since by the terms of Article 38 of the Statute,

> "The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
>
> **(a)** international conventions, whether general or particular, establishing rules expressly recognized by the contesting States"

the Court in this case is bound to give effect to the pertinent provisions of the 1958 Convention.

11 Article 6 of the 1958 Convention is prescriptive. Its first paragraph provides:

> "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."

12 Since there is no agreement between the Parties, "the boundary is the median line" — "unless another boundary line is justified by special circumstances". That brings us to the ever-recurring question: are there special circumstances which justify another boundary?

13 It is plain that the term "special" circumstances may not be judicially interpreted to mean "any" circumstances. The meaning of the term "special" is antithetical to "any" or "all" or what is the generality of circumstances. Nor in interpreting the 1958 Convention may "special" circumstances be equated with the broader range of "relevant" circumstances which may be applicable in customary international law. The factors that are pertinent to a circumstance clearly are wider than those which are special to it. What then are "special circumstances" — i.e., particular, peculiar or singular circumstances — as that term is illuminated by the *travaux preparatoires* of the 1958 Geneva Convention and by Court precedents?

14 The *travaux preparatoires* indicate that, by special circumstances, the drafters of the 1958 Convention decidedly did not mean any circumstance which the arbitrator or judge might see as relevant. Judgment was to be made on the basis of law, not *ex aequo et bono*. Graphic illustration was given of what are "special circumstances": initially, an exceptional configuration of the coast, or the presence of islands or of navigable channels. The pertinent passage of the report of the International Law Commission, which ultimately was the basis of the draft of the Convention submitted to the Geneva Conference, provides:

> "Having regard to the conclusions of the committee of experts referred to above [the committee which proposed equidistance], the Commission now felt in the position to formulate a general rule, based on the principle of equidistance, applicable to the boundaries of the continental shelf both of adjacent States and of States whose coasts are opposite to each other. The rule thus proposed is subject to such modifications as may be agreed upon by the parties. Moreover, while in the case of both kinds of boundaries the rule of equidistance is the general rule, it is subject to modification in 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 departures necessitated by any exceptional configuration of the coast, as well as the presence of islands or of navigable channels. To that extent the rule adopted partakes of some elasticity … . arbitration, while expected to take into account the special circumstances calling for modification of the major principle of*

> *equidistance, is not contemplated as arbitration* ex aequo et bono. *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*." (*Yearbook of the International Law Commission*, 1953, Vol. II, p. 216, para. 82; emphasis supplied.)

So in the view of the International Law Commission, "reasonable modifications" of "the general rule, based on the principle of equidistance" might be made where departures were "necessitated by the special circumstances of the case".

15 At the Geneva Conference at which the 1958 Convention was adopted, the Commission's carefully crafted proposal was sustained in a formulation of the British and Netherlands delegations. The only elucidation of what might be a special circumstance was the statement of the British delegation's Admiralty expert, Commander Kennedy, offered in explanation of "The fairest method of establishing a sea boundary … that of the median line":

> "Among the special circumstances which might exist there was, for example, the presence of a small or large island in the area to be apportioned; he [Commander Kennedy] suggested that, for the purposes of drawing a boundary, islands should be treated on their merits, very small islands or sand cays … being neglected as base points … Other types of special circumstances were the possession by one of the two States concerned of special mineral exploitation rights or fishery rights, or the presence of a navigable channel; in all such cases, a deviation from the median line would be justified, but the median line would still provide the best starting point for negotiations." (UNCLOS I, Fourth Committee, Continental Shelf, *Official Records*, Vol. VI, p. 93.)

No delegation questioned the sense and scope of special circumstances given by Commander Kennedy. At the same time, the United States delegation observed that "the rule adopted would have to be fairly elastic", and supported maintenance of "the reference to special circumstances, since account would have to be taken of the great variety of complex geographical situations that existed" (*ibid.*, p. 95). While the diversity of views about the merits of equidistance which since has become ritualized was introduced at the Geneva Conference, the text of what became Article 6 was overwhelmingly adopted.

16 At the Geneva Conference as in the International Law Commission, there was no suggestion that differing lengths of opposite coastlines — which would represent the typical and not the special case — would constitute a special circumstance. Of course islands, as well as mainlands, have coasts, which may be situated opposite other coasts. But the acceptance of islands as a special circumstance in the *travaux preparatoires* plainly refers to islands whose situation or size or other characteristics may constitute a special circumstance in a delimitation between two other coasts; an island was not conceived to be of itself a special circumstance which affects its own coastal projections. That concept is so bizarre that naturally it finds no expression in the intentions of those who drafted the 1958 Convention.

17 Of prior cases in this Court of delimitation of the continental shelf or of fishing zones, three are particularly pertinent. In the *North Sea Continental Shelf* cases, the Court drew a distinction between the situation of adjacent and opposite coasts. It took account of the lengths and configurations of the coasts of adjacent States. As to opposite States, it had this

to say of the product of the International Law Commission which found expression in Article 6 of the 1958 Geneva Convention:

> "Most of the difficulties felt in the International Law Commission related, as here, to the case of the lateral boundary between adjacent States. Less difficulty was felt over that of the median line boundary between opposite States, although it too is an equidistance line. For this there seems to the Court to be good reason. The continental shelf area off, and dividing, opposite States, can be claimed by each of them to be a natural prolongation of its territory. These prolongations meet and overlap, and can therefore only be delimited by means of a median line; and, ignoring the presence of islets, rocks and minor coastal projections, the disproportionally distorting effect of which can be eliminated by other means, such a line must effect an equal division of the particular area involved. If there is a third State on one of the coasts concerned, the area of mutual natural prolongation with that of the same or another opposite State will be a separate and distinct one, to be treated in the same way. This type of case is therefore different from that of laterally adjacent States on the same coast with no immediately opposite coast in front of it, and does not give rise to the same kind of problem — a conclusion which also finds some confirmation in the difference of language to be observed in the two paragraphs of Article 6 of the Geneva Convention … as respects recourse in the one case to median lines and in the other to lateral equidistance lines, in the event of absence of agreement.
>
> If on the other hand, contrary to the view expressed in the preceding paragraph, it were correct to say that there is no essential difference in the process of delimiting the continental shelf areas between opposite States and that of delimitations between adjacent States, then the results ought in principle to be the same or at least comparable. But in fact, whereas a median line divides equally between the two opposite countries areas that can be regarded as being the natural prolongation of the territory of each of them, a lateral equidistance line often leaves to one of the States concerned areas that are a natural prolongation of the territory of the other." (*I.C.J. Reports 1969*, pp. 36–37, paras. 57 and 58.)

18 In the *Gulf of Maine* case, the Chamber adjusted a median line to take account of the "actual situation" respecting the length of coastlines, which in some measure were opposite. Its selection of the relevant coastlines, the larger part of which were adjacent rather than opposite, was controversial, but a calculation was made of the lengths of the coastlines so selected and the resultant relationship between them was mathematically applied to adjust the position of the median line in that precise measure. The *Gulf of Maine* case is distinguishable from the instant case on the grounds that, first, the 1958 Convention was not applicable to its determination of a single maritime boundary; second, the adjustment in the median line was made in a situation in which the coasts were not only opposite but adjacent and in which a salient issue was abatement of claimed cut-off effects which an unadjusted median line would entail; and third, the adjustment in the position of the median line was made in proportion to the actual difference in the length of the coasts which the Chamber calculated.

19 While for these reasons, the *Gulf of Maine* case provides no more than qualified support for the Court's reasoning and conclusions in the instant case, direct support is provided by the Court's Judgment in the *Continental Shelf (Libyan Arab Jamahariya/Malta)* case. Not on

a doctrinal level, for, on the contrary, the Court in that case had this to say about Libya's contention that the length of coastlines afforded the basis of delimitation:

> “However, to use the ratio of coastal lengths as of itself determinative of the seaward reach and area of continental shelf proper to each Party, is to go far beyond the use of proportionality as a test of equity, and as a corrective of the unjustifiable difference of treatment resulting from some method of drawing the boundary line. If such a use of proportionality were right, it is difficult indeed to see what room would be left for any other consideration; for it would be at once the principle of entitlement to continental shelf rights and also the method of putting that principle into operation. Its weakness as a basis of argument, however, is that the use of proportionality as a method in its own right is wanting of support in the practice of States, in the public expression of their views at (in particular) the Third United Nations Conference on the Law of the Sea, or in the jurisprudence. It is not possible for the Court to endorse a proposal at once so far-reaching and so novel.” (*I.C.J. Reports 1985*, p. 45, para. 58.)

Nevertheless, the Court proceeded, in a situation of purely opposite coasts, in which the far greater length of Libya's coast in relation to that of Malta was similar to the very great extent of Greenland's coast relative to that of Jan Mayen, to shift the median line markedly northwards in Libya's favour to take account of a difference in coastal lengths. It cannot be said, to take mathematical or proportionate account of a difference in coastal lengths, for, unlike the *Gulf of Maine* Judgment, the application of proportionality in the *Libya/Malta* case evidences no discernible, specific relationship between the different coastal lengths of Libya and Malta. Indeed, in that case as in this, if the vast differences in coastal lengths were to have been given proportionate effect, the relatively minuscule islands would have no continental shelves or fishing zones at all. The obscure measure of adjustment of the median line between Libya and Malta appears to have had the benefit of inspiration, if divine, then from Roman gods, for the line selected just happened essentially to coincide with the limit of the claims of a third State, Italy, whose claims the Court paradoxically earlier had declined to pass upon. In the current case, the measure of adjustment seems to have followed, if not from the inspiration of Norse gods, then from considerations of symmetry, once the decision was made to furnish “equitable access” to the southern sector in which capelin may be fished. In Selden's seventeenth-century days, equity was described as the Chancellor's conscience, variable indeed; it was as if the standard of measurement called a foot were to be the length of the Chancellor's foot, “an uncertain measure”. (Pollock, ed., *Table Talk of John Selden*, 1927, p. 43.) Nowadays, equity is to be impressionistically measured by the length of opposite coastlines.

III. Should Maximalist Claims Be Rewarded?

20 If the case between Denmark and Norway is to be considered in a fashion which places the legal entitlements of each Party on an equal plane, then both Greenland and Jan Mayen should be viewed as entitled prima facie to a 200-mile zone. These entitlements, however, being less than 400 miles apart, overlap. Thus it is within this large maritime area of overlapping potential entitlements that the line of delimitation had to be drawn. But not in Denmark's view. For its part, Denmark claimed its full 200-mile entitlement, proposing to leave Norway none of its, whereas Norway, for its part, took a more modest approach, claiming not the full extent of its 200-mile entitlement but only those areas which lie to the east of a median line drawn between the opposite coasts of Jan Mayen and Greenland. That is to say, Denmark's claim is precisely the same claim as could be made if Jan Mayen Island did not exist or, if existing, were to be treated not as an island but as a rock “which cannot sustain human habitation or economic life” of its own and which accordingly shall have “no exclusive economic zone or continental shelf (Art. 121 of the 1982 United Nations

Convention on the Law of the Sea). The singular characteristics of Jan Mayen Island may leave room for argument about whether it meets the standards of Article 121, but Denmark did not make that argument; it accepted that Jan Mayen Island is not a rock but an island.

21 The line of delimitation indicated by the Court gives the impression of rewarding Denmark's maximalist claim and penalizing Norway's moderation. Equitable or equal access is given to the Parties in the southerly area that matters, and the remainder of the line is indicated to conjoin with the line so to be drawn, apparently all of this to fall within the area of Norway's claim. Norway proposed a median line, which fell roughly midway between the coasts of Greenland and Jan Mayen, but which nevertheless would have accorded Greenland significantly more continental shelf and fishing zone than Jan Mayen, for the reason that Greenland's far longer coast generates more area seawards than does Jan Mayen's short coast. But that was not seen as sufficient for Denmark's maximalist claim or the Court's apportionment, which is markedly more generous to Denmark than is the median line. To arrive at this expanded apportionment, the Court has found it right to award Greenland a bonus for the length of its coast or to penalize Jan Mayen for the shortness of its. The result is to attribute almost three-quarters of the total area of overlapping potential entitlements to Denmark and a bit more than one-quarter to Norway. Why this should be seen as equitable is not clear but what is clear is that the Court's Judgment may tend to encourage immoderate and discourage moderate claims in future. Yet it may be said in defence of the approach of Denmark, if not of the Court, that, however extreme Denmark's claim appears in legal terms, in political terms it is perfectly understandable. Once Norway had extended to Iceland a 200-mile zone in relation to Jan Mayen, naturally Denmark sought no less on behalf of Greenland.

* * *

22 As noted, in this case Article 6 of the 1958 Convention has mandatory force, for the Parties and for the Court. But the 1958 Convention concerns the continental shelf; it does not govern the fishing zone. It is agreed by the Parties and the Court alike that customary international law governs delimitation of the fishing zone. It is also agreed that, in this case of opposite coasts, it would make no practical sense for the delimitation of the fishing zone to produce a line which differs from that to be drawn for delimitation of the continental shelf.

23 The saving grace for the Court's Judgment in these circumstances is that the customary law governing delimitation of the fishing zone is elastic indeed, having been shaped by the Court's judicial and by arbitral decisions and the porous terms of the United Nations Convention on the Law of the Sea. Under that Convention, which is not in force, an equitable solution is to be achieved, for the continental shelf and the exclusive economic zone, on the basis of international law as referred to in Article 38 of the Statute of the Court. Nothing is said in these Convention provisions of equidistance, or special circumstances, or relevant circumstances. Permeable as the Convention's provisions are, they exclude an equitable solution based not on international law but considerations *ex aequo et bono*. The terms of Article 38 of the Statute distinguish between the function of judicial decision in accordance with international law which applies the sources of that law, and the power of the Court to decide a case *ex aequo et bono* if the parties so agree.

24 Nevertheless, the authority to seek an equitable solution by the application of a law whose principles remain largely undefined affords the Court an exceptional measure of judicial discretion. In this Judgment, the Court's attempted definition of that law ultimately does little more than require the investigation of “relevant circumstances” which have to be taken into account if an equitable result is to be achieved. Invoking “relevant circumstances” is in accord with earlier Judgments of the Court, beginning with the *North*

Sea Continental Shelf cases, and is consistent with the tenor of the debate at the Third United Nations Conference on the Law of the Sea. If the Court draws from the cornucopia of judicial discretion afforded by its appreciation of what circumstances are relevant the decision that the fishing zone shall be equally apportioned in this case, it is difficult to maintain that that exercise of discretion is more objectionable than indication of an alternative line.

25 If that is so, the question then arises, should the continental shelf line imported by the 1958 Convention — the median line — govern, or should the fishing zone line indicated by the Court's sense of equity govern?

26 There is no ready answer to this conundrum. It might on the one hand be maintained that the 1958 Convention affords anterior and harder law, unmodified by a subsequent treaty in force. It should accordingly govern, the more so because there are a number of continental shelf agreements and awards which are in force which are not treated as having been reworked by the subsequent advent of the concept of the exclusive economic zone or variants thereof or by the lenient terms of the United Nations Convention on the Law of the Sea. On the other hand, it might be maintained that, even if that be generally so, the real interests at stake in this case involve the apportionment of fishing rights and that, therefore, the Court's appreciation of fishing zone equities should govern any apportionment of the continental shelf.

27 The Court avoids a choice between these approaches by maintaining that it applies “a general norm based on equitable principles” amalgamating the two in a formula it describes as “the equidistance-special circumstances rule”. Whether, in view of the reasoning employed in this case by the Court, it has effectively employed that rule is debatable. But what is clear is that the Court leavens its Judgment with a large infusion of equitable ferment, importing as it does a search for “relevant circumstances”, and so concocts a conclusion which does not lend itself to dissection or, for that matter, dissent. Based on large and loose approaches such as its gross impression of the effects of differing lengths of coasts, its desire to afford equitable access to fishing resources, and the attractions of the symmetrical conjoinder of indicated lines of delimitation, the Court comes up with a line which, given the criteria employed, may be as reasonable as another. Where this leaves the law of maritime delimitation, to the extent that such a law subsists, is perplexing.

(Signed) Stephen M. Schwebel.

Separate Opinion Of Judge Shahabuddeen

Mohamed Shahabuddeen

1 Three decades after the entry into force of the Geneva Convention on the Continental Shelf of 1958, and following on a great deal of intervening developments in the field of maritime delimitation, Article 6, paragraph 1, of the Convention is now being applied for the first time by the Court. Issues of some difficulty arise. I agree with the Judgment but have reservations on some points and additional views on others. In Parts I to VI respectively, I set out my reasoning on (1) the delimitation regime applicable to the continental shelf; (2) proportionality; (3) the disparity in coastal lengths; (4) the determination of an equitable line; (5) the competence to establish a single line; and (6) the judicial propriety of drawing a delimitation line.

Part I. The Delimitation Regime Applicable To The Continental Shelf

(i) The Central Issue

2 The instant case places directly before the Court, as no other case has done, important questions of interpretation of Article 6, paragraph 1, of the Geneva Convention on the Continental Shelf of 1958 (the 1958 Convention). Both Parties accepted that this provision established one combined equidistance-special circumstances rule, but from this point onwards their positions diverged sharply. Ignoring at this stage alternative arguments on both sides, Denmark's position was in effect that this combined rule was indistinguishable from the rule at customary international law, under which equidistance is a non-preferential method among other possible methods, the choice of any particular method being in each case made by the application of equitable principles, taking account of the relevant circumstances. Norway, for its part, contended that, in the absence of agreement, the question was whether there were special circumstances, and that if, as it submitted, there was none, then, in terms of the provision, “the boundary is the median line”. In the words of the Solicitor-General for Norway:

> “The main element of that language is prescriptive and self-executing: ‘In the absence of agreement … the boundary is the median line.’ There is no detour by way of reference to ‘principles’ which require ‘application’, as in paragraph 2 relating to adjacent States. The language is direct and dispositive, and has room for only one element of appreciation: the proviso for the event that ‘another boundary line is justified by special circumstances’.” (CR 93/6, p. 43, 18 January 1993, Mr. Haug, Co-Agent for Norway. See also CR93/8, pp. 49, 52, 53, 20 January 1993.)

3 I take the Judgment to mean that the Court in substance upholds the Norwegian reading of the provision in the sense that, had it found that there were no special circumstances, it would have had no ground for shifting the median line, which accordingly would have been the boundary. As this interpretation of the provision may well differ from that more generally favoured, I feel I should say why I support it.

(ii) The Delimitation Principles of the Geneva Convention on the Continental Shelf 1958 Apply

4 It will be convenient first to consider the general question of the applicability of the delimitation provisions of the 1958 Convention. Both Parties accept that the Convention is in force as between them. Both are also signatories to the 1982 United Nations Convention on the Law of the Sea (the 1982 Convention). But this they have not ratified, and it is not yet in force. However, it is generally agreed that the leading principles of the 1982 Convention, or at any rate those relevant to the present case, are expressive of customary international law, although there may be argument as to precisely what provisions can be so regarded (see *Delimitation of the Maritime Areas between Canada and France*, Decision of 10 January 1992, para. 42 of Arbitrator Prosper Weil's dissenting opinion, referring to paragraphs 75 *et seq.* of the Decision).

5 In taking the position that the 1958 Convention is still in force, the Parties would not appear to be at variance with such jurisprudence as there exists on the subject. In the case concerning the *Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland and the French Republic*, 1977 (*Reports of International Arbitral Awards (RIAA)*, Vol. XVIII, p. 3, at pp. 35–37), France argued that the new trends which were then evolving, and which later took shape in the 1982 Convention, had rendered obsolete the 1958 Convention, to which both France and the United Kingdom were parties. The submission was overruled, the Court of Arbitration holding that, within

limits set by certain French reservations to the 1958 Convention, the latter was in force as between the two States (*ibid*., p. 37, para. 48). In the case concerning *Delimitation of the Maritime Boundary in the Gulf of Maine Area*, the Chamber held that the 1958 Convention did not apply to the delimitation of a single line for the continental shelf and the fishery zone between Canada and the United States of America; but the Chamber clearly considered that the Convention was in force as between the two States in respect of the continental shelf even as it emerged after 1958 and would have applied if the shelf alone were being delimited (*I.C.J. Reports 1984*, p. 301, para. 118, p. 303, para. 124. See also the *Canada/France Arbitration*, 1992, Decision, paras. 39 and 40, and the 1982 Convention, Arts. 83 and 311).

6 However, while accepting that the delimitation provisions of Article 6, paragraph 1, of the 1958 Convention are still in force as between itself and Norway, Denmark contends that they are inapplicable in this particular case by reason of the fact that the case is concerned with a delimitation by a single line of both the continental shelf and the fishery zone. I give my reasons in Part V for disagreeing with this contention. If Denmark is wrong on this point, it follows, from its having accepted that the Convention is in force between itself and Norway, that Article 6, paragraph 1, is applicable to this particular case.

7 The arguments on the precise operational relationship between the provisions of the 1958 Convention and those of the 1982 Convention could be complex, particularly as regards Articles 83 and 311 of the latter (see, *inter alia*, Lucius Caflisch, "The Delimitation of Marine Spaces between States with Opposite or Adjacent Coasts", in René-Jean Dupuy and Daniel Vignes (eds.), *A Handbook on the New Law of the Sea*, Vol. 1, 1991, p. 479). However, for the reasons given, I propose to proceed on the basis that the Court is required to apply the delimitation provisions of Article 6, paragraph 1, of the 1958 Convention as provisions of a general international convention "establishing rules expressly recognized by the contesting States" within the meaning of Article 38, paragraph 1 (a), of the Statute of the Court. The interpretation of those provisions is another matter. It is the subject of the remainder of this Part.

(iii) The General Issue of Interpretation Relating to Article 6, Paragraph 1, of the 1958 Convention

8 The resolution of the questions of interpretation which arise will make it necessary to consult a body of case-law the principal items of which are footnoted below[1]. They will be referred to in brief as the *North Sea* cases, the *Anglo-French Arbitration*, the *Tunisia/Libya* case, the *Gulf of Maine* case, the *Libya/Malta* case, and the *Canada/France Arbitration*, respectively. However, although these cases may assist, they do not pre-empt the answers to the questions presented. In the *North Sea* cases the Court said:

> "Since, accordingly, the foregoing considerations must lead the Court to hold that Article 6 of the Geneva Convention is not, as such, applicable to the delimitations involved in the present proceedings, it becomes unnecessary for it to go into certain questions relating to the interpretation or application of that provision which would otherwise arise." (*I.C.J. Reports 1969*, p. 27, para. 34.)

The provision was not in issue in the *Tunisia/Libya* case or in the *Libya/Malta* case, Libya not being a party to the Convention. In the *Gulf of Maine* case, as has been seen, the Chamber took the view that the provision, which would otherwise have applied, was inapplicable to the delimitation of a single boundary for the continental shelf and the fishery zone (*I.C.J. Reports 1984*, pp. 300–303, paras. 115–125). The Court of Arbitration in the *Canada/France Arbitration* took a similar view in relation to the delimitation of an all-purpose line (*Canada/France Arbitration*, Decision, paras. 39 and 40). In the *Anglo-French*

Arbitration, the provision was involved and it did receive an interpretation by the Court of Arbitration (*RIAA*, Vol. XVIII, p. 45, para. 70, and p. 57, para. 97). That interpretation will be considered below.

9 The literature is heavy with a view that the jurisprudence has placed a certain interpretation on Article 6 of the 1958 Convention; that, frankly, that interpretation varies from the terms of the provision and indeed substantially alters its intent; but that the variation so effected is now an established part of the living law; and that it is therefore a futile effort of revisionism, if not simply impermissible, to trouble over the original meaning of the provision. Respecting that view, a lawyer who goes to work on the problem would still like to know the precise legal route through which so remarkable a change has come about. Something more than impressions is required; it is not enough to be told, however confidently, that, whatever the provision meant in 1958, it now has to be interpreted and applied in accordance with the jurisprudence as it has since developed. Yes; but how? And to what extent? The change could not have occurred through osmosis. If the provision is now to be understood differently from the way it would have been understood when made, is this the result of subsequent developments in the law operating to *modify* the provision in a legislative sense? If, as it seems, there has not been any such modification, is the different reading which the provision must now receive the result of *judicial interpretation* which the Court considers that it should follow, even though it is not bound by any doctrine of binding precedent? If not, how has the transformation of the original meaning of so important a treaty provision been managed?

10 First, as to possible modification. The extent to which the interpretation and application of a treaty must take account of the subsequent evolution of the law has been much debated[1]. That such account must be taken at any rate in the case of jurisdictional and law-making treaty provisions seems clear (*Aegean Sea Continental Shelf, I.C.J. Reports 1978*, pp. 32–34, paras. 77–80; and, *ibid*., pp. 68–69, and footnote 1 to p. 69, Judge de Castro, dissenting). More particularly, later developments in customary international law do need to be taken into account in applying the provisions of the 1958 Convention (*Anglo-French Arbitration*, 1977, *RIAA*, Vol. XVIII, p. 37, para. 48. And see *Gulf of Maine, I.C.J. Reports 1984*, p. 291, para. 83).

11 Thus, account must be taken of the fact that Article 76 of the 1982 Convention has introduced a new definition of the outer limit of the continental shelf. There is little dispute that this replaces the different definition set out in Article 1 of the 1958 Convention (*Tunisia/Libya*, *I.C.J. Reports 1982*, pp. 114–115, paras. 52–53, Judge Jiménez de Aréchaga, separate opinion). But exactly how this has come about is less clear.

12 Differences between two rules relating to the same matter may sometimes be resolved by regarding the rules as being really complementary to each other (*Electricity Company of Sofia and Bulgaria*, P.C.I.J., Series A/B, No. 77, pp. 75 ff.; and see, *ibid*., pp. 136 ff., Judge De Visscher, separate opinion). In case of irreconcilable conflict (as in this case), an integrated legal system would provide some method of determining which rule ultimately prevails; for the same facts cannot at one and the same time be subject to two contradictory rules. Judge Anzilotti did not seem to entertain that possibility when he said,

> "[i]t is clear that, in the same legal system, there cannot at the same time exist two rules relating to the same facts and attaching to these facts contradictory consequences …" (*ibid*., p. 90, separate opinion. And see, *ibid*., p. 105, Judge

Urrutia, dissenting. Cf. *I.C.J. Pleadings, Nuclear Tests*, Vol. I, p. 238, Mr. Elihu Lauterpacht, Q.C.).

13 How has the problem been resolved in this case ? The substitution of the 1982 definition of the continental shelf for the 1958 definition could not have come about through a treaty displacement, since the 1982 Convention is not in force. Could it have come about through the customary international law effect of the new definition on the old? At least in relation to the normal continental shelf of 200 miles (which is what this opinion is concerned with), the better view would seem to be that the new limit operates at the level of customary international law. If the 1958 rule is regarded solely as a treaty rule, the position is that "a later custom … prevails over an earlier treaty …" (Paul Reuter, *Introduction to the Law of Treaties*, 1989, pp. 107–108, para. 216). But, of course, the same rule may exist autonomously under customary international law as well as under conventional international law[1]. The limit prescribed by Article 1 of the 1958 Convention was regarded as being also expressive of customary international law (*Tunisia/Libya*, *I.C.J. Reports 1982*, p. 74, para. 101, referring to the *North Sea* cases). Considered on this basis, it would clearly be superseded by the different limit prescribed by later customary international law as expressed in Article 76 of the 1982 Convention.

14 Thus, whether the limit prescribed by Article 1 of the 1958 Convention is treated solely as a treaty rule or also as a rule of customary international law, it falls to be regarded as having been modified by Article 76 of the 1982 Convention applying as customary international law. Both Parties in fact proceeded on the basis that the applicable limit is 200 miles in accordance with contemporary customary international law.

15 But I do not consider that there has been any modification of the delimitation provisions of the 1958 Convention. In the *North Sea* cases, the Court said, "Articles 1 and 2 of the Geneva Convention do not appear to have any direct connection with inter-State delimitation as such" (*I.C.J. Reports 1969*, p. 40, para. 67). The delimitation procedures of Article 6 were not dependent on the particular outer limits fixed for the continental shelf. Subsequent changes in those limits should not affect the continued applicability of the procedures. No doubt, as remarked above, any application of the delimitation principles of the 1958 Convention would have to take account of the evolution of the law relating to the subject-matter to which the application is directed; but I cannot see that this calls for any modification of the delimitation principles themselves.

16 States are entitled by agreement to derogate from rules of international law other than *jus cogens* (which seems to have little, if any, application in this field). Hence they could well establish among themselves a conventional delimitation procedure which is different from that applying under general international law. I read the *North Sea* cases to mean that the delimitation régime established by the 1958 Convention was different from that prevailing under general international law. Nothing in subsequent developments has operated to put an end to the conventional régime so established in 1958. Without being lured further into the history of the subject, one may note the successful opposition to any mention of equidistance being made in the delimitation provisions of the 1982 Convention; but the Parties have, correctly in my view, not suggested that anything in this Convention operates to *modify* the delimitation provisions of the 1958 Convention in those cases in which these provisions apply.

17 So far for modification. Now for judicial interpretation. To the extent, if any, that the 1958 delimitation text has been the subject of interpretation by the Court, I should be slow to differ, particularly when regard is had to the role of the Court in developing the law. But, as indicated in paragraph 45 of today's Judgment, there has never been any concrete case falling to be decided by the Court under that provision and the Court has not therefore had occasion to pronounce authoritatively on the interpretation of its precise terms. As observed above, an interpretation was made by the Anglo-French Court of Arbitration (*RIAA*, Vol. XVIII, pp. 44–45, paras. 68 and 70, and p. 51, para. 84). For reasons to be later given, my respectful submission is that there is not a sufficiency of reason for this Court to follow that decision.

18 The position, as I see it, is that, where as a matter of treaty obligation the delimitation of the continental shelf between parties is governed by the delimitation provisions of the 1958 Convention, as is the case here, the duty of the Court is not to apply any jurisprudence relating to those provisions, but to apply the provisions themselves in the sense in which they are to be understood when construed in accordance with the applicable principles of treaty interpretation. The question then is: in what sense are the provisions to be understood when so construed?

(iv) Equidistance Is per se a Technical Method, but, as Set Out in Article 6 of the 1958 Convention, It Forms Part of a Rule of Law

19 I do not enter into the view, for which there is high authority, that the idea of equidistance is not inherent in the concept of the continental shelf (*North Sea, I.C.J. Reports 1969*, p. 23, para. 23, pp. 33–34, paras. 48–50, and pp. 46–47, para. 85). By itself, equidistance is a technical method and not a principle of international law. But there is nothing which can seriously suggest that the use of a technical method in prescribed circumstances cannot be commanded by a rule of law. “[T]he real question”, as was correctly submitted by Professor Jaenicke (to whose arguments on the 1958 Convention I shall be referring with some frequency),

> “is not whether the equidistance method is a rule or principle of law, which it is certainly not, but rather whether there is any rule of law which prescribes under which circumstances the equidistance method determines the boundary” (*I.C.J. Pleadings, North Sea Continental Shelf*, Vol. II, p. 13).

It seems to me that there is such a rule, namely, a rule which provides, in mandatory terms, that the equidistance method is to be used to establish the boundary where agreement and special circumstances are both absent.

20 No doubt, as remarked by Professor Jaenicke:

> “When the experts recommended the equidistance method to the International Law Commission in 1953 and spoke of the ‘principle’ of equidistance, they certainly did not recommend it as a ‘principle of law’ … They rather understood it as a principle of geometric construction which might be used for defining the boundary …” *(Ibid.)*

But the International Law Commission was a commission of jurists, not a committee of technical experts. It was effectively the Commission which adopted the method in relation to the case of the continental shelf. To be sure, equidistance *per se* remained a geometric method even as incorporated in Article 6, paragraph 1, of the 1958 Convention. But it now held a place within the normative framework of a treaty provision, which stipulated that, in

certain circumstances, the boundary is the median line. As therein used it became part of a rule of law. With his usual grasp of principles, Judge Tanaka put the matter this way:

> "We have before us a technical norm of a geometrical nature, which is called the equidistance rule, and may serve a geographical purpose. This norm, being in itself of a technical nature, constitutes a norm of expediency which is of an optional, i.e., not obligatory character, and the non-observation of which does not produce any further effect than failure to achieve the result it would have rendered possible. This technical norm of a geometrical nature can be used as a method for delimiting the continental shelf. The legislator, being aware of the utility of this method for legal purposes, has adopted it as the content of a legal norm.
>
> Thus the equidistance method as a simple technique is embodied in law, whether in Article 6, paragraph 2, of the Geneva Convention or in corresponding customary international law. By being submitted to a juridical evaluation and invested with the character of a legal norm, it has acquired an obligatory force which it did not have as a simple technical norm." (*North Sea, I.C.J. Reports 1969*, pp. 182–183.)

21 That was stated in the course of a dissenting opinion. But it seems to me that the Court itself also recognized that Article 6 of the 1958 Convention did have the effect of imparting normative force to the technical method of equidistance when it said:

> "In the light of these various considerations, the Court reaches the conclusion that the Geneva Convention did not embody or crystallize any pre-existing or emergent rule of customary law, according to which the delimitation of continental shelf areas between adjacent States must, unless the Parties otherwise agree, be carried out on an equidistance-special circumstances basis. A rule was of course embodied in Article 6 of the Convention, but as a purely conventional rule. Whether it has since acquired a broader basis remains to be seen: *qua* conventional rule however, as has already been concluded, it is not opposable to the Federal Republic." (*Ibid*., p. 41, para. 69.)

Thus, the Convention did not represent any customary rule of law requiring a delimitation to be carried out, in the absence of agreement, on an equidistance-special circumstances basis; but there was no doubt that "[a] rule was … embodied in Article 6 of the Convention", and simple inspection would show that that rule did incorporate a requirement for the use of the equidistance method in certain circumstances.

22 In the *Gulf of Maine* case the Chamber seemed to recognize that "special international law" can

> "include some rule specifically requiring the Parties, and consequently the Chamber, to apply certain criteria or certain specific practical methods to the delimitation that is requested" (*I.C.J. Reports 1984*, p. 300, para. 114).

In my opinion, Article 6 of the 1958 Convention does include a rule specifically requiring the use of equidistance as a practical method of delimitation when certain prescribed conditions are satisfied.

(v) The Equidistance-Special Circumstances Provision Consists of a Rule Requiring the Use of Equidistance Subject to an Exception If There Are Special Circumstances

23 For all that the literature might suggest to the contrary, it does not seem possible to erase a distinction which Article 6, paragraph 1, of the 1958 Convention prima facie establishes between the median line part and the special circumstances part of the provision when it provides that, "[i]n the absence of agreement, and unless another boundary is justified by special circumstances, the boundary is the median line". In applying either of the two parts, regard must obviously be had to the other, and in this sense I accept that they establish one single combined rule; but this does not obliterate the fact that this single combined rule does consist of two parts. It is difficult to apprehend how the evident distinction between these two parts and the relationship of rule and exception which that distinction establishes between them are removed by simply calling them the "equidistance-special circumstances" rule. To use a label as a substitute for analysis is to risk what, in another context, T. J. Lawrence called "the reproach of mistaking obscurity for profundity"[1].

24 The question is: what is the precise relationship between that part of the rule which refers to equidistance and that part which refers to special circumstances? The argument of the Federal Republic of Germany in the *North Sea* cases was that —

> "[t]he discussion [in the International Law Commission] on the reservation of 'special circumstances' showed that this clause was understood not so much as a limited exception to a generally applicable rule, but more in the sense of an alternative of equal rank to the equidistance method" (*I.C.J. Pleadings, North Sea Continental Shelf*, Vol. I, p. 68).

On this the Danish comment (in the *North Sea* cases), which has not lost relevance in the light of the subsequent treatment of the subject, was that —

> "[t]he Federal Republic further seeks … to undermine the legal force of the 'equidistance principle' by so inflating the scope of the 'special circumstances' exception as almost to make the 'equidistance principle' the exception rather than the rule" (*ibid.*, p. 205).

25 One knows that, in response to concern expressed in the International Law Commission about possible hardship which might be produced by the equidistance method in certain circumstances, the Special Rapporteur, Professor François, suggested that equidistance should be recognized only "as a general rule", but that that suggestion encountered opposition, whereupon Mr. Spiropoulos proposed a reservation reading, "unless another boundary line is justified by special circumstances" (*Yearbook of the International Law Commission*, 1953, Vol. I, p. 130, para. 62). Obviously, the inclusion of the words "as a general rule" could have subverted the equidistance provision. Hersch Lauterpacht contended that "it was at least arguable that they deprived the rule of its legal character" (*ibid.*, p. 128, para. 47). Without putting it so high, one might concede that that, at any rate, could be the practical result of using the adjectival form of what Mr. Albert Thomas once referred to as "the notorious word 'generally' which is found in a great many documents" (*Competence of the ILO in Regard to International Regulation of the Conditions of Labour of Persons Employed in Agriculture, P.C.I.J., Series C, No. 1*, p. 136). It seems

clear that the Spiropoulos reservation, which was accepted, was intended to avert such a risk and to preserve the integrity of the provision subject only to an exception.

26 Well known as it is, it is useful to recall that the International Law Commission's own commentary on the draft provision which eventually became Article 6 of the 1958 Convention was as follows:

> "81. In the matter of the delimitation of the boundaries of the continental shelf the Commission was in the position to derive some guidance from proposals made by the committee of experts on the delimitation of territorial waters. In its provisional draft, the Commission, which at that time was not in possession of requisite technical and expert information on the matter, merely proposed that the boundaries of the continental shelf contiguous to the territories of adjacent States should be settled by agreement of the parties and that, in the absence of such agreement, the boundary must be determined by arbitration *ex aequo et bono*. With regard to the boundaries of the continental shelf of States whose coasts are opposite to each other, the Commission proposed the median line — subject to reference to arbitration in cases in which the configuration of the coast might give rise to difficulties in drawing the median line.
>
> 82. Having regard to the conclusions of the committee of experts referred to above, the Commission now felt in the position to formulate a *general rule*, based on the principle of equidistance, applicable to the boundaries of the continental shelf both of adjacent States and of States whose coasts are opposite to each other. The rule thus proposed is subject to such *modifications* as may be agreed upon by the parties. Moreover, while in the case of both kinds of boundaries *the rule of equidistance is the general rule*, it is subject to *modification* in 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 departures *necessitated* by any *exceptional* configuration of the coast, as well as the presence of islands or of navigable channels. To that extent the rule adopted partakes of some elasticity. In view of the general arbitration clause … no special provision was considered necessary for submitting any resulting disputes to arbitration. Such arbitration, while expected to take into account the special circumstances calling for *modification* of the *major principle* of equidistance, is not contemplated as arbitration *ex aequo et bono*. 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." (*Yearbook of the International Law Commission*, 1953, Vol. II, p. 216, paras. 81–82 , footnote omitted; emphasis added. And see *I.C.J. Pleadings, North Sea Continental Shelf*, Vol. I, p. 181.)

27 The stress laid by the International Law Commission (not by the Committee of Experts) on the equidistance provision as "the *general rule* … subject to modification in cases in which another boundary line is justified by special circumstances", or as that "*major principle* … subject to reasonable modifications necessitated by the special circumstances of the case", is not reconcilable with any suggestion that the Commission regarded the "special circumstances" reservation as "an alternative of equal rank to the equidistance method" (see also *I.C.J. Pleadings, North Sea Continental Shelf*, Vol. I, pp. 203 ff., Counter-Memorial of Denmark).

28 No doubt, as has been pointed out by some writers, it is possible to detect increased interest at the 1956 proceedings of the International Law Commission, and also at the proceedings of the Fourth Committee of the United Nations Conference on the Law of the Sea 1958, in the necessity to secure an equitable boundary through the use of the "special circumstances" provision in those cases where, because of such circumstances, the use of the equidistance method would result in inequity. Adverting in 1956 to such circumstances, the International Law Commission did say that "[t]his case may arise fairly often, so that the rule adopted is fairly elastic" (*Yearbook of the International Law Commission*, 1956, Vol. II, p. 300). And there is, indeed, a great deal in the preparatory work of the Commission to show how indispensable the exception was thought to be to the working of the rule (*North Sea, I.C.J. Reports 1969*, pp. 92–95, Judge Padilla Nervo, separate opinion). Speaking in the Commission in 1956, Sir Gerald Fitzmaurice took the position that —

> "special circumstances would be the rule rather than the exception, owing to the technical difficulty of applying an exact median line and to the possibility that such application would be open to the objection that the geographical configuration of the coast made it inequitable, because, for example, the low-water mark, which constituted the baseline, was liable to physical change in the course of time by silting. The point should be made in the comment that exceptional cases were liable to arise fairly frequently." (*Yearbook of the International Law Commission*, 1956, Vol. I, p. 152, para. 28.)

But the reasons given there for holding that "special circumstances would be the rule rather than the exception" related to the practical operation of the provision, and not to its juridical character. However frequently it might be necessary to have recourse to special circumstances, this could not alter the legal structure of the provision, which clearly cast equidistance as the rule, with special circumstances as the exception.

29 To return to the debate in the *North Sea* cases, the position was well put by Sir Humphrey Waldock when he submitted "that the very words 'unless' and 'special' stamp the clause with the hallmark of an exception" (*I.C.J. Pleadings, North Sea Continental Shelf*, Vol. II, p. 267), and when he added later:

> "In our view the word 'unless', the phrase 'another boundary line', the phrase 'is justified' and the phrase 'special circumstances' individually and in combination categorically characterize the clause as an exception to the 'general rule' or, as the Commission said, 'major principle' of equidistance." (*Ibid*., p. 280.)

These cogent arguments must have weighed with the Court when, in its own considered turn, it spoke of "the *exception* in favour of 'special circumstances'" (*I.C.J. Reports 1969*, p. 36, para. 55; emphasis added). Scarcely striking a different note, in 1977 the Anglo-French Court of Arbitration referred to the provision as "the 'special circumstances' *condition*" (*RIAA*, Vol. XVIII, p. 45, para. 70; emphasis added).

30 Interestingly, speaking some years later as counsel for Canada in the *Gulf of Maine* case, Professor Jaenicke put it this way:

> "Even if the equidistance method and the presence of special circumstances have to be considered together in appreciating all of the circumstances of the case, it remains nevertheless true that under Article 6 the application of the equidistance method or the use of some other method because of special circumstances stand in

relationship to each other as rule and exception." (*I.C.J. Pleadings, Delimitation of the Maritime Boundary in the Gulf of Maine Area*, Vol. VII, p. 51.)

31 In the *North Sea* cases, Judge Morelli, in an argument of some refinement, did not think that the reference to special circumstances was "a true exception", but he accepted that "*all the Parties* to the present cases have always referred to it as an 'exception'" (*I.C.J. Reports 1969*, p. 206, dissenting opinion; emphasis added). With respect, I think the Parties were right, and some of the other Judges seemed to think so too (*ibid*., pp. 186–187, Judge Tanaka, dissenting; pp. 220 and 239, Judge Lachs, dissenting; and p. 254, Judge *ad hoc* Sorensen, dissenting. Cf. Judge Padilla Nervo, separate opinion, *ibid*., p. 92, and Judge Ammoun, separate opinion, *ibid*., p. 148, para. 52). Indeed, as mentioned above, even the Court referred to the clause as an "exception" (*ibid*., p. 36, para. 55). It needs to be added that, in denying that the "special circumstances" limb was a true exception, Judge Morelli was really seeking to enhance the primacy of the equidistance limb, and not to diminish it. I do not see how it is possible to refute Judge *ad hoc* Sørensen's conclusion that —

> "[a] natural construction of the wording of the provision, in particular the words 'unless another boundary line is justified …', seems to indicate that the principle of equidistance is intended to be the main rule, and the drawing of another boundary line an exception to this main rule. This general understanding of the provision seems to be confirmed by the *travaux préparatoires*, including in particular the 1953 report of the Committee of Experts and the reports of the International Law Commission in 1953 and 1956." (*Ibid*., p. 254.)

32 In sum, important as was the "special circumstances" provision, its importance was nevertheless not such as to extinguish the essential distinction between rule and exception which the very structure and terms of the provision ineluctably presented. One must distinguish between the practical operation of a provision and the juridical character of its structure. A principle subject to an exception does not cease to be a principle (see Sir Robert Jennings, "The Principles Governing Marine Boundaries", in *Staat und Volkerrechtsordnung, Festschrift für Karl Doehring*, 1989, p. 397, at p. 399). However often the circumstances contemplated by the exception may arise, the resulting frequency of recourse to the exception and the accompanying elasticity of the whole provision do not abate the juridical character of the exception as an exception or that of the general rule as the general rule; in law, the subordinate character of the exception as a safeguard to the working of the rule remains. As was said by Judge de Castro, "The flexibility of a rule is not a reason for denying its existence" (*Fisheries Jurisdiction (United Kingdom* v. *Iceland), I.C.J. Reports 1974*, p. 96, separate opinion). Or, to adapt the words of Judge Read, "the importance of [the rule] cannot be measured by the frequency of [its] exercise" (*International Status of South West Africa, I.C.J. Reports 1950*, p. 169, separate opinion). I believe it is a generally accepted principle of construction that an exception, like a proviso, cannot be so read as to cancel out the legal effect of the main rule. This can happen only where the exception is in fact repugnant to the rule[1], in which case the whole provision might well fall. Mere frequency of recourse to an exception is not proof of repugnance between rule and exception; and, unless it is, it cannot, in my view, serve to deprive the rule of its juridical character as a rule (cf. *Tunisia/Libya*, *I.C.J. Reports 1982*, p. 197, para. 64, Judge Oda, dissenting).

33 The propensity to think in terms of Article 6, paragraph 1, of the 1958 Convention as being a single combined equidistance-special circumstances rule which is equivalent to the equitable principles-relevant circumstances rule of customary international law is not well supported. In my submission, that thinking resolves itself, under scrutiny, into a too hasty attempt to liquidate that part of the "combination" which is indisputably a rule and to supplant it by that part which is as clearly an exception, and to do so without saying, because it cannot be said, that the exception is repugnant to the rule; and yet, analytically, it is only if there is such a repugnance that the rule, and the distinctive position which it manifestly accords to equidistance, can be neutralized.

(vi) The Use of the Equidistance Method Can Be Obligatory under Article 6 of the 1958 Convention

34 I come next to the question whether the use of the equidistance method is ever obligatory under Article 6, paragraph 1, of the 1958 Convention. Denmark submits that the equidistance rule set out in the provision "is not of an obligatory character, not even as a starting point for a delimitation" (Memorial, Vol. I, p. 60, para. 212). By contrast, the Norwegian case proceeds on the footing that, absent both an agreement and special circumstances, the equidistance rule is mandatory under Article 6, paragraph 1.

35 Judicial statements are easily come by to the effect that the equidistance method is not compulsory at customary international law (see, for example, *Tunisia/Libya*, *I.C.J. Reports 1982*, p. 79, para. 110). But there is no clear pronouncement by this Court to that effect so far as the application of Article 6 of the 1958 Convention to a concrete case is concerned.

36 Briefly, it appears to me that to hold that the equidistance rule could never operate compulsorily under Article 6, paragraph 1, of the 1958 Convention would be to breach the Court's own declaration that its function is "to interpret …, not to revise" a treaty[1]. Nor does it appear that the case-law would safely support such a holding.

37 To begin with the *North Sea* cases themselves, it seems plausible that the whole assumption behind the elaborate enquiry which the Court conducted into the question whether the Federal Republic of Germany was bound by the 1958 Convention was that, if it was, the provisions of Article 6 concerning equidistance would necessarily apply unless there were special circumstances, there being no agreement. True, the Judgment includes remarks of an amplitude which might suggest that the equidistance method is in any event not mandatory even under Article 6 of the Convention (*I.C.J. Reports 1969*, pp. 23–24, paras. 21–24, and pp. 45–46, para. 82). But the Court did say that

> "Article 6 is so framed as to put second the *obligation* to make use of the equidistance method, causing it to come after a primary *obligation* to effect delimitation by agreement" (*ibid.*, p. 42, para. 72; emphasis added).

Thus, however the obligation to use the equidistance method might be ranked, the Court did refer to it as an "obligation", as it plainly was; even if it came second, it was an "obligation" in the same juridical sense in which there was an "obligation to effect delimitation by agreement". That the Court accepted that Article 6 of the Convention did create an obligation to use the equidistance method would seem to have been recognized by Judge Ammoun and Vice-President Koretsky (*ibid.*, pp. 149–150, separate opinion, and pp. 154-155, dissenting opinion, respectively). The Court's statements on the point may be harmonized by taking the view that any suggestion by it that equidistance was not

obligatory under the 1958 Convention is to be understood not in an absolute sense, but in the qualified sense that it was not obligatory in all cases.

38 In the *Anglo-French Arbitration* the Court of Arbitration distinctly stated —

> "that under Article 6 the equidistance principle *ultimately possesses an obligatory force* which it does not have in the same measure under the rules of customary law; for Article 6 makes the application of the equidistance principle a matter of treaty obligation for Parties to the Convention" (*RIAA*, Vol. XVIII, p. 45, para. 70; emphasis added).

Speaking still with reference to that provision, the Court of Arbitration later said:

> "In the absence of agreement, and unless another boundary is justified by special circumstances, *the boundary is to be the line which is equidistant* from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured." (*RIAA*, Vol. XVIII, p. 111, para. 238 ; emphasis added.)

39 In the *Gulf of Maine* case, the Chamber likewise took the view that —

> "if a question as to the delimitation of the continental shelf only had arisen between the two States, there would be no doubt as to the *mandatory* application of the method prescribed in Article 6 of the Convention, always subject, of course, to the condition that recourse is to be had to another method or combination of methods where special circumstances so require" (*I.C.J. Reports 1984*, p. 301, para. 118; emphasis added. And see *ibid*., p. 301, para. 116).

Judge Gros, dissenting, added:

> "The 1958 Convention on the Continental Shelf posits an equidistance/special-circumstances rule, a single rule which is clear: if there are no special circumstances, equidistance *must* be applied." (*Ibid*., p. 387, para. 46; emphasis added.)

40 In the *Libya/Malta* case, the Court said:

> "In thus establishing, as the first stage in the delimitation process, the median line as the provisional delimitation line, the Court could hardly ignore the fact that the equidistance method has never been regarded, even in a delimitation between opposite coasts, as one to be applied without modification whatever the circumstances. Already, in the 1958 Convention on the Continental Shelf, which *imposes* upon the States parties to it an *obligation* of treaty-law, failing agreement, to have recourse to equidistance for the delimitation of the continental shelf areas, Article 6 contains the proviso that *that method is to be used* 'unless another boundary line is justified by special circumstances'." (*I.C.J. Reports 1985*, p. 48, para. 65; emphasis added.)

Thus, a different line may well be established by agreement or through the operation of "special circumstances"; but, failing these, the Convention unquestionably "*imposes* upon

the States parties to it an *obligation* of treaty-law … to have recourse to equidistance …", that "method" being one which "*is to be used* …" in those circumstances.

41 In the *Canada/France Arbitration*, it would appear that, as in the *Gulf of Maine* case, the Court of Arbitration, at least by implication, also took the position that, if the continental shelf alone were involved, it would have been obligatory to apply equidistance under Article 6 of the 1958 Convention, unless special circumstances were present (Decision, 10 June 1992, paras. 39 and 40).

42 Naturally, if there is a dispute as to whether there are in fact special circumstances, this must be settled in some appropriate way, possibly by agreement or, as is sought to be done in these proceedings, by adjudication. Referring to the regime of Article 6 of the 1958 Convention, the matter was put this way by Professor Jaenicke in the *North Sea* cases:

> "If the Parties agree that there are no special circumstances then the equidistance boundary is the boundary, but if the Parties are in dispute as to whether there are special circumstances or not, the matter has to be settled either by agreement or by arbitration." (*I.C.J. Pleadings, North Sea Continental Shelf*, Vol. II, p. 52.)

A dispute as to whether special circumstances exist is not insoluble. It may be determined "either by agreement or by arbitration" (including judicial settlement). If the determination is that special circumstances do not exist, then, to adopt the argument, "the equidistance boundary is the boundary".

(vii) "Special Circumstances" Are Narrower than "Relevant Circumstances"

43 The mechanism of equating the equidistance-special circumstances rule of the 1958 Convention with the equitable principles-relevant circumstances rule of customary international law depends largely upon an assimilation of "special circumstances" to "relevant circumstances". In this respect, Denmark submits:

> "With reference to situations where no agreement has been reached between the Parties, Article 6.1 sets out a rule of equidistance, a rule which, however, is not of an obligatory character, not even as a starting point for a delimitation. This follows from the wording of Article 6.1, '… unless another boundary is justified by special circumstances …,'. That wording is interpreted as having in view the achievement olutions taking into consideration the relevant special circumstances of each particular case of delimitation." (Memorial, Vol. I, p. 60, para. 212.)

The implication in the last sentence that there are "relevant special circumstances" in each case seems clear. Is it also right?

44 There seems to be force in the argument that the category "special circumstances" is narrower than that of "relevant circumstances" (*I.C.J. Pleadings, Continental Shelf* (*Libyan Arab Jamahiriya/Malta*, Vol. II, Counter-Memorial of Malta, p. 292, para. 108). No doubt there is a sense in which it can be said that every situation has its "special circumstances"; but the "special circumstances" which count under Article 6, paragraph 1, of the 1958 Convention are limited to those which justify a boundary other than an equidistance line on the ground that the latter will create an inequity which can be avoided only by using some other method or methods of delimitation.

45 The expression “special circumstances” is aptly used in a provision operating as an exception to a rule requiring the application of the equidistance method in the absence of agreement; it is inapt if sought to be read as a reference to all relevant circumstances in the light of which a choice is to be made among any of a number of possible methods (including equidistance) with a view to producing the most equitable delimitation. In the former case, the circumstances are “special” in the sense that they create inequity if a particular delimitation method — that of equidistance — is applied and accordingly operate to justify the putting aside of the rule requiring the use of that method; in the latter case, the circumstances are simply those which are “relevant” to the choice of the most equitable method of delimitation (including equidistance as a possible method) and not only those which justify putting aside a rule of law requiring the use of that particular method (see Charles Vallée, “Le droit des espaces maritimes”, in *Droit international public*, Paris, 4th ed., 1984, p. 375).

46 In effect, under Article 6, paragraph 1, of the 1958 Convention, the equidistance method applies not because “special circumstances” require it to apply, but because there are no “special circumstances” to prevent it from applying. By contrast, under customary international law, the equidistance method applies only where the “relevant circumstances” require its application. Combining these two perspectives, one may say that, whereas “relevant circumstances” may well require the application of equidistance, “special circumstances” can only operate to exclude it, and never to apply it. Hence, as compared with “relevant circumstances”, “special circumstances” are both narrower in scope and exclusionary in effect in relation to the use of the equidistance method. Relevant circumstances exist in all cases; special circumstances exist only in some. A question can arise as to whether special circumstances exist, and, when it arises, it may be resolved, by agreement or other form of determination, to the effect that such circumstances do or do not exist. No question can ever arise as to whether relevant circumstances exist, for they always do.

47 The preparatory work of the International Law Commission does serve to emphasize the importance attached to the “special circumstances” provision, but it is far from suggesting that the Commission considered that special circumstances inhered in every case. The provision was formulated in terms of providing, exceptionally, for a non-equidistance line (including a modified equidistance line) where the existence of special circumstances justified such a line as opposed to an equidistance line. The necessary assumption was that special circumstances would not exist in all cases. Were it otherwise, the foundation of the main rule would largely disappear and, with it, the usefulness of the rule itself; such a consequence stands excluded by the principle that an interpretation which would deprive a treaty of a great part of its value is inadmissible (*Acquisition of Polish Nationality, P.C.I.J., Series B, No. 7*, p. 17; and *Minority Schools in Albania, P.C.I.J., Series A/B, No. 64*, p. 20).

48 If the reference to the median line in Article 6, paragraph 1, of the 1958 Convention was intended merely to indicate one of any number of possible methods of delimitation, with the choice among them being always made by reference to equitable principles, taking account of the relevant circumstances, the drafters took care to conceal the intention. On that hypothesis, there was little point in singling out that particular method or, indeed, in speaking specifically of “special circumstances” which justify some other boundary; it would have sufficed, and should have been simpler, to state that, in the absence of agreement, the boundary was to be that justified by equitable principles, taking account of the relevant circumstances. As remarked above, if this were the correct meaning, it is difficult to see why, except for theoretical reasons, the Court in 1969 troubled itself with the question whether the provision was applicable, for the régime under the provision would have been the same as that under customary international law. As it happened, the Court reached the conclusion that the provision was not declaratory of the position under customary

international law (*I.C.J. Reports 1969*, p. 41, para. 69). However it came about, the provision, as drafted, would seem to have been designed to present equidistance in a position of prominence, which was to yield to some other delimitation method only if there were special circumstances which justified another boundary. There is nothing of consequence in the relevant International Law Commission material, or indeed in that of the Geneva Conference of 1958, to set against this view.

(viii) There Are Limits to the Mandatory Application of Equitable Principles, as, for Example, in the Case of a Delimitation by Agreement

49 Obviously, where special circumstances exist, the role of equitable principles will be conspicuous in ascertaining what boundary is justified by such circumstances. But the straining in the effort to treat equitable principles as mandatorily and directly applying to every conceivable delimitation is apparent in repeated statements to the effect that any agreement is to be negotiated on the basis of such principles. No doubt, that should be the general aim; but with what effect if an agreement is in fact reached otherwise than on the basis of the equities of the case?

50 A delimitation effected by agreement may be presumed to accord with equity; but the presumption is rebuttable. As remarked by the Court in the *North Sea* cases themselves,

> "Without attempting to enter into, still less pronounce upon any question of *jus cogens*, it is well understood that, in practice, rules of international law can, by agreement, be derogated from in particular cases, or as between particular parties …" (*I.C.J. Reports 1969*, p. 42, para. 72; and see *Lighthouses in Crete and Samos, P.C.I.J., Series A/B, No. 71*, p. 150, second paragraph, Judge *ad hoc* Séfériadès, separate opinion).

In a delimitation agreement a party is competent to make concessions on political and other grounds having nothing to do with the intrinsic merits of its maritime claims (*North Sea, I.C.J. Reports 1969*, p. 155, Vice-President Koretsky, dissenting); a party may quite competently and validly dispose of its rights (*ibid*., p. 205, para. 10, Judge Morelli, dissenting). For example, a State concerned with another State in respect of two distinct and wholly unrelated geographical areas may make concessions in one area in exchange for concessions in the other (for a possible case of "tradeoff between two different geographical areas, see the Agreement between the United States of America and Mexico of 4 May 1978 relating to the Maritime Boundaries between the two countries, Counter-Memorial, Vol. 2, Ann. 65, pp. 248 ff., and Reply, Vol. 1, p. 92, para. 245). The agreement reached will be binding because it is a treaty; and yet it almost certainly will not reflect the equities in the geographical areas concerned, each taken by itself. On the contrary, it may have everything to do with considerations extraneous to the equities. As remarked by Judge Gros, dissenting: "Two States may negotiate a single boundary which suits them without going into the question of whether the result is equitable." (*Gulf of Maine, I.C.J. Reports 1984*, p. 370, para. 16. And see Sir Robert Y. Jennings, "The Principles Governing Marine Boundaries", *op. cit*., at pp. 401 ff.)

51 The real object of the requirement to proceed by way of agreement was to avoid problems of opposability arising from unilateral delimitations (*North Sea, I.C.J. Reports 1969*, p. 184, Judge Tanaka, dissenting; *Tunisia/Libya*, *I.C.J. Reports 1982*, p. 194, para. 60, Judge Oda, dissenting; *Gulf of Maine, I.C.J. Reports 1984*, p. 292, para. 87; and *Libya/Malta*, *I.C.J. Reports 1985*, p. 141, paras. 32–33, Judge Oda, dissenting). The fact that the efficacy of such a delimitation as regards other States depends on international law had been earlier pointed out (the *Fisheries case, I.C.J. Reports 1951*, p. 132. And see, later, the *Fisheries Jurisdiction (United Kingdom* v. *Iceland), Merits, I.C.J. Reports 1974*, p. 22, para. 49, and p.

24, para. 54). It was not the object of the framers of the provision to ensure that equitable principles would mandatorily or necessarily operate through the machinery of treaty-making.

52 In the *North Sea* cases the Parties had, by their Special Agreement, undertaken

> "to effect such a delimitation 'by agreement in pursuance of the decision requested from the … Court' — that is to say on the basis of, and in accordance with, the principles and rules of international law found by the Court to be applicable" (*I.C.J. Reports 1969*, p. 13, para. 2).

Thus, a treaty obligation had been undertaken to reach agreement in accordance with the principles and rules of international law found by the Court to be applicable. The Court accordingly cast its decision in the form of principles and rules to be observed in the course of the projected negotiations (*ibid.*, p. 46, para. 84. And see Prosper Weil, *Perspectives du droit de la délimitation maritime*, 1988, pp. 114–123). There was no occasion for the Court to say what it had already said in paragraph 72 of the Judgment, that in practice parties could consensually derogate from those principles and rules. Correctly construed, the *North Sea* cases did not intend to lay it down that a delimitation agreement could only be negotiated and concluded in accordance with equitable principles. Nor can Article 74, paragraph 1, and Article 83, paragraph 1, of the 1982 Convention be so interpreted; the possibility of consensual derogation always remains.

53 If then equitable principles do not apply mandatorily to the making of a delimitation agreement, that circumstance may be borne in mind in considering, in the next Section, the extent to which the applicability of the median line method under the 1958 Convention is dependent on such principles, as distinguished from being dependent on the absence of agreement and of special circumstances.

(ix) If Only Marginally, the 1958 Convention Envisages a Wider Use of the Equidistance Method than Does Customary International Law

54 No doubt the general idea which inspired the drafting of the 1958 Convention was the desirability of achieving an equitable solution in all cases. But it is important to distinguish an idea inspiring a provision from the way in which the provision seeks to give effect to the idea. In the first *Genocide Convention* case, the Court wrote,

> "The high ideals which inspired the Convention provide, by *virtue of the common will of the parties*, the foundation and measure of all its provisions." (*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, I.C.J. Reports 1951*, p. 23; emphasis added.)

Thus, the inspiring ideals provide "the foundation and measure" of the provisions of the Convention; but they do so only "by virtue of the common will of the parties", and that will is of course expressed in the relevant provisions of the Convention. The ideals may, indeed, explain the provisions; but they do not exert an independent force from outside of the provisions as if the provisions simply did not exist. In this case, in the absence of both agreement and special circumstances, the particular provision itself regards the equidistance line as the appropriate method of achieving an equitable solution. Professor Jaenicke put it well when he submitted to the Chamber in the *Gulf of Maine* case —

> “that Article 6 presumes that the equidistance method yields an equitable result as long as no special circumstances are apparent which might cast doubt on the equitableness of such a boundary” (*I.C.J. Pleadings, Delimitation of the Maritime Boundary in the Gulf of Maine Area*, Vol. VII, p.51).

55 That is correct. In the absence of an agreement and special circumstances, the parties have, through the Convention, already agreed that an equidistance line would be equitable, and it is their agreement as to what is equitable which matters. It is the duty of the Court to keep faith with the will of the parties as so expressed and not to substitute its own conception of what would be an equitable solution in such conditions. It helps to temper any disposition to make such a substitution to bear in mind that, as a matter of general jurisprudence, an indeterminate legal concept (such as, I think, is that of an equitable solution)

> “does not usually lead compellingly to any one decision in a concrete case, but rather allows a wide range for variable judgment in interpretation and application, approaching compulsion only at the limits of the range” (Julius Stone, *Legal System and Lawyers' Reasonings*, 1964, p. 264).

56 In some circumstances, equity can be satisfied in different ways. Certainly, an equitable solution in a given situation may result just as well from the use of one method as from the use of another. In the words of Paul Jean-Marie Reuter:

> “Si pour reprendre le *dictum* de la Cour internationale de Justice dans l'affaire du *Plateau continental de la mer du Nord* (par. 93) ‘il n'y a pas de limites juridiques aux considérations que les Etats peuvent examiner afin de s'assurer qu'ils vont appliquer des procédés équitables’, il n'y en a pas non plus aux combinaisons techniques que l'on peut mettre en œuvre pour reéaliser une délimitation équitable.” (Paul Jean-Marie Reuter, “Une ligne unique de délimitation des espaces maritimes?”, in *Mélanges Georges Perrin*, 1984, p. 265. And see, ibid., p. 266.)

Thus an equitable delimitation could be produced by recourse to different technical methods or combinations of methods. More to the point, the circumstances of some cases may conceivably admit of more than one equitable line (see Sir Robert Jennings, “*The Principles Governing Marine Boundaries*”, *op. cit.*, p. 402). The median line may well be just as equitable as some other line. It is not in such a case that the median line is excluded; it is excluded only where the *special* circumstances *justify* some other boundary in the sense of demonstrating that the median line would in those particular circumstances be productive of injustice, as indeed is evident from the *travaux préparatoires* of the International Law Commission and the 1958 Geneva Conference. On the other hand, a particular non-equidistance line is “justified” (not “*appropriate*”) only if in the circumstances of the case justice can be done only by that line and not by an equidistance line. In the absence of such circumstances, the median line is the boundary.

57 An obvious problem is of course that the provision neither defines “special circumstances” nor lays down any criteria for identifying what is the “boundary line” which “is *justified* by” particular special circumstances. This being so, the scope of the concept of “special circumstances” and its precise relationship with the rule relating to equidistance must be sought in some higher criterion implicit in the provision as controlling the

relationship between its two parts. Why? Because, to turn for the last time to the argument of Professor Jaenicke :

> "If a legal provision such as Article 6, paragraph 2, contains a rule and at the same time provides for an exception to this rule under the general notion of special circumstances, there must necessarily be some higher standard for judging whether the rule or the exception applies." (*I.C.J. Pleadings, North Sea Continental Shelf*, Vol. II, p. 178.)

In the case of Article 6, it is reasonable to locate the co-ordinating higher standard in equitable principles as understood in international law.

58 This approach rejoins the generally accepted view that equity is the overall controlling factor, both for the use of the equidistance method and for the use of some other possible method. But there is this difference, that some sense is sought to be given to the specific reference to the equidistance method, in so far as the use of this method is retained as obligatory in a situation in which an equitable solution may conceivably be offered either by the use of that method or by the use of some other (including a modification of the equidistance method). If this margin in favour of equidistance is excluded, it becomes difficult to explain the need for the specific reference to that method; for, excluding that margin, the provision, as argued above, might have been more simply worded to say that, in the absence of agreement, the boundary shall in all cases be that required by equitable principles, taking account of the relevant circumstances. On this formula, no specific method being singled out, equidistance would rank (as received doctrine has it) equally with all other methods, the choice among them being made in all cases by the application of equitable principles, taking account of the relevant circumstances.

59 It is conceded that in practice the 1958 conventional rule and the rule of customary international law would tend in large measure to produce similar results. But, however that may be, it does appear to me that there is a distinction, and that it is more than one of mere nuance, between treating equitable principles as operating to produce an equitable delimitation through the rule and exception structure of the equidistance-special circumstances provision, and treating equitable principles as directly acting on the relevant circumstances of each case to produce an equitable delimitation.

(x) However Impromptu Might Have Been the Tabling of the Equidistance Idea in 1953, It Was Maturely Considered Before Being Finally Adopted in 1958

60 Over the years emphasis has been placed on the fact that the International Law Commission had before it several possible methods of delimitation of the continental shelf, and on the following remark by the Court in the *North Sea* cases :

> "In this almost impromptu, and certainly contingent manner was the principle of equidistance for the delimitation of continental shelf boundaries propounded." (*I.C.J. Reports 1969*, p. 35, para. 53.)

61 The 1953 Committee of Experts, by which the principle of equidistance was so "propounded", was concerned primarily with the delimitation of the territorial sea. It stated that equidistance was equally applicable to the delimitation of the continental shelf. According to the International Law Commission's Special Rapporteur, Professor François, the Committee of Experts, in so stating, "had confirmed the Commission's preliminary view that the technique of the median line could be adopted for States whose coasts faced each other …" (*Yearbook of the International Law Commission*, 1953, Vol. I, p. 106, para. 39). So, from the beginning the International Law Commission was involved in the thinking

concerning the applicability of equidistance to the delimitation of the continental shelf, at least as between opposite coasts. In paragraph 162 of his Second Report on the High Seas of 10 April 1951, Professor François had himself submitted to the Commission nine draft articles on the continental shelf as a basis of discussion. Draft Article 9 read :

> “Si deux ou plusieurs Etats sont intéressés au même plateau continental en dehors des eaux territoriales, les limites de la partie du plateau de chacun d'eux seront fixées de commun accord entre les Parties. Faute d'accord, la démarcation entre les plateaux continentaux de deux Etats voisins sera constituée par la prolongation de la ligne séparant les eaux territoriales, et la démarcation entre les plateaux continentaux de deux Etats séparés par la mer sera constituée par la ligne médiane entre les deux côtes.” (*Yearbook of the International Law Commission*, 1951, Vol. II, p. 102.)

A footnote to this provision added :

> “Comme ligne de démarcation entre le plateau continental commun à deux Etats séparés par la mer, on pourrait adopter, par analogie à la ligne de démarcation entre les eaux territoriales dans les détroits, la ligne médiane entre les deux côtes. Le cas échéant, les Etats intéressés pourraient, d'un commun accord, délimiter les plateaux continentaux d'une manière différente.” (*Ibid*., p. 103. And see the discussion in *ibid*., Vol. I, pp. 285–287, 411.)

Thus the idea of the median line was being considered as early as 1951.

62 The discussions on the subject in the Commission in 1953, after the submission of the recommendations of the Committee of Experts, were adjourned for five days for the purpose of allowing time for consideration (*Yearbook of the International Law Commission*, 1953, Vol. I, pp. 108 and 125). It was only after further discussions that the text was adopted (*ibid*., p. 134, para. 51. For the text, see ibid., Vol. II, p. 213). Not a long period of adjournment, it may be said. But then, three years later, the text was again discussed in the Commission (*Yearbook of the International Law Commission*, 1956, Vol. I, pp. 151–153, 277).

63 Besides, it could not be said that the adoption of the substance of the International Law Commission's text at the Geneva Conference in 1958, following on a debate at the eleventh session of the United Nations General Assembly[1], was the result of an impromptu response by the Conference to a new text suddenly presented : it seems clear that the text was the subject of careful study by well-prepared jurists in 1958 and that opportunity had been given to Governments to be consulted in preceding intervals. “The scale and thoroughness of this process” was rightly noticed by Vice-President Koretsky (*North Sea, I.C.J. Reports 1969*, p. 156, dissenting opinion. And see *I.C.J. Pleadings, Delimitation of the Maritime Boundary in the Gulf of Maine Area*, Vol. II, pp. 78–79, paras. 203–204; and *Official Records of the United Nations Conference on the Law of the Sea*, Vol. VI, Fourth Committee, Geneva, 24 February–27 April 1958, pp. 9 ff., passim, and 91–98). The need for flexibility in the working of the provision was recognized and, indeed, emphasized (*Official Records of the United Nations Conference on the Law of the Sea*, Vol. VI, *op. cit*., p. 22, para. 35, Tunisia); but nothing said suggests that the equidistance method was not intended to play the ultimate concrete normative role *ex facie* assigned to it by the terms of the provision.

64 The triad — agreement, equidistance, special circumstances — appeared in the draft adopted by the International Law Commission on 30 June 1953. They remained on the table until they emerged in the final text in 1958. Textual alterations were made in the interval, but suggestions that these profoundly affected the essential original relationship of the three elements of the triad are not borne out (cf. Contre-mémoire présenté par le Gouvernement de la République française, in the *Anglo/French Arbitration*, July 1976, Vol. 1, p. 49, para. 125).

65 Whatever might have been the circumstances in which the equidistance proposal came before the Commission in 1953, there was nothing rushed in the consideration which it received from then on until its final adoption five years later in 1958. To assume the opposite is to invite the supposition that, had the framers of the provision acted with greater deliberation, they would have employed materially different language. This sort of reflection, if engaged in by a court, imports a risk of its taking a corresponding view that its task is to give effect not to the language used, but to language which, in the court's opinion, should have been used in order to express an idea which the framers of the provision did not in fact have in mind, but which the court thinks they would have had in mind had they acted with greater deliberation. It is scarcely necessary to say that this is not an admissible method of interpretation (see Judge Lachs's comment in the *North Sea* cases, *I.C.J. Reports 1969*, pp. 221–222).

(xi) Scholarly Opinion

66 I shall add a brief reference to scholarly opinion. Without attempting a survey, I have the impression that many writers would share the view expressed by Professor Bowett, when, but for decisional authority, he considered that the correct situation was as follows :

> "The legislative history of Article 6 suggests that 'special circumstances' operate as an exception to the general rule and not as an independent principle of equal validity. As the I.L.C. stated :
>
> > '… 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'.
>
> Indeed, one might have thought that it could scarcely be otherwise, for if 'special circumstances' stood on an equal footing with the median/equidistance line rule, there would in effect be no rule to fall back on in the event of disagreement, and this the parties to the 1958 Convention clearly did not intend. On this view it would have followed from this relationship of rule to exception that the rule applies *unless* a party can discharge the dual onus of proving
>
> > (a) that 'special circumstances' exist, within the meaning of Article 6, and
> >
> > (b) that these 'justify' another boundary." (Derek Bowett, *The Legal Regime of Islands in International Law*, 1979, pp. 149–150 . Footnote omitted.)

There is no question here of what Henri Rolin referred to, deprecatingly, as "l'attrait de cette entreprise" of contradicting an advocate with his academic writings (*I.C.J. Pleadings,*

Right of Passage over Indian Territory, Vol. V, p. 187). For Professor Bowett did also state that

> "it cannot now be argued (if the Court [of Arbitration] is right) that equidistance applies *unless* a party can show that there exist special circumstances of rather limited character" (Bowett, *op. cit.*, p. 151).

The matter of importance in this Court is his caveat, "if the Court [of Arbitration] is right". Was it? I am not persuaded that it was.

(xii) Conclusion

67 Equidistance *per se* is certainly a geometric method and not a legal principle ; but in the collocation in which it occurs, in the form of the median line, in Article 6, paragraph 1, of the 1958 Convention, it undoubtedly forms part of a rule of law to the effect that, subject to two conditions, namely, the absence of agreement and the non-existence of special circumstances, the boundary is the median line. To say that equidistance is applicable only where equitable principles as applied to the relevant circumstances indicate it as the most suitable method among other possible methods for achieving an equitable delimitation is to impose a condition for its application in addition to the two which have in fact been prescribed by the provision itself. "To impose an additional condition … would be equivalent, not to interpreting the [Convention], but to reconstructing it." (*Acquisition of Polish Nationality, P.C.I.J., Series B, No. 7*, p. 20. And see Judge Read, dissenting, in the *Interpretation of Peace Treaties* case, *I.C.J. Reports 1950*, p. 246.) However widely the exception relating to special circumstances may be construed, it cannot be read so as to decapitate the clear intendment of the rule that, when the two prescribed conditions are satisfied, the equidistance method automatically and compulsorily applies to define the boundary.

68 A certain view has imposed itself to shift the equidistance method from the position of distinctiveness plainly assigned to it within the framework of the 1958 provision to a position described by Judge Evensen as one of "relegation … to the last rank of practical methods" (*Tunisia/Libya*, *I.C.J. Reports 1982*, p. 297). To Judge *ad hoc* Valticos, the method has often seemed "la 'mal-aimée'" among delimitation methods (*Libya/Malta*, *I.C.J. Reports 1985*, p. 106, para. 7). So lowly a position is not justified by the language of the provision. Looking at that language, one might think naturally of Vattel's aphorism, "The first general maxim of interpretation is that it is not permissible to interpret that which does not need interpretation."[1] If the idea behind that maxim has not always been hospitably received[2], I would yet borrow the words of Judge Winiarski and conclude that "[n]o effort of interpretation could make these clear provisions say what they do not say" (*The Application of the Convention of 1902 Governing the Guardianship of Infants, I.C.J. Reports 1958*, p. 133, dissenting opinion).

69 Towards the end of his distinguished judicial career, Judge Anzilotti remarked,

> "[I]n this case, the Court is not confronted with a rule of common international law; it is dealing with a specific and formal provision, Article 3 of the Treaty, which it is required to apply." (*Electricity Company of Sofia and Bulgaria, P.C.I.J., Series A/B, No. 77*, p. 98, dissenting opinion.)

The context was different, but not so different as to exclude the approach. It would serve no useful purpose to purport to be applying the delimitation provision of the 1958 Convention while straining to equate it with the position at general international law. Such an equation would be artificial. Affirmations to the contrary are impressive, but not convincing. In the end, it may not make much practical difference whether there is an equation if, as I think, there are special circumstances within the meaning of the provision. But, at this stage, the question whether there is such an equation does present itself; and the answer I would give is to uphold the submission of Norway to the effect that, absent both agreement and special circumstances, “the boundary is the median line”.

Part II. Proportionality

70 The question now is whether the will of the Parties, as expressed in Article 6, paragraph 1, of the 1958 Convention, truly calls for a median line. It can only do so if there are no special circumstances which justify another boundary. Are there any such circumstances ? Denmark contends that the disparity in the lengths of the two opposite coasts is such a circumstance. Norway submits that it is not. If Denmark is right, the further question will arise as to what is the boundary which such special circumstances justify. It seems to me that the answers to both questions will turn largely on the issue of proportionality. To this general issue, the subject of debate, I now turn.

(i) The Broad Evolutionary Perspective

71 It would be useful to begin by adverting to some aspects of the broad perspective within which the jurisprudence has been unfolding.

72 First, the law in this field being in a state of evolution, the danger of over-conceptualization has been rightly pointed out (*North Sea, I.C.J. Reports 1969*, p. 53, para. 100; and *Tunisia/Libya*, *I.C.J. Reports 1982*, p. 92, para. 132). Not surprisingly, the language in the case-law is not always clear or consistent. It is possible to discern at some stages in the movement of the jurisprudence a shifting discrepancy between recital of known but possibly obsolescent legal propositions and the controlling principle to be extracted from the decision actually made (*Libya/Malta*, *I.C.J. Reports 1985*, p. 90, para. 37, joint separate opinion of Judges Ruda, Bedjaoui and Jiménez de Aréchaga). The understandable reason for the jurisprudential haze is that, in its effort to reconcile stability with change, the Court accepts change, while tending to retain an attachment to articulations which the change has really left behind. For here too, as Keynes said, “the difficulty lies not in the new ideas, but in escaping from the old ones” (cited in Earl Warren, “Toward a More Active International Court”, *Virginia Journal of International Law*, 1971, VoI. 11, p. 295).

73 Second, there seems to be a danger of overlooking the effect of a delimitation line in settling the question of the extent of the continental shelf to which the litigating parties are entitled in relation to each other. Almost certainly, this above all is what the parties really wish to know; it is the delimitation line which gives them the answer. As observed in the joint separate opinion in the *Libya/Malta* case, “the Court is establishing a line which will determine the areas which ‘appertain’ to each of the Parties” (*I.C.J. Reports 1985*, p. 92, para. 40). This effect of a delimitation decision in determining what are the areas appertaining to each of the parties is apt to be obscured by the tendency of the jurisprudence to dwell on the principle that the continental shelf appertains to a coastal State *ipso jure*, and that, accordingly, the object of a delimitation is not to apportion the continental shelf (considered as an undivided common pool) in separate shares among the interested coastal States, but simply to determine what is the line separating areas of the shelf which already appertain to each of them individually (*North Sea, I.C.J. Reports 1969*,

p. 22, para. 20; and see p. 188, Judge Tanaka, dissenting, and p. 199, Judge Morelli, dissenting).

74 But, in the words of Judge Mbaye, “it is not feasible artificially to separate the right to an area of continental shelf from the rules for delimiting [the] shelf” (Libya/Malta, *I.C.J. Reports 1985*, p. 96, separate opinion). True, the questions of entitlement and delimitation are “distinct”. But, as the Court remarked, that they “are also complementary is self-evident. The legal basis of that which is to be delimited, and of entitlement to it, cannot be other than pertinent to that delimitation.” (*Ibid*., p. 30, para. 27. And see *ibid*., pp. 33–34, para. 34.) If the necessary jurisdiction exists, there would be nothing to prevent a State from seeking a declaration of its entitlement, were this to be challenged by another State. The occasion may not often arise, but it could, as where there is a dispute as to whether the territory in question is for any reason incapable of generating a continental shelf of its own. A dispute of that kind was presented in the *Aegean Sea Continental Shelf* case, in which Turkey took the position that “the Greek Islands situated very close to the Turkish coast do not possess a [continental] shelf of their own” (*I.C.J. Reports 1978*, p. 8, para. 16); and naturally the Application by Greece did include a claim for a declaration of entitlement (*ibid*., p. 6, para. 12, item (i) of Greece's Application). More usually, however, what a coastal State may wish to ascertain is what is the precise extent of its entitlement in relation to an adjacent or opposite State; it is a decision as to delimitation which settles the point.

75 Thus, the theory of the law (correct in itself) that separate continental shelf areas already appertain to each coastal State should not be allowed to foster the illusion that the determination of a delimitation line is not *uno flatu* an effective declaration of the actual extent of the area to which each State is entitled vis-à-vis the other. The Court in 1969 did not make this mistake. It accepted that a delimitation line does define areas of entitlement when it said :

> “Evidently any dispute about boundaries must involve that there is a disputed marginal or fringe area, to which both parties are laying claim, so that any delimitation of it which does not leave it wholly to one of the parties will in practice divide it between them in certain shares, or operate as if such a division had been made.” (*I.C.J. Reports 1969*, p. 22, para. 20.)

It is true, as the Court observed, that under Article 2 of the 1958 Convention the coastal State's rights in the continental shelf are “exclusive”, but, as it added,

> “this says nothing as to what in fact are the precise areas in respect of which each coastal State possesses these exclusive rights. This question, which can arise only as regards the fringes of a coastal State's shelf area is, as explained at the end of paragraph 20 above, exactly what falls to be settled through the process of delimitation, and this is the sphere of Article 6, not Article 2.” (*Ibid*., p. 40, para. 67.)

Of course it is the case that the question “can arise only as regards the fringes of a coastal State's shelf area”. It is nonetheless true that, whenever such a question arises, it is the delimitation line which provides the answer “as to what in fact are the precise areas in respect of which each coastal State possesses these exclusive rights” ; and that answer could make a substantial difference in terms of relative magnitudes.

76 In the *North Sea* cases the Court understood very well that the whole of the cases was really about the extent of the continental shelf areas claimed by each State in relation to each other. It repeated the substance of that understanding in 1978 when it said, "Any disputed delimitation of a boundary entails some determination of entitlement to the areas to be delimited" (*Aegean Sea Continental Shelf, I.C.J. Reports 1978*, p. 35, para. 84). Even in respect of terrestrial questions, it is inappropriate to insist on too rigid a distinction between attribution of title and delimitation (*Frontier Dispute, I.C.J. Reports 1986*, p. 563, para. 17).

77 It follows that failure to consider the effect which a proposed delimitation will have on the definition of the area of the continental shelf appertaining to each State may be to miss the real point of the litigation.

78 Third, it is necessary to bear in mind that, to the extent that the fundamental principle of natural prolongation has been displaced within the conceptual framework of the continental shelf, the restraints which it previously imposed on recourse to the factor of a reasonable degree of proportionality would fall to be now regarded as correspondingly relaxed. This point is developed in Section (ii) below.

(ii) Proportionality and Natural Prolongation

79 Much of the received jurisprudence on the question of proportionality was influenced by what the Court in 1969 referred to as the "fundamental concept of the continental shelf as being the natural prolongation of the land domain" (*North Sea, I.C.J. Reports 1969*, p. 30, para. 40). It is submitted that it was natural prolongation, considered in a physical sense, which was chiefly (though not wholly) responsible for the restraints imposed on proportionality. So it is necessary to consider how far natural prolongation was understood in a physical sense, in what way it operated in that sense to impose such restraints, and to what extent, if any, those restraints should now be regarded as having been diminished by the attrition of that aspect of the concept which operated in large part to impose them.

80 First then, as to the sense in which natural prolongation was understood. It is true that even in 1956 the International Law Commission had "decided not to adhere strictly to the geological concept of the continental shelf" (*Yearbook of the International Law Commission*, 1956, Vol. II, p. 297, subpara. 6. And see the general discussion, *ibid*., 1956, Vol. I, pp. 130 ff.). But the material before the Commission shows that even scientists differed in their use of the term "continental shelf" (*ibid*., 1956, Vol. II, p. 297, subpara. 5). Consequently, I do not wish to argue whether the Court was right in 1969 in understanding the concept in a physical sense. I am concerned only with the question whether the concept was in fact so understood by the Court, and, if so, with what consequences, if any, for the concept of proportionality as enunciated by it.

81 It has, of course, been long recognized that the "natural prolongation of the land domain" does not always assume a geomorphological character specifically identified with the extension of any given coastline. As the Court noted in 1982:

> "at a very early stage in the development of the continental shelf as a concept of law, it acquired a more extensive connotation, so as eventually to embrace any sea-bed area possessing a particular relationship with the coastline of a neighbouring State, whether or not such area presented the specific characteristics which a geographer would recognize as those of what he would classify as 'continental

shelf'" (*Tunisia/Libya*, *I.C.J. Reports 1982*, p. 45, para. 41. And see *ibid*., pp. 45–46, paras. 42–43.)

It is for these reasons that the Court added :

> "It would be a mistake to suppose that it will in all cases, or even in the majority of them, be possible or appropriate to establish that the natural prolongation of one State extends, in relation to the natural prolongation of another State, just so far and no farther, so that the two prolongations meet along an easily defined line." (*Ibid*., p. 47, para. 44. And see, generally, Judge *ad hoc* Jiménez de Aréchaga, separate opinion, pp. 110–113, 116–120.)

82 But it would not be right to take these views too far back in time. The North Sea delimitations relating to the Norwegian Trough are sometimes cited as supportive of the opinion that even in 1969 the Court accepted that natural prolongation was not always physical. That view is plausible. But the interpretation of the Court's Judgment on the point which I prefer is that, apart from expressly stating that it was not "attempting to pronounce on the status of that feature", the Court considered that the delimitations were explicable by reason of the decision of the Parties to ignore the existence of the Trough. In its words, "it was only by first ignoring the existence of the Trough that these median lines fell to be drawn at all" (*I.C.J. Reports 1969*, p. 32, para. 45). Had the Parties not agreed to ignore the existence of the Trough, different consequences might well have ensued from the fact that, as the Court found,

> "the shelf areas … separated from the Norwegian coast by … the Trough cannot in any physical sense be said to be adjacent to it, nor to be its natural prolongation" *(ibid.)*.

83 Presenting its idea of natural prolongation, what the Court said in 1969 was this :

> "The 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. The continental shelf is, by definition, an area physically extending the territory of most coastal States into a species of platform which has attracted the attention first of geographers and hydrographers and then of jurists. The importance of the geological aspect is emphasized by the care which, at the beginning of its investigation, the International Law Commission took to acquire exact information as to its characteristics, as can be seen in particular from the definitions to be found on page 131 of Volume I of the *Yearbook of the International Law Commission* for 1956. The appurtenance of the shelf to the countries in front of whose coastlines it lies, is therefore a fact, and it can be useful to consider the geology of that shelf in order to find out whether the direction taken by certain configurational features should influence delimitation because, in certain localities, they point-up the whole notion of the appurtenance of the continental shelf to the State whose territory it does in fact prolong." (*North Sea, I.C.J. Reports 1969*, p. 51, para. 95; and see *ibid*., p. 31, para. 43.)

For the Court, natural prolongation was the “fundamental concept of the continental shelf. It went out of its way to explain that what it had in mind was natural prolongation in a palpably physical sense. It offered no other version of the concept. The concept being “fundamental”, it might be supposed that, if the Court had in mind the possibility of some other kind of natural prolongation, it would have mentioned it, and mentioned it the more explicitly the more esoteric it was. It did not. With some diligence, it is possible to qualify this view by recourse to fragmentary remarks and tangential phrases dropped here and there in the Judgment. But one cannot now rewrite the Judgment in the hindsight of later jurisprudence or of more sophisticated ideas developed in relation to the Law of the Sea Convention 1982. Incidental expressions in the Judgment do not blunt its hard thrust. That thrust was clear : when the Court spoke of “natural prolongation” it meant just that — a prolongation which was “natural”, and not one which was philosophical, theoretical or notional. It is not necessary, however, to take an absolute position; it suffices for present purposes to say that the working view which the Court took was that natural prolongation was physical in character.

84 Now for the second point, as to the way in which natural prolongation in the physical sense operated to impose restraints on recourse to the concept of proportionality.

85 Natural prolongation was considered as relevant to title. But, as recalled above, title and delimitation are interlinked. One can scarcely fail to see this connection at work in the very first *principle or rule of international law* enunciated by the Court in 1969 as being “applicable to … *delimitation*”, when it spoke of account having to be taken

> “of all the relevant circumstances, in such a way as to leave as much as possible to each Party of all those parts of the continental shelf that constitute a natural prolongation of its land territory into and under the sea, without encroachment on the natural prolongation of the land territory of the other” (*I.C.J. Reports 1969*, p. 53, para. 101 (C) (1). And see *ibid*., p. 47, para. 85 (c).)

As the Chamber observed in 1984, a delimitation is “a legal political operation” which does not have to follow a natural boundary, where one is discernible (*Gulf of Maine, I.C.J. Reports 1984*, p. 277, para. 56). But it is nonetheless clear that the view taken by the Court in 1969 was that a major factor differentiating one State's continental shelf from that of its neighbour, and, therefore, governing the establishment of the delimitation line, was that of natural prolongation, dependent of course on whether the physical circumstances permitted of separate identification (*Tunisia/Libya*, *I.C.J. Reports 1982*, p. 46, para. 43, and p. 92, para. 133 A (2)). This was why a submarine area lying closer to the coast of one State than to that of another might yet appertain to the latter if it formed part of the “natural extension” of the latter's land territory (*North Sea, I.C.J. Reports 1969*, p. 31,para. 43).

86 Natural prolongation in a physical sense was equally the reason why, in the absence of any agreed solution, marginal areas of overlap had to be divided equally between the three States concerned in the *North Sea* cases (*ibid*., p. 50, para. 91, p. 52, para. 99, and p. 53, para. 101 (C) (2)). As I interpret the Judgment, differentiation of separate prolongations being impossible within marginal areas of overlap, but the geographical situation in the particular case being one of “quasi-equality” in which the “coastlines [were] in fact comparable in length”, the prolongations in the areas of overlap would fall to be deemed of equal extent, with corresponding consequences for division of the areas. In other words, equal division in the particular case would be the result of a presumed equality in natural prolongations. Save on the basis of some such reasoning, the direction for equal division was at best mechanical, at worst arbitrary. As it was, it did not escape criticism from Vice-

President Koretsky, on the ground that it transgressed the Court's own distinction between delimitation and distribution (*North Sea, I.C.J. Reports 1969*, p. 168).

87 The direction for equal division of marginal areas of overlap left untouched the clear implication of the Judgment that two coasts of exactly the same length and configuration could well have continental shelves of different areas, dependent on the extent of their respective natural prolongations. Thus the physical implications of natural prolongation operated to limit the extent to which the concept of proportionality could be applied. But for this aspect, there would have been much to support the view expressed by President Bustamante y Rivero that the concept of natural prolongation

> "implies, as an obvious logical necessity, a relationship of *proportionality* between the length of the coastline of the land territory of a State and the extent of the continental shelf appertaining to such land territory. Parallel with this, so far as concerns inter-State relations, the conclusion is inescapable that the State which has a longer coastline will have a more extensive shelf. This kind of proportionality is consequently, in my view, another of the principles embraced by the law of the continental shelf. The Judgment, in paragraphs 94 and 98, mentions this element as one of the factors to be taken into consideration for the delimitation of a shelf; the Court nevertheless did not confer upon it the character of an obligatory principle." (*Ibid.*, pp. 58–59, para. 4, separate opinion.)

The amplitude of that view of proportionality is attributable to its neglect of the restraints implicit in the physical basis of the concept of natural prolongation as this was understood by the Court.

88 It is useful to consider the contrasting view expressed by the Anglo-French Court of Arbitration in a well-known passage in which it said :

> "In short, it is disproportion rather than any general principle of proportionality which is the relevant criterion or factor. The equitable delimitation of the continental shelf is not, as this Court has already emphasized in paragraph 78, a question of apportioning — sharing out — the continental shelf amongst the States abutting upon it. Nor is it a question of simply assigning to them areas of the shelf in proportion to the length of their coastlines : for to do this would be to substitute for the delimitation of boundaries a distributive apportionment of shares. Furthermore, the fundamental principle that the continental shelf appertains to a coastal State as being the natural prolongation of its territory places definite limits on recourse to the factor of proportionality." (*RIAA*, Vol. XVIII, p. 58, para. 101.)

The Court of Arbitration is thought to have understood the concept of proportionality somewhat more narrowly than did this Court in 1969 (cf. *Libya/Malta*, *I.C.J. Reports 1985*, pp. 72–73, Vice-President Sette-Camara, separate opinion). The 1969 Judgment seemed innocent of the refinement that "it is disproportion rather than any general principle of proportionality which is the relevant criterion or factor". It is, however, possible to understand the dictum of the Court of Arbitration in this way. As remarked above, natural prolongation, in its geophysical sense, could well mean that two perfectly comparable coasts could have unequal areas of the continental shelf. On this basis, it might well be said that "it is disproportion rather than any general principle of proportionality which is the relevant criterion or factor". This restrictive formulation reflected the "definite limits" which, as the Court of Arbitration found, were placed on recourse to proportionality by the

“fundamental principle that the continental shelf appertains to a coastal State as being the natural prolongation of its territory”.

89 Now for the third point, concerning the extent, if any, to which the restraints imposed on recourse to proportionality by natural prolongation should be regarded as having been relaxed by reason of the attenuation of the latter concept, at least in its physical aspect.

90 The concept of natural prolongation is not altogether extinct; to some extent it continues to exist even under the 1982 Convention (*Tunisia/Libya*, *I.C.J. Reports 1982*, p. 47, para. 44, and p. 48, para. 47; and *Libya/Malta*, *I.C.J. Reports 1985*, p. 68, Vice-President Sette-Camara, separate opinion, and pp. 93 ff., Judge Mbaye, separate opinion). And, although I do not propose to argue the point, its existence under the Convention still has a physical aspect, at least in the case of the broad shelf. But, for practical purposes (including those of delimitation), within the normal continental shelf of 200 miles' width, natural prolongation has now been replaced by the geometric and more neutral principle of adjacency measured by distance. Some hesitation notwithstanding, that change has occurred (*Tunisia/Libya*, *I.C.J. Reports 1982*, pp. 48–49, para. 48; and *Libya/Malta*, *I.C.J. Reports 1985*, pp. 35–36, paras. 39–40, p. 41, para. 49, pp. 46–47, para. 61, and pp. 55–56, para. 77. Cf., *ibid*., p. 33, para. 34). The effect of this important development needs to be more frankly addressed than it has been.

91 It is not logical to continue to think as if the “definite limits” which the fundamental principle of natural prolongation had earlier placed “on recourse to the factor of proportionality” still exist to the same degree now that that principle (which was the basic source of those limits) has been superseded in relation to the normal continental shelf by the principle of adjacency measured by distance. This new principle, being geometric, leaves the factor of proportionality free to operate to the same extent in all cases, subject only to the existence of other restraining circumstances.

92 It seems to me that the influence on proportionality which the concept of natural prolongation, considered in its geophysical sense, exerted in the seminal case of 1969 continued even after greater weight began to be placed on the purely legal aspects of the idea. It is possible, however, to see in the evolution of the jurisprudence, culminating on this point in the *Libya/Malta* case, a growing readiness, in the case of the normal continental shelf, to come to terms with the implications of the supersession of natural prolongation by the distance criterion and a corresponding willingness to admit proportionality to a fuller role unrestrained by the “definite limits” which natural prolongation had previously imposed on recourse to it.

93 Even with the restraints imposed on proportionality by the fundamental concept of natural prolongation, in none of the cases dealt with by the Court can it persuasively be said that the Court did not in one way or another show a concern with the question whether the delimitation line established by it would divide the maritime areas in keeping with reasonable expectations deriving from a comparison of coastal lengths. Whatever the methodology employed, the Court has always seemed aware of the need to avoid a defeat of those expectations. It is not really credible to assert that the decisive consideration in the *North Sea* cases was not the fact that the three coastlines were comparable in length. The capacity, and the duty, of the Court to satisfy such expectations need now to be re-evaluated in the light of the evolution of the concept of natural prolongation.

94 It is not a satisfactory answer to say that proportionality could result in one State exercising jurisdiction under the nose of another. The non-encroachment principle, extended to the continental shelf as now understood, still remains to prevent that from happening, by setting an appropriate limit to the extent to which proportionality can bring one State close to another (*Libya/Malta*, *I.C.J. Reports 1985*, p. 89, para. 34, joint separate opinion). Nor is it enough to iterate the unchallenged proposition that proportionality is not in itself a direct principle of delimitation; there have always been, and there still are, other considerations to be taken into account in determining a delimitation line (*ibid.*, p. 45, para. 58). To divide the continental shelf in mechanical proportion to the coastal lengths would impermissibly exclude such other considerations. Mathematical exactness is not the aim. This is apart from the circumstance that proportionality could be satisfied by different conceivable lines (*Tunisia/Libya*, *I.C.J. Reports 1982*, p. 258, para. 162, Judge Oda, dissenting). These various considerations continue to place their own restraints on proportionality; and consequently the reference in the *Libya/Malta* case to "the need to avoid in the delimitation any excessive disproportion" seems a reasonable way of putting the matter (*I.C.J. Reports 1985*, p. 57). But, in construing and applying this formulation, it would be right to take the general view that the role of proportionality is now necessarily larger to the extent that the "definite limits" previously imposed on recourse to it by "the fundamental principle" of natural prolongation have been relaxed, if not removed, with the supersession of the latter by the principle of adjacency measured by distance.

(iii) The Question of the Normative Status of Proportionality

95 Counsel for Norway correctly pointed out that the factor concerning a reasonable degree of proportionality, as between coastal lengths and continental shelf areas, was stated by the Court in 1969 as the "final" of three "factors", and was not included among "the principles and rules of international law" laid down by the Court in subparagraph (C) of paragraph 101 of the Judgment. But I am less confident that it would be correct to rely on that circumstance as justifying the attribution of a "modest" status to that factor. The substance of the proposition concerning a reasonable degree of proportionality is central to the application of "equitable principles" to which the Court expressly and, I should have thought, peremptorily linked it when it spoke of "the element of a reasonable degree of proportionality, which a delimitation carried out in accordance with equitable principles ought to bring about" between coastal lengths and corresponding maritime areas. Counsel for Denmark was right in stressing the words "ought to bring about" (CR 93/2, pp. 77–78, 12 January 1993, Professor Jiménez de Aréchaga). Those words necessarily signified that the "element of a reasonable degree of proportionality" was something positively enjoined by "equitable principles" themselves, which, of course, were the governing legal principles. This being so, there is not much purpose in considering whether it would be right to describe the status of the proportionality factor as "modest" or as one of "subordination", and, if so, with precisely what meanings.

96 If the Court did not include proportionality among "the principles and rules of international law" set out in subparagraph (C) of the dispositif of the *North Sea* Judgment, the explanation is to be found in the fact, yet again, that the decision, in the then state of the law, proceeded on the assumption that the fundamental principle of the continental shelf was that of the "natural prolongation of the land domain", understood in a physical sense. As has been seen, because of this principle and the way in which it was understood, two coasts could well be of the same length and the same configuration and yet generate different continental shelf areas if their natural prolongations were unequal. Hence natural prolongation could well have the effect of making it impossible to achieve a reasonable degree of proportionality of continental shelf areas to coastal lengths; as observed by the Anglo-French Court of Arbitration, it really operated to impose "definite limits" on recourse to proportionality. Thus, and for a reason which in my opinion no longer carries weight,

proportionality could not be enunciated as part of “the principles and rules of international law”. But it did not follow from this that, as compared with other factors, it was intended to occupy only a modest status.

97 I am not persuaded that an enumerative ranking is discernible from the circumstance that proportionality was stated only as the final of three factors. The first factor was “the general configuration of the coasts of the Parties…”. This would obviously apply as an important factor — and not merely as a modest one — in the process of effecting the delimitation, and I see no sufficient reason why it should be otherwise as regards the factor of a reasonable degree of proportionality. I should be surprised if in the course of the subsequent negotiations the Federal Republic of Germany was agreeable to the view that the Court's Judgment required it to assign so humble a role to a factor which plainly lay at the root of its discontent (see *North Sea, I.C.J. Reports 1969*, p. 17, para. 7) and was, in my view, as plainly a major link in the overall reasoning of the Court.

98 What was it that was preoccupying the Court in paragraph 91 of the Judgment ? I cannot read that all-important part of the Judgment without being fixed with the clear impression that the Court was concerned to ensure that, in “a geographical situation of quasi-equality as between a number of States” whose “coastlines are in fact comparable in length”, steps should be taken to correct the distorting effect of a particular coastal configuration so as to ensure that one of the three States would not “enjoy *continental shelf rights* considerably different from those of its neighbours merely because” of that particular feature. The reference in the dispositif to “the element of a reasonable degree of proportionality … between the extent of the continental shelf areas appertaining to the coastal State and the length of its coast …” has to be read in the light of this driving concern to ensure, subject to any other relevant factors, a rough measure of equality of “*continental shelf rights*” in relation to coastlines that were “in fact *comparable in length*”. The Court's expressed objective of ensuring that no such State would “enjoy continental shelf rights considerably different from those of its neighbours” could obviously not be achieved without regard to the area of the continental shelf over which such rights would be exercised. This objective might of course involve, but was not limited to, equality in respect of the seaward extent to which the continental shelf of a State was to extend; the latter was primarily addressed by the separate *principle* or *rule of international law* that the delimitation was to be effected “without encroachment on the natural prolongation of the land territory of the other State (*I.C.J. Reports 1969*, p. 53, para. 101 (C) (1)). When the dispositif is thus construed, it is impossible to accept a parsing of its terms which results in a modest status for the third factor relating to reasonable proportionality. If this view is at variance with the position taken by the Court in the *Libya/Malta* case as to the status of the proportionality factor under the 1969 decision, I respectfully differ from that position (see *Libya/Malta*, *I.C.J. Reports 1985*, pp. 43–45, paras. 55–57).

99 For the same reasons, I have difficulty with Norway's argument that the concept of proportionality, as enunciated by the Court in 1969, was not one “of general application”. Naturally, the concept was stated in relation to the circumstances of the particular case, but I am unable to see that the broad reasoning on which it rested was incapable of general application. There is a noticeable want of principle to support the view that when the Court spoke of

> “the element of a reasonable degree of proportionality, which a delimitation carried out in accordance with equitable principles ought to bring about between the extent

of the continental shelf areas appertaining to the coastal State and the length of its coast" (*I.C.J. Reports 1969*, p. 54, para. 101 (D) (3)),

it considered that that prima facie equitable result was one which "*equitable principles ought to bring about*", but not in all cases. It may well be that that equitable result flows, in certain circumstances, directly from the application of the method of delimitation chosen, without need for any finishing adjustment; but this is an altogether different thing from saying that the result itself is not one which "equitable principles ought to bring about" in all cases. The result is always a valid objective, whether or not some specific or additional step is needed to accomplish it. It follows, too, that the fact that it is only in some circumstances that some specific or additional step may be required to achieve that objective does not make the objective one of modest importance.

100 Nor do I accept that the rationale underlying proportionality does not extend to the case of opposite coasts (cf. *I.C.J. Reports 1985*, p. 135, para. 18, Judge Oda, dissenting, and pp. 184–185, Judge Schwebel, dissenting). In the *Libya/Malta* case, the Court did not think there was any such limitation. The idea of proportionality is inevitably directed to a comparison of the extent to which effect should be given to competing claims to the continental shelf. Such a competition exists just as much in the case of claims to the continental shelf as between opposite coasts as it exists in the case of claims to the continental shelf as between adjacent coasts.

(iv) The Question Whether Proportionality May Operate as a Factor in the Process of Effecting a Delimitation, and Not Merely as an ex post facto Test of the Equitableness of a Delimitation Carried Out Without Reference to It

101 There is a great deal of authority in favour of the view, supported by Norway, that proportionality is only admissible as an *ex post facto* test of equity and operates only to correct — usually on a relatively minor scale — any inequities resulting from a delimitation by whatever method produced[1]. It can, no doubt, serve in that way ; but I am not persuaded that it must be so confined. There is nothing in the 1969 Judgment indicative of an intent to relegate it to service only as an *ex post facto* test of the equitableness of a delimitation carried out without reference to it. The first and second factors, relating respectively to the general coastal configuration and to the physical and geological structure and natural resources, could obviously be taken into account in the very process of effecting the delimitation. It is difficult to appreciate why the position has to be different as regards the third factor relating to proportionality.

102 Nor can I see that the position was different in the *Tunisia/Libya* case. The reasonable proportionality factor was reproduced in paragraph 133, subparagraph B (5), of the Judgment in terms almost identical with those of the 1969 formulation, except that, for obvious reasons, it was now to apply not in relation to "the length of [the] coast", but in relation to "the length of the relevant part of [the] coast". Also, reflecting the structure of the particular request to the Court, it was now stated as one of the "relevant circumstances … to be taken into account in achieving an equitable delimitation", and not as one of "the factors to be taken into account in the course of the negotiations" (*I.C.J. Reports 1982*, p. 93, para. 133 B (5), and *I.C.J. Reports 1969*, p. 53, para. 101 (D) (3)). But paragraph 133 A of the Judgment, which set out the "principles and rules of international law applicable for the delimitation", stated as the very first of these that "the delimitation is to be effected in accordance with equitable principles, and taking account of all relevant circumstances". Thus, proportionality having been stipulated as one of the relevant circumstances, the dispositif, read as a whole, was effectively propounding a principle or rule of international law which itself directed that the delimitation was to be effected in accordance with equitable principles and taking account of proportionality as a relevant circumstance. I am

not able to appreciate how anything in this could reasonably mean that proportionality was not after all to be taken into account in the process of effecting the delimitation, but that it was to serve merely as an *ex post facto* test of the equitableness of a delimitation which had been carried out without taking account of it. If the delimitation was carried out without taking account of proportionality, this would represent a direct breach of the direction in the dispositif that the delimitation should be effected taking account of all relevant circumstances, proportionality being explicitly stated as one of these. It is true that in paragraph 131 of the Judgment, the Court, referring to the ratio between coastal lengths and continental shelf areas, said :

> "This result, taking into account all the relevant circumstances, seems to the Court to meet the requirements of the test of proportionality as an aspect of equity." (*I.C.J. Reports 1982*, p. 91.)

There is a certain orthodoxy about the statement; but I do not consider it sufficient to off-set the interpretation of principle, which the dispositif itself bears, to the effect that the ratio between coastal lengths and continental shelf areas was to be treated not merely as an *ex post facto* test of the equitableness of the result, but as a factor in the actual delimitation process. This, at any rate, was how Judge Gros understood the Judgment (*ibid*., pp. 152–153, paras. 17 ff.). I think his understanding was right, both as to what the Court meant and as to what it in fact did.

103 To an extent there has always been a measure of unreality in the debate as to whether proportionality is limited to an *ex post facto* role, or as to whether it may also operate as a factor influencing the primary delimitation. There is some truth in Professor Prosper Weil's remark :

> "In practice the distinction is easily blurred: once chased out through the main door, proportionality has no difficulty in re-entering by the side doors of the disparity of coastal length and of the test *a posteriori*" (CR 93/9, p. 19, 21 January 1993, translation.)

But the true inference is not illegality, but inevitability. In the form of a comparison of coastal lengths, proportionality made a frontal appearance in the *Libya/Malta* case. There, the Court made a distinction between using a disparity in coastal lengths as an element in the determination of the delimitation line, and using, as an *ex post facto* test of the equitableness of the result, the proportion between coastal lengths and corresponding maritime areas, the latter being arithmetical, the former taken in the round (*I.C.J. Reports 1985*, pp. 49 ff., pp. 52 ff.; pp. 72 ff., Vice-President SetteCamara, separate opinion; pp. 82 ff., joint separate opinion; and pp. 138 ff., Judge Oda, dissenting). As I understand the case, the delimitation exercise consisted of two steps, the first step being the provisional establishment of a median line, and the second being the northward shift ofthat line. Thus, the disparity in coastal lengths, which was the reason for the northward shift, was taken into account in the very process of establishing the delimitation line. It was only after this had been done that the Court turned to consider the question of verifying the equitableness of the results of the delimitation so executed by reference to the ratios between coastal lengths and corresponding maritime areas (see, generally, *ibid*., pp. 48–55, paras. 66–75). Not surprisingly, no material discrepancy was disclosed.

104 And why “not surprisingly” ? Because, as a matter of common sense, there is no purpose in taking into account a disparity in coastal lengths in the process of effecting a delimitation unless the intention is that the disparity is to be reflected in the rights of the parties as assigned to them by the delimitation line. But now, if the question is asked what are these rights, the answer can only be rights over the continental shelf. And here comes the crucial question: How are these rights over the continental shelf estimated? Surely by reference to the areal division accomplished by the line. It is not easy to apprehend how it is possible to affirm that a disparity in coastal lengths may be taken into account in the process of determining a delimitation line, while firmly eschewing the making of any comparison, in the course of the same process, between the extent of that disparity and the extent of any disparity in the corresponding maritime areas which might be produced by any proposed line. The proposition presses sophistication to the point of disbelief.

105 Unless, when taking account of a disparity in coastal lengths in the process of effecting a delimitation, one at the same time has an eye to the ultimate effect of the operation on the extent of the maritime areas which the delimitation will assign to each claimant, the disparity in coastal lengths will not have been realistically taken into account when effecting the delimitation. Conversely, as the available cases suggest, where a disparity in coastal lengths has been realistically taken into account, any *ex post facto* test is unlikely to reveal anything inequitable in the result so far as proportionality between coastal lengths and continental shelf areas is concerned (see *Tunisia/Libya*, *I.C.J. Reports 1982*, p. 91, para. 131; and *Libya/Malta*, *I.C.J. Reports 1985*, pp. 53–55, para. 75, and p. 56, para. 78). Or, to put it another way, the very fact that in such cases the *ex post facto* test revealed no material disproportionality strongly suggests that, in the course of effecting the delimitation, account must in fact have been taken of the possible effect of the delimitation on the ratio between coastal lengths and maritime areas. That the *ex post facto* test revealed no material disproportionality was not a miraculous coincidence; it was a logical consequence of account having been realistically taken of the disparity in coastal lengths in the process of delimitation. It may be remarked that the dispositif in the *Libya/Malta* case treated “the disparity in the lengths of the relevant coasts” on the same footing as “the need to avoid in the delimitation any excessive disproportion” as between coastal lengths and continental shelf areas, both being referred to as “circumstances and factors to be taken into account in achieving an equitable delimitation” (*I.C.J. Reports 1985*, p. 57).

106 As mentioned above, the cases establish that proportionality as between coastal lengths cannot be used as a method of delimitation. Were proportionality to be used in that way, “it would”, as the Court said, “be at once the principle of entitlement to continental shelf rights and also the method of putting that principle into operation” (*ibid*., p. 45, para. 58). But the point to be emphasized is that the Court did accept it as “the principle of entitlement”. That is important because earlier in the same Judgment the Court said,

> “Neither is there any reason why a factor which has no part to play in the establishment of title should be taken into account as a relevant circumstance for the purposes of delimitation,” (*Ibid*., p.35, para. 40; and see *ibid*., pp. 46–47, para. 61.)

This statement may reasonably be thought to suggest that proportionality, being “the principle of entitlement”, is admissible as a relevant factor for the purpose of delimitation, even if it cannot by itself serve as a method for constructing any particular line.

107 In brief, it is not possible to overlook the fact that it is “the extension in space of the sovereign powers and rights” of the State through its coastal front which generates its entitlement to continental shelf rights (*Aegean Sea Continental Shelf, I.C.J. Reports 1978*, p. 35, para. 85, and p. 36, para. 86; *Tunisia/Libya*, *I.C.J. Reports 1982*, p. 61, paras. 73–74; *Libya/Malta*, *I.C.J. Reports 1985*, pp. 40–41, paras. 47, 49, and p. 83, para. 21, joint separate opinion); that “the coast of the territory of the State is the decisive factor for title to submarine areas adjacent to it” (*Tunisia/Libya*, *I.C.J. Reports 1982*, p. 61, para. 73; emphasis added); that a longer coast will tend to generate a greater area of continental shelf than a shorter coast, as implied in the *North Sea* cases (*I.C.J. Reports 1969*, p. 54, para. 101 (D) (3)); and that, consequently, where there is a lack of comparability between the two coasts in question, this should in principle enter as a factor into the very process of establishing the delimitation line with a view to ensuring a tolerable relationship between coastal lengths and continental shelf areas.

Part III. The Disparity In Coastal Lengths

108 A preliminary remark is this. On both of the proposals presented, Jan Mayen would get a maritime area greater than what is proportionate to its coastal length; this is so even on Denmark's proposal. There is no suggestion that the island's share should be strictly limited by proportionality. The question is whether the marked disparity in coastal lengths should be altogether disregarded. If it is, as it would practically be on Norway's proposal, a kilometre of Jan Mayen's coast would have six times as great a maritime area as a kilometre of the coast of East Greenland. Would the use of a median line which produces this result be equitable?

109 However odd its shape might be, a line of equidistance, if correctly drawn, is, from a geometrical point of view, never distorted (see *I.C.J. Pleadings, North Sea Continental Shelf*, Vol. II, p. 153, Mr. Jacobsen, Agent for Denmark). Yet, in response to particular geographical features, it could assume a configuration which might be regarded as creative of a special circumstance disqualifying it for use as an equitable boundary under Article 6, paragraph 1, of the 1958 Convention. Putting aside cases in which the configuration of the median line is so affected, are there situations in which the median line is disqualified for use by reason simply of the proportions in which it divides the continental shelf area? In this case, for example, would the disproportionality in areas produced by that line be a special circumstance disqualifying it for use? Denmark would answer in the affirmative; Norway in the negative.

110 In an interesting way each Party rested its case on the idea of equality, which however was understood in these different ways:

(a) equality in the sense of equal division of overlapping areas, as mentioned by the Court in 1969, a division which Norway contended would largely be accomplished by a median line, with any inequality being in favour of Denmark;

(b) equality in the sense in which a median line effects an equal division of the distance between opposite coasts ; and

(c) equality in the sense of comparing like with like, with the consequence that to treat coasts of unequal length as if they were of equal length would be to treat them unequally.

111 Norway contended for *(a)* and *(b)*; Denmark contended for *(c)*. They are dealt with respectively in Sections (i), (ii) and (iii) below. Inevitably, the treatment is not neatly compartmentalized, and permeating the whole is the question of proportionality considered in Part II. It may be added that, in general, Norway tended to de-emphasize proportionality and to stress equal division, while Denmark tended to stress proportionality and to de-emphasize equal division.

(i) Norway's Claim Considered on the Basis of the Case-Law concerning Equal Division of Overlapping Areas

112 I begin with the first of the two senses in which Norway rested its claim to a median line on the idea of equality. This is the sense in which the case-law speaks of equal division of overlapping areas.

113 I understood Norway to be contending that what has to be delimited is not the whole of the continental shelf lying between the two opposite coasts, but only the smaller part within this wider area which is enclosed by the two overlapping 200-mile lines projected from each coast; that the principle established by the case-law is that this area of overlap should be divided equally; and that, although the median line would tend to favour Greenland somewhat even within the area of overlap, yet, from a practical point of view, it would effect a fairly equal division of this area (Counter-Memorial, Vol. I, pp. 124–126, paras. 421–424; pp. 147–148, paras. 498–502; and Rejoinder, pp. 170 ff.).

114 There are two questions which I propose to examine. First, is the premise of Norway's position correct, in so far as it seems to be asserting that what is being delimited is not the entire continental shelf lying between the two opposite coasts, but only the smaller area of overlap lying in the middle of the larger area? Second, in so far as the case-law speaks of the area of overlap being divided by the median line equally, does it contemplate all conceivable cases regardless of disparities in coastal lengths, or only cases in which the coastal lengths are comparable?

115 As to the first question, naturally the delimitation line would not lie outside the area of overlap. But, once constructed, what the line delimits is not the area of overlap, but the continental shelf lying between the two opposite coasts. This must be so because what Article 6, paragraph 1, of the 1958 Convention speaks of is “the boundary of the continental shelf appertaining to [opposite] States” — words which I would construe to refer to a boundary relating to the entire continental shelf lying between the opposite coasts. Likewise, paragraph 3 of the provision speaks of “delimiting the boundaries of the continental shelf”.

116 Even if it is only the area of overlap which is being delimited, the delimitation must take account of the factor of a reasonable degree of proportionality, and this in turn takes account of the ultimate effect of the delimitation line on the position of the parties within the whole of the continental shelf areas appertaining to them (*North Sea, I.C.J. Reports 1969*, p. 54, para. 101 (D) (3), and *Libya/Malta*, *I.C.J. Reports 1985*, pp. 54–55, para. 75). That factor will obviously have to be taken into account in relation to the whole of the continental shelf in a case in which, the distance between the coasts being less than 200 miles, the whole of the shelf is within the area of overlap. I cannot see that it can apply any the less to the whole of the continental shelf where, as in this case, the distance is greater than 200 miles.

117 Thus, it cannot, in my view, be right to proceed on a premise which suggests that the equitableness of a delimitation line is not affected by the repercussions of the line on the continental shelf outside the inner area of overlap within which the line is constructed.

118 Now to the second question, as to whether the case-law on equal division contemplated all conceivable cases regardless of disparities in coastal lengths.

119 The arguments reached back to two ways in which the 1969 Judgment dealt with the matter. The passage which was emphasized by Norway was the following :

> "The continental shelf area off, and dividing, opposite States, can be claimed by each of them to be a natural prolongation of its territory. These prolongations meet and overlap, and can therefore only be delimited by means of a median line ; and, ignoring the presence of islets, rocks and minor coastal projections, the disproportionally distorting effect of which can be eliminated by other means, such a line must effect an equal division of the particular area involved." (*I.C.J. Reports 1969*, p. 36, para. 57.)

The passage which was stressed by Denmark was this :

> "In a sea with the particular configuration of the North Sea, and in view of the particular geographical situation of the Parties' coastlines upon that sea, the methods chosen by them for the purpose of fixing the delimitation of their respective areas may happen in certain localities to lead to an overlapping of the areas appertaining to them. The Court considers that such a situation must be accepted as a given fact and resolved either by an agreed, or failing that by an equal division of the overlapping areas, or by agreements for joint exploitation, the latter solution appearing particularly appropriate when it is a question of preserving the unity of a deposit." (*I.C.J. Reports 1969*, p. 52, para. 99. And see *ibid.*, p. 53, para. 101 (C) (2).)

Relying on this passage, and on the associated elements of the dispositif, Denmark concluded that :

> "the asserted principle of equal division supposed to be derived from that case was to apply only in those marginal areas of overlap, not in the delimitation as a whole" (Reply, Vol. I, p. 153, para. 416).

120 Both of the two passages from the 1969 Judgment speak of equal division. But there is one element in the first passage which is absent from the second, namely, a reference to the use of the median line in a delimitation between opposite States. The second passage prescribed the objective (barring agreement) of equal division of marginal areas of overlap, but stipulated no particular method of delimitation for achieving it; equal division does not necessarily imply the use of the median line. In view of this difference, I am not able to accept Denmark's submission that the idea of equal division, as referred to in the first passage, is restricted to the case of marginal areas of overlap dealt with in the second.

121 But the question remains whether the idea of equal division applies to every delimitation as between opposite States regardless of disparities in coastal lengths. Here it is worth bearing in mind that a court in making a statement cannot always visualize all the varied circumstances to which it may later be sought to apply the statement. Is it really clear that, in speaking in 1969 of equal division by a median line of the continental shelf between "opposite States", this Court visualized all conceivable cases, however peculiar, in

which one State may be said to be “opposite” to another? What was the picture in its mind when it spoke of “opposite States”? The thing furthest from the mind of the Court was a situation in which a small island and a long mainland coast were confronting each other as the primary components of the relevant geographical area. The sense in which the Court considered the position of islands was that in which “islets, rocks and minor coastal projections” might operate to distort a median line (*I.C.J. Reports 1969*, p. 36, para. 57). With the view which the Court then took of natural prolongation as being physical in character, it is doubtful that it would have entertained the idea of the natural prolongation of a small island coast realistically meeting and overlapping with the whole of the natural prolongation of a mainland coast nine times as long, in the practical sense in which the natural prolongations of two comparable and opposite coasts would. It is even less likely that the Court would have taken that view where the distance between the coasts was as great as it is in this case.

122 Referring to the Court's 1969 dictum on the principle of equal division by a median line, counsel for Norway cited the following comment in the ninth edition of Oppenheim's *International Law* (Vol. 1, p. 779, fn. 10):

> “But of course, except in the unlikely case of exactly corresponding coastlines, a median line never does effect an *equal* division of areas, nor does it seek to do so.” (CR 93/7, p. 51, 19 January 1993, Professor Brownlie.)

One readily agrees. The point had in substance been made to the Court in the course of the oral arguments concerning Judge Sir Gerald Fitzmaurice's third question. In his answer, Sir Humphrey Waldock expressly stated “that even median lines by no means guarantee an equal division of areas whether in a narrow or more extensive continental shelf (*I.C.J. Pleadings, North Sea Continental Shelf*, Vol. II, p. 275. And see *ibid.*, pp. 163 and 248 ff.). It would not be right to suppose that the Court overlooked the point ; nor had it been given any good reason to disagree with it. So the question which arises is this. When the Court said that a median line “must” divide areas equally, did the Court fall into error, regard being had to the fact that a median line does not always do that? Or, would the more reasonable interpretation be to read the Court's reference to equal division by a median line as contemplating cases in which two States were “opposite States” in the sense of having coastlines which were comparable and which could in consequence lead to equal division by a median line, at any rate with the non-mathematical roughness tolerable in maritime delimitation? Recognizing that some circularity of argument is not altogether absent, I would nevertheless elect for the second view and conclude that, when the Court said that a median line “must effect an equal division”, it could not have intended to include situations in which a median line could not possibly achieve that result, such as the instant case in which one coast is nine times as long as the other. In my opinion, there is no compelling basis for suggesting that the Court's reference to a median line as effecting an equal division was intended to apply in all conceivable situations in which prolongations overlapped; manifestly a median line could not always do that, and the Court might reasonably be credited with knowing this.

123 Counsel for Norway cited certain other decisions which referred to paragraph 57 of the Court's 1969 Judgment, or to the principle it enunciated, namely, the cases of the *Gulf of Maine*, Libya/Malta and the *Anglo-French Arbitration*. These do not really take the matter further.

124 In referring to the question of equal division by a median line, the Chamber in 1984 expressly incorporated an important caveat when it said —

> "it is inevitable that the Chamber's basic choice should favour a criterion long held to be as equitable as it is simple, namely that in principle, *while having regard to the special circumstances of the case*, one should aim at an equal division of areas where the maritime projections of the coasts of the States between which delimitation is to be effected converge and overlap." (*Gulf of Maine, I.C.J. Reports 1984*, p. 327, para. 195; emphasis added.)

In that case, in which the disparity in coastal lengths in the second segment was much less than it is here (the ratio there being 1.38 to 1 as against 9.2 to 1 in this case), the median line was appropriately adjusted. Several references by the Chamber (cited by Counsel for Norway) to the idea of equal division do show the importance the Chamber attached to the idea; they do not show that the Chamber considered that any and every area of overlap was always to be divided equally, whether by a median line or otherwise[1]. On the contrary, the Chamber said :

> "The applicability of this method is, however, subject to the condition that there are no special circumstances in the case which would make that criterion inequitable, by showing such division to be unreasonable and so entailing recourse to a different method or methods, or, at the very least, appropriate correction of the effect produced by the application of the first method." (*Ibid.*, pp. 300–301, para. 115.)

And the Chamber explicitly considered the modest disparity in coastal lengths in that case as "particularly notable" and as amounting to "a special circumstance of some weight" (*ibid.*, p. 322, para. 184).

125 In the *Libya/Malta* case, in which the Court recited paragraph 57 of the 1969 Judgment, the median line was not used as the boundary; it was only used "by way of a provisional step in a process to be continued by other operations …" (*I.C.J. Reports 1985*, p. 47, para. 62). The Court adjusted the results produced by the median line precisely in order to take account of a marked disparity in coastal lengths. The ultimate result was not at all to divide the area equally between the two States ; the State with the longer coast got much more.

126 In the *Anglo-French Arbitration*, the Court of Arbitration said :

> "In a situation where the coasts of the two States are opposite each other, the median line will normally effect a broadly equal and equitable delimitation. But this is simply because of the geometrical effects of applying the equidistance principle to *an area of continental shelf which, in fact, lies between coasts that, in fact, face each other across that continental shelf*. In short, the equitable character of the delimitation results not from the *legal* designation of the situation as one of 'Opposite' States *but from its actual geographical character as such*." (*RIAA*, Vol. XVIII, p. 112, para. 239; first emphasis added.)

The Court of Arbitration was indeed speaking of broadly equal division of the continental shelf by a median line. But how a median line could divide the intervening continental shelf equally where the opposite coasts are markedly unequal is thoroughly unclear. On the facts, this was not the kind of situation which the Court of Arbitration envisaged. What it had in

mind was “an area of continental shelf which, in fact, lies between coasts that, in fact, face each other across that continental shelf”. In such a case,

> “the equitable character of the delimitation results not from the *legal* designation of the situation as one of ‘Opposite’ States *but from its actual geographical character as such*”.

I hesitate to imagine that the Court of Arbitration would have used these fact-oriented descriptions in the case of a small island coast confronting a mainland coast nine times as long. That it did not contemplate such a case is shown by paragraph 182 of its decision, reading :

> “Between opposite States, as this Court has stated in paragraph 95, a median line boundary will in normal circumstances leave broadly equal areas of continental shelf to each State and constitute a delimitation in accordance with equitable principles. It follows that where the coastlines of two opposite States are themselves approximately equal in their relation to the continental shelf not only should the boundary in normal circumstances be the median line but the areas of shelf left to each Party on either side of the median line should be broadly equal or at least broadly comparable. Clearly, if the Channel Islands did not exist, this is precisely how the delimitation of the boundary of the continental shelf in the English Channel would present itself.” (*RIAA*, Vol. XVIII, p. 88.)

Thus, the Court of Arbitration was speaking of a broadly equal division being produced by a median line “in normal circumstances”, as “where the coastlines of two opposite States are themselves approximately equal in their relation to the continental shelf”. It was in such cases that the use of the median line would be equitable.

127 In my opinion, the case-law on equal division does not speak against Denmark.

(ii) Norway's Claim Considered on the Basis that a Median Line Effects an Equal Division of the Distance between Opposite Coasts

128 Now to the second sense in which Norway rested its claim to a median line on the idea of equality. This is the sense in which a median line effects an equal division of the distance between opposite coasts.

129 I agree with Norway's argument that what the median line operates to divide equally is the distance between the two opposite coasts, and not necessarily the maritime area. Unless the two opposite coasts are mirror images of each other, both in configuration and in length, a median line will not divide the maritime area equally. Equality, where it is achieved, is really an aspect of proportionality. And so it may be added more generally that a median line will not necessarily divide the area in proportion to the coastal lengths where these are unequal. Clearly, ideal situations in which exact proportionality can be achieved cannot be the only ones in which Article 6, paragraph 1, of the 1958 Convention contemplated that the median line would be the boundary. Hence, as I understand the Norwegian case, where that provision operates to prescribe the median line as the boundary, the median line is the boundary even if it does not in fact divide the maritime area in proportion to coastal lengths. True; but, in order to avoid a *petitio principii*, it is necessary to bear in mind that whether in any given situation the provision really operates to prescribe the median line as the boundary depends on whether or not a median line will be creative of inequity. In my opinion, this, though obviously a matter of degree, turns, in the circumstances of this case, on the extent to which a median line fails to satisfy the

element of a reasonable degree of proportionality as between the coastal lengths and the corresponding maritime areas.

130 By reason of a radial effect which favours the circular over the linear, a given length of a typical island coast will generate a greater continental shelf area than the same length of a typical mainland coast. It may be said that this is an advantage which the law confers on an island and that there is no reason why it should be deprived ofthat advantage where it happens to lie less than 400 miles off a mainland coast (including that of a large island such as Greenland). But it seems to me that there is an equitable distinction between the case of an island enjoying that advantage where it lies in the open sea beyond that distance and the case where it lies within that distance opposite to another coast. In the former case, the enjoyment by the island of its advantage does not affect the right appertaining to any other coast; in the latter case, it does. On Norway's proposal, Jan Mayen, with a coastal front of 54 kilometres, would have a maritime zone of 96,000 square kilometres; East Greenland, with a coastal front of 504 kilometres, would have a maritime zone of 141,000 square kilometres. Each kilometre of Jan Mayen's coast would therefore generate a maritime zone six times as great as that generated by a kilometre of East Greenland's coast. To say that the island is entitled by law to a line which accords to a given length of its coast six times the continental shelf area appertaining to the same length of the opposite mainland coast and that what the law gives should not be withheld, is to exclude equity altogether from the calculations which produce so disproportionate a result. If the matter fell to be governed by Article 83, paragraph 1, of the Law of the Sea Convention of 1982, it might be fairly doubted whether such a disproportionality would rank as an “equitable solution”.

131 Responding to Denmark's arguments about disproportionality, Norway observed that, where, as in this case, the two coasts are of unequal length, a median line would operate to give the larger area to the longer coast. This is true ; to an extent it can be said that the median line does take account of a disparity in coastal lengths and that there would be duplication if that disparity were to be separately or additionally treated. But, although the median line would leave a larger area to the longer coast, this would not necessarily ensure that there is no excessive disproportionality.

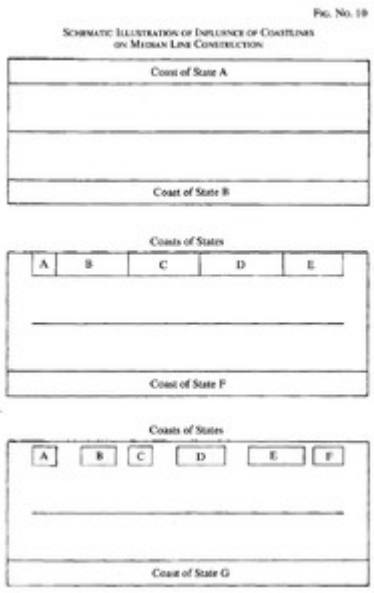
132 Objectively considered, there is nothing in the geography of the relevant area to suggest that each kilometre of Jan Mayen's coast must generate six times as much continental shelf as a kilometre of the relevant coast of East Greenland, as would be the case on Norway's proposal. True, the idea of the continental shelf is a creature of law. But, even so, in a case of this kind one is supposed to be delimiting a maritime area between opposite physical coasts. This area -the “relevant area” — is the territory covered by converging projections from each opposite coast (see the reasoning in *Tunisia/Libya*, *I.C.J. Reports 1982*, pp. 61–62, para. 75). Norway did not present any idea of the relevant area, but Denmark did. I accept Denmark's idea of the area as accurate. It is represented roughly by the figure AEFB, BCDG, GH and HA shown in sketch-map No. 1 included in the Judgment. When this figure is interpreted in the light of the pertinent material, it will be seen that the relevant area which it represents is bounded on the west wholly by 504 kilometres of the coast of East Greenland, but that on the east it is only in very small part that it is bounded by 54 kilometres of the coast of Jan Mayen. On the east, it is bounded by the western coast of Jan Mayen notionally projected 200 miles to the north and 100 miles to the south-west up to the outer limit of Iceland's maritime area (see Memorial, Vol. I, Map II; Rejoinder, Map VI; Reply, Vol. I, Map V; and Figs. 12,14and 15, presented by Denmark). The use of a median line means that what is being divided is not the space between East

Greenland and Jan Mayen, but the space between East Greenland and the western coast of Jan Mayen artificially extended to the north and to the south-west.

133 Hence, when Norway insists on “the legal equality of a median line” (CR 93/7, p. 58, 19 January 1993, Professor Brownlie), in the sense of equality in the seawards reach of the generating capacity of each coast, it is a legal equality which carries with it the benefit to Norway of being applied to an area the eastern boundary of which can only theoretically be said to be represented by Jan Mayen, whereas the western boundary is practically coterminous with the relevant coast of East Greenland.

134 It was the argument of Denmark that, in the case of a short island coast confronting a long mainland coast, equity could not be achieved unless the delimitation line were drawn nearer to the short coast than would be the case if a median line were used, so as to avoid any excessive disproportionality. Norway disagreed.

135 To illustrate its criticisms of Denmark's proposition, Norway introduced Figure No. 10, reproduced on the following page. It shows, as one would expect, that, as between two equal and parallel coastlines (one lying north of the other) a median line accomplishes an equal division of the intervening maritime space. Norway, however, understood Denmark's reasoning to have the consequence that, if the northern coast were broken up among several different States, then



View full-sized figure

Schematic Illustration of Influence of Coastlines on Median Line Construction

> “the long coast [on the south] would by its length alone lead to a location of each of the several [maritime] boundaries to the north of a median line between the physical coastlines” (CR 93/11, p. 45, 27 January 1993, Professor Brownlie).

If that were the consequence of Denmark's reasoning, it would be plainly inequitable, tending, as it would, to favour the southern coast as against the northern coast taken as a whole, both being equal in length. But, contrary to Norway's analysis, each of the short coasts on the north would not, in that situation, be facing the whole of the long coast on the south. If the northern long coast came to be divided up among several States, any tendency in the projections of each resulting short coast to fan out seawards would be confined by an opposing tendency generated from the neighbouring short coast (*Libya/Malta*, *I.C.J. Reports 1985*, pp. 79–80, para. 10, and p. 80, para. 14, joint separate opinion). The projections from

any given short coast would not oppose those from the whole of the opposite long coast. In the result, in the case of any of the short coasts, the relevant opposite coast would be, not the whole of the opposite long coast, but only that small part of it which was equal to that of the short coast. Thus the relevant coasts would be two equal and parallel short coasts, and the maritime space between them would be equally — and equitably — divided by a median line. Denmark's arguments do not lead in such a case to a northward shift in the position of the median line, and its thesis cannot be faulted on the basis that it would produce inequitable results if such a shift were made. So too if the northern long coast were broken up into a series of islands, each near to the other; for, in such a case, the radial projections of each island would be cut off by those of the island next to it, with the result that the coast of each island would be left to face only a corresponding length of the southern long coast and not the whole of the latter.

136 Denmark's submission that a shift is required to achieve equity is directed only to the case where an otherwise isolated short coast — such as that of a small island standing alone in the open seas — confronts a long mainland coast, such as the relevant part of the coast of East Greenland. Removing from Figure No. 10 all elements not relevant to such a case, it will be apparent from the remaining elements that in such a case — the case presented by Denmark — a median line will indeed divide the maritime area so as to give to each kilometre of the short coast a markedly greater area of the maritime zone than it would give to each kilometre of the opposite long coast. Granted that mathematical equality is not the criterion, yet where, as in this case, the discrepancy in areas attributable to a kilometre of each coast is in the order of a ratio of 6:1 in favour of the short coast, insistence that “legal equality” is nevertheless satisfied because the distance between the coasts is still equally divided by the median line becomes too remote from common understanding to satisfy the kind of practical equality that it should be the aim of equity to achieve in international relations. In my opinion, a disproportionality of that magnitude amounts to an inequity disqualifying the median line as an equitable method of delimitation.

(iii) Denmark's Claim Considered on the Basis of Equality in the Sense of Treating Like with Like

137 At this stage, the main features of Denmark's case will have sufficiently appeared from the foregoing. It is, of course, based on considerations relating to proportionality. But there is a particular feature of this concept which Denmark invoked. In the words of the Court, “the essential aspect of the criterion of proportionality is simply that one must compare like with like” (*Tunisia/Libya*, *I.C.J. Reports 1982*, p. 91, para. 130). Or, as it also said, “the only absolute requirement of equity is that one should compare like with like” (*ibid.*, p. 76, para. 104). I believe it was in this sense that counsel for Denmark submitted that to treat coasts of unequal length as if they were of equal length is to treat them unequally (CR 93/10, p. 51, 25 January 1993, Professor Bowett).

138 There are warnings in the books, doubtfully made, that the common law maxim “Equality is equity” needs qualification when sought to be extended to the field of international law. In international relations, situations tend to become highly individualized, perhaps, it is said, even more so than at the municipal level, and an equality of treatment which entirely neglects an inequality of conditions and their results can lead to grave injustice (Charles De Visscher, *De l'équité dans le règlement arbitral et judiciaire des litiges de droit international public*, 1972, pp. 7, 8, 32 ; and *Minority Schools in Albania, P.C.I.J., Series A/B, No. 64*, p. 4, at p. 19). Consequently, “Rétablir l'équilibre entre des situations différentes, tel peut tre l'objet d'une égalité qui répond à l'équité” (Charles De Visscher, *op. cit.*, p. 7. And see Paul Reuter, “Quelques réflexions sur l'équité en droit international”, *Revue belge de droit international*, 1980-I, Vol. XV, p. 165, at pp. 170–173). I construe that and similar statements to the effect that equity is concerned with the achievement of a balance or equilibrium of competing interests as meaning that, where the positions being

considered are materially different, equality translates out as proportionality so as to achieve an equality in relations. The substance of the idea was expressed by Judge Tanaka when, dealing admittedly with another area of the law, he said :

> "the principle of equality before the law does not mean the absolute equality, namely equal treatment of men without regard to individual, concrete circumstances, but it means the relative equality, namely the principle to treat equally what are equal and unequally what are unequal" (*South West Africa, I.C.J. Reports 1966*, pp. 305–306, dissenting opinion).

The common law maxim is not really deficient on the point, it being accepted, at least today, that "the word 'equality' in the maxim means not literal equality but proportionate equality" (R. P. Meagher, W. M. C. Gummow and J. R. F. Lehane, *Equity, Doctrines and Remedies*, 3rd ed., 1992, p. 87, para. 330).

139 It is indeed the case that, as the Chamber said in the *Frontier Dispute* case:

> "Although 'Equity does not necessarily imply equality' (*North Sea Continental Shelf, I.C.J. Reports 1969*, p. 49, para. 91), where there are no special circumstances the latter is generally the best expression of the former." (*I.C.J. Reports 1986*, p. 633, para. 150.)

Thus, subject to reasonable exceptions for "special circumstances", the idea of equality is central to equity. What the Court said in 1969 was that "[e]quity does not necessarily imply equality" (*North Sea, I.C.J. Reports 1969*, p. 49, para. 91); the Court did not say that "[e]quity does not imply equality". To abstract the idea of equality altogether from equity is at once to denude the latter of meaning and to disfigure the Court's statement on the subject. But, while the Court did not therefore exclude the idea of equality from equity, it did emphasize that "[e]quality is to be reckoned within the same plane" (*ibid*., p. 50, para. 91). This was why the Court was concerned, in the circumstances of the case, to ensure that States with comparable coastlines should be accorded practical equality of treatment. That too was why the Court was equally unable to accept that "there could [ever] be a question of rendering the situation of a State with an extensive coastline similar to that of a State with a restricted coastline" (*ibid*., pp. 49–50, para. 91). I should have thought that this straightforward and pertinent statement of principle was directly threatened where a coastline nine times as long as another was assigned an area of the continental shelf just one and a half times as large as that assigned to the other. Yet that would be the consequence in this case unless the disparity in coastal lengths could be regarded as a special circumstance displacing the use of the median line. Can it be so regarded ?

140 Responding to Denmark's claim that Jan Mayen, *par excellence*, is a special circumstance, Norway contends that a special circumstance is some incidental physical feature which would distort a median line fixed by reference to the primary components of the relevant geographical region; that Jan Mayen is not such an incidental physical feature but is itself one of the components of the delimitation area; and that it cannot in consequence be a special circumstance in the delimitation of its own coastal projections. The situations in some cases support Norway's idea of a special circumstance. See, for example, the *North Sea* cases, the *Anglo-French Arbitration*, and the *Tunisia/Libya* case. Cases in which some islet or other physical feature between opposite coasts would operate to impart an unduly distorting effect on a median line are obviously not apt in this case. Denmark's attempt, in the course of the written pleadings, to treat Jan Mayen itself as occurring "on the wrong side" of a delimitation line between mainland Norway and Greenland (Reply, Vol. I, p. 109, para. 299) was rightly not pursued in the oral arguments,

there being no question of any continental shelf between these two territories falling to be delimited.

141 How then can Jan Mayen be a special circumstance? The question turns on another: what is the scope of "special circumstances"? In the *North Sea* cases, the Court itself referred to "still unresolved controversies as to the exact meaning and scope of this notion" (*I.C.J. Reports 1969*, p. 42, para. 72. See also *ibid*., p. 254, Judge *ad hoc* Sorensen, dissenting). And in 1977 the Anglo-French Court of Arbitration had reason to note that

> "Article 6 neither defines 'special circumstances' nor lays down the criterion by which it is to be assessed whether any given circumstances justify a boundary line other than the equidistance line" (*RIAA*, Vol. XVIII, p. 45, para. 70).

It is useful, however, to recall the statement of Judge Lachs in his dissenting opinion in the *North Sea* cases that "the application of the rule [of equidistance], and the admission of possible exceptions from it, call for a reasonable approach"; as he remarked, "'Reasonableness' requires that the realities of a situation, as it affects all the Parties, be fully taken into account" (*I.C.J. Reports 1969*, p. 239).

142 Adhering to my opinion that "special circumstances" within the meaning of Article 6 of the 1958 Convention are narrower than "relevant circumstances" at customary international law, it nevertheless appears to me that the former could reasonably encompass a variety of situations.

143 I do not think that I need take up a position on the question whether *a priori* a primary component of a relevant area may not be a special circumstance. The real question is not whether Jan Mayen is *per se* a special circumstance, but whether the relationship between Jan Mayen and Greenland is a special circumstance. No doubt, the International Law Commission had in mind particular physical features or irregularities which would have an unduly distorting effect on an equidistance line that would otherwise be required (*North Sea, I.C.J. Reports 1969*, pp. 92–94, Judge Padilla Nervo, separate opinion; *Tunisia/Libya*, *I.C.J. Reports 1982*, pp. 187 ff., Judge Oda, dissenting; and *Libya/Malta*, *I.C.J. Reports 1985*, pp. 142 ff., Judge Oda, dissenting). But it would seem to me that the true underlying principle is that a circumstance is a special circumstance if it is such as to render the use of the median line inequitable. Thus viewed, special circumstances could include circumstances in addition to those which impart some peculiar shape to the median line. Even assuming that Jan Mayen is not *per se* a special circumstance, the disparity between its coastal length and that of East Greenland would render the use of the median line inequitable and is accordingly a special circumstance.

144 In the *Libya/Malta* case, Judge Oda, dissenting, remarked :

> "The technique of the present Judgment involves taking the entire territory of one Party as a special circumstance affecting a delimitation …" (*I.C.J. Reports 1985*, pp. 138–139, para. 27.)

Judge Oda was critical of the Judgment on the point. Whether his criticisms were justified or not does not affect the correctness of his perception that the Court had in reality treated "the entire territory of one Party as a special circumstance" — or perhaps, more accurately, the entire coastline of the territory of one Party in its relationship with that of the other. The coastlines involved were, of course, those of a small island and that of an opposite long mainland coast. The island in this case is not only a small one facing a long mainland coast; it is an *isolated* small island facing a long mainland coast — isolated in the particular sense that its radial projections, in relation to the long coast, are not constrained by the

projections from any third coasts. I am of opinion that this constitutes a special circumstance which excludes the use of the median line under Article 6, paragraph 1, of the 1958 Convention, and support the finding of the Court to the same effect.

(iv) The Fishery Zone

145 The foregoing observations concerned the continental shelf and were premised on the applicable law being that laid down in the 1958 Convention. In contrast, the delimitation of the fishery zone is governed by general international law. The conclusion reached in relation to the continental shelf is however applicable in principle to the case of the fishery zone, in the sense that, taking account of the relevant circumstances, equitable principles would preclude the use of the median line for its delimitation.

Part IV. The Determination Of An Equitable Line

146 Proportionality by itself cannot serve as a method of delimitation, but, in the special circumstances of the case, it would indicate a line lying somewhere between Denmark's 200-mile line and the western outer limits of Jan Mayen's territorial sea. Since the maximum limit under contemporary international law for the continental shelf in this case is 200 miles, Denmark submits that the delimitation line is the 200-mile line proposed by it. Norway's criticism that this involves a correction of equity by law is attractive but not convincing. I do not interpret Denmark's reference to a possible line beyond the 200-mile limit as being a reference to a line fixed by equity in opposition to one fixed by law, so that equity would then have to be corrected by law. It is only a step in the theoretical reasoning employed by Denmark to demonstrate the extent to which equity would give effect to what it perceives to be the fair intent of the law in the special circumstances of the case, that extent being bounded by the 200-mile limit fixed by the law. Equity itself being part of the law, there is no question either of equity correcting law or of law correcting equity.

147 Denmark's 200-mile line would yield an areal ratio of 6.64 to 1 in favour of Greenland, as against a coastal length ratio of 9.2 to 1 in favour of Greenland. So Jan Mayen would still be securing proportionately more than Greenland. But the problem with Denmark's approach, to which I have been otherwise much drawn, is that it would have the effect of assigning to Denmark the whole of the area lying between the two overlapping 200-mile lines. That point, which has been pressed by Norway, is not conclusive proof of infirmity in Denmark's argument; for, in the *North Sea* cases, the Court did visualize the possibility that a delimitation line could leave the “disputed marginal or fringe area… wholly to one of the parties”. It is, however, possible to interpret the Court's statement as suggesting that it would be more usual for the delimitation line to “divide it between them in certain shares, or operate as if such a division had been made” (*I.C.J. Reports 1969*, p. 22, para. 20).

148 Thus, while equity is not synonymous with splitting the difference, it is only in extreme conditions, if at all, that it would be right to exclude a party altogether from the “disputed marginal or fringe area”. I consider that those conditions come near to being satisfied in the special circumstances of this case, but not quite. Although I would have preferred a line lying somewhat more to the east of that determined by the Court and derived by way of a moderate westward shift of Denmark's line, I cannot say that my preference is so compellingly right as to disable me from adhering to the Judgment on this point.

149 I apprehend, however, that it is necessary to consider possible criticisms of the discretionary character of the decision. The method by which the line has been determined by the Court follows the precedent set in the *Libya/Malta* case. There, as has been seen, a two-stage procedure was applied involving the provisional drawing of a median line and a shift in the position of that line to take account of the disparities in coastal lengths, with the final line lying nearer to the short coast than to the long. The problem which this procedure presents is one of quantification of equity, in the sense of finding a rationale to justify the

extent to which the shift is made. Why exactly that extent? Why not a little more, or a little less ? The difficulty of finding a persuasive answer increases with the extent of the shift.

150 The problem is a familiar one in the field of exercising a judicial discretion. A residue of discretion is intrinsic to the judicial function (see Sir Robert Y. Jennings, "Equity and Equitable Principles", *Schweizerisches Jahrbuch für internationales Recht*, Vol. XLII (1986), p. 35, and *Gulf of Maine, I.C.J. Reports 1984*, p. 357, Judge Schwebel, separate opinion). The process of assessing damages offers an illustration; in such a case, as the Court itself observed, "the precise determination of the actual amount to be awarded could not be based on any specific rule of law" (*Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco, I.C.J. Reports 1956*, p. 100). It would not be right to suppose that observers who have expressed disquiet are unacquainted with the principle involved. Nor should it be felt that they consider it fatal that there is no "rule for the mathematical delimitation of maritime zones (*Fisheries Jurisdiction, I.C.J. Reports 1974*, p. 96, Judge de Castro, separate opinion). They recognize that within bounds, which may well be ample, judicial discretion is available to fill the gap (*Libya/Malta*, *I.C.J. Reports 1985*, p. 187, Judge Schwebel, dissenting). But, as was observed by President Bustamante y Rivero speaking of Spanish administrative law, "a discretionary power by no means implies an arbitrary one" (*Barcelona Traction, Light and Power Company, Limited, I.C.J. Reports 1970*, pp. 59–60, separate opinion). In the field of maritime delimitation, where the margin of appreciation is as wide as it is, the difficulty is one of offering a satisfactory legal basis for any particular exercise of the discretion if the result is not to appear to be "a line which the Court has derived *ex nihilo*" (*Tunisia/Libya*, *I.C.J. Reports 1982*, p. 150, para. 14, Judge Gros, dissenting).

151 The Court has emphasized that its powers of appreciation in the application of equitable principles are to be distinguished from a power to decide *ex aequo et bono* (*Tunisia/Libya*, *I.C.J. Reports 1982*, p. 60, para. 71 ; and see *Libya/Malta*, *I.C.J. Reports 1985*, p. 39, para. 45, and *Gulf of Maine, I.C.J. Reports 1984*, p. 278, para. 59). Tightening up a less well-defined position taken in the *Tunisia/Libya* case, it has recognized too that the equity which it applies "should display consistency and a degree of predictability" (*Libya/Malta*, *I.C.J. Reports 1985*, p. 39, para. 45). The response, however, is that the equitable principles ; which the Court applies lack concreteness of content to the point where the Court is in fact exercising a range of discretion which is practically indistinguishable from a power to decide ex aequo et bono (see, generally, E. Lauterpacht, *Aspects of the Administration of International Justice*, 1991,pp. 124–130). In the words of Judge Gros :

> "A decision not subject to any verification of its soundness on a basis of law may be expedient, but it is never a judicial act. Equity discovered by an exercise of discretion is not a form of application of law." (*Gulf of Maine, I.C.J. Reports 1984*, p. 382, para. 37, dissenting. And see *Tunisia/Libya*, *I.C.J. Reports 1982*, p. 153, para. 18, Judge Gros, dissenting.)

Graver still is the warning "that an inordinate use of equity would lead to government by judges, which no State would easily accept" (*Gulf of Maine, I.C.J. Reports 1984*, p. 385, para. 41, Judge Gros, dissenting). Criticisms of this order of severity deserve consideration.

152 The judicial character of the Court, rightly emphasized by Judge Kellogg in *Free Zones of Upper Savoy and the District of Gex (P.C.I.J., Series A, No. 24)*, does not neutralize the fact that, pursuant to Article 38, paragraph 2, of its Statute, the Court, if authorized by the Parties, may act in disregard of existing international law (A. P. Fachiri, *The Permanent Court of International Justice*, 2nd ed., 1932, pp. 105–106; Dr. Max Habicht, *The Power of*

the Intemational Judge to Give a Decision "ex aequo et bono", 1935, pp. 20–27; and Charles De Visscher, *op. cit.*, pp. 21–26). In such a case,

> "the Court is not compelled to depart from applicable law, but it is permitted to do so, it may even call upon a party to give up legal rights. Yet it does not have a complete freedom of action. It cannot act capriciously and arbitrarily. To the extent that it goes outside the applicable law, or acts where no law is applicable, it must proceed upon objective considerations of what is fair and just. Such considerations depend, in large measure, upon the judges' personal appreciation, and yet the Court would not be justified in reaching a result which could not be explained on rational grounds." (M. O. Hudson, *The Permanent Court of InternationalJustice, 1920–1942* (1943 ed.), p. 620, para. 553.)

Although an *ex aequo et bono* power does not require a departure from principles of law, its hallmark is that it permits of such a departure. Where no such departure is in question, it is not correct to speak of a tribunal as acting *ex aequo et bono*, even where the tribunal may itself have used the term in describing its decision (see *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco, I.C.J. Reports 1956*, p. 100). No power to depart from principles of law is exercisable in an equitable delimitation by the Court. Wide as are the Court's powers of appreciation, they are powers conferred by the law itself; their exercise results in a judicial definition of the existing legal relations between the parties, and not in a legislative creation of new legal relations displacing existing ones between them (see, generally, Sir Hersch Lauterpacht, *The Development of International Law by the International Court*, 1958, p. 213, para. 68 ; and, also by him, *Private Law Sources and Analogies of International Law (with Special Reference to International Arbitration)*, 1927, pp. 65–66, para. 28). This being the case, it would not be right to regard an application by the Court of equitable principles as amounting to the assumption of a power to act *ex aequo et bono*.

153 Putting aside cases in which an arbitrator is restricted to determining which of two lines is the boundary, it seems appropriate to recall the words used by Hersch Lauterpacht when he wrote :

> "If [an arbitrator] chooses an intermediate line, there is no reason for maintaining with any degree of cogency that the boundary chosen is a common denominator arrived at through a process of compromise and mediation, as distinguished from a strictly judicial procedure. Unless he is expressly precluded by the terms of the arbitration agreement from adopting such a course, he may — in fact, he must — *by balancing the relative value of the arguments and proofs adduced by the parties*, fix a line which he deems to be correct in law. He may choose a line suggested by one party. But he need not necessarily do so." (Hersch Lauterpacht, *The Function of Law in the International Community*, 1933, p. 132; emphasis added.)

154 Writing earlier with reference to allegations that the result of the St. Croix boundary arbitration "was rather effected by negotiation than by a Judicial determination", J. B. Moore likewise remarked :

> "It certainly is true that the decision did not fully allow the claim of either party; but it is permissible to take the view that what appeared to the advocate of one of the parties, and no doubt equally to the advocate of the other party, to be a 'negotiation' rather than a 'Judicial determination', since it required the abandonment by each of a part of his contentions, was after all only an example of the *necessary process of adjustment, of the weighing of one consideration against another*, by which, in the

presence of proofs concerning the effect of which opinions may inevitably differ, concurrent and just human judgments, judicial and otherwise, are daily reached." (J. B. Moore (ed.), *International Adjudications Ancient and Modern*, 1930, Vol. 2, pp. 367–368 ; emphasis added.)

155 The individualization of justice, through the application of legal norms framed in terms of standards, in such a way as to reconcile a tolerable degree of predictability with the need to adjust to the peculiarities of a special situation is not the same as eclecticism or arbitrariness (see *Fisheries Jurisdiction, I.C.J. Reports 1974*, p. 56, footnote 1, Judge Dillard, separate opinion). To resort to such standards is to "recognize that within the bounds fixed each case is to a certain extent unique" (Roscoe Pound, *An Introduction to the Philosophy of Law*, 1930, p. 118. And see *ibid.*, pp. 113–120, and, also by him, "Hierarchy of Sources and Forms in Different Systems of Law", *Tulane Law Review* (1933), Vol. 7, p. 485). As has been said :

"When courts are required to apply such standards as fairness, reasonableness and non-arbitrariness, conscionableness, clean hands, *just* cause or excuse, *sufficient* cause, *due* care, adequacy, or hardship, then judgment cannot turn on logical formulations and deductions, but must include a decision as to what justice requires in the context of the instant case. This is recognised, indeed, as to many equitable standards, and also as to such notorious common law standards as 'reasonableness'. They are predicated on fact-value complexes, not on mere facts." (Julius Stone, *Legal System and Lawyers' Reasonings*, 1964, pp. 263–264; footnotes omitted. And see, generally, also by him, *The Province and Function of Law*, 1946, pp. 318–319, 325–326, 411–412.)

In such cases, it is only as the decision-maker approaches the limits of the available range of discretion that any particular decision (and no other) is compellingly right (Julius Stone, *Legal System and Lawyers' Reasonings*, 1964, p. 264).

156 "From Principles to Pragmatism : Changes in the Function of the Judicial Process and the Law" was the title chosen by Professor P. S. Atiyah for his inaugural lecture delivered before the University of Oxford on 17 February 1978 (*Iowa Law Review*, 1980, Vol. 65-II, p. 1249). The title, though challenging, speaks for itself. On the subject of "the modern version of Equity", he wrote :

"Surely there can be no doubt that the modern judicial discretion, sometimes statutory, but sometimes also self-granted, to do what is thought just according to all the circumstances of the case is the twentieth-century version of Equity." (*Ibid.*, p. 1255.)

A little later he added :

"The law… is now largely based on the assumption that the infinite variety of circumstances is such that the attempt to lay down general rules is bound to lead to injustice. Justice can only be done by the individualized, ad hoc approach, by examining the facts of the particular case in great detail and determining what appears to be fair, having regard to what has happened." (P. S. Atiyah, *op. cit.*, *Iowa Law Review*, 1980, Vol. 65-II, p. 1256.)

And then, referring to “an increasing tendency to use legal tools and techniques which have an in-built flexibility”, he cited as the “outstanding example… the very wide use made today of standards of reasonableness” *(ibid.)*. It is unlikely that the jurisprudential phenomena examined by Professor Atiyah have no counterpart in other legal systems, or that they are irrelevant to international law merely by reason of distinctions between equity in international law and equity in municipal law.

157 Nothing in these trends provides justification for dispensing with the need to define the area of judicial discretion by clear bounds, or to establish criteria governing its exercise within the prescribed limits. But it seems to me that such limits are to be found in the settled principle that the Court is concerned not to apportion common property, but to delimit rights already separately appertaining to each party. As argued above, a delimitation may indeed operate to settle definitively what is the extent of competing rights in marginal areas, but it does not have the effect of sharing out undivided property. The criteria governing a delimitation are also reasonably clear (see, for example, *Gulf of Maine, I.C.J. Reports 1984*, pp. 312–313, para. 157; and *Libya/Malta*, *I.C.J. Reports 1985*, pp. 39–40, para. 46). What remains is the task of weighing and balancing the operation of the applicable criteria within those limits. Admittedly, the process could be a difficult one, because, as the Court said in 1969, “The problem of the relative weight to be accorded to different considerations naturally varies with the circumstances of the case” (*North Sea, I.C.J. Reports 1969*, p. 50, para. 93). But difficulties of this kind experienced in discharging the task of the Court are not enough to take the Court beyond the province of the judicial mission.

158 The need to weigh and balance competing considerations necessarily places a limit on the capacity of a court to adjudicate with mathematical precision. Inability to demonstrate that level of exactness is not inconsistent with the due discharge of the judicial mission. To expect more is not merely to overestimate the judicial function; it is to misunderstand it. The misunderstanding is compounded where that function relates to maritime delimitation, a field in which it is particularly useful to bear in mind Professor Paul Reuter's general remark that international law “est nécessairement simple et un peu rustique” (*I.C.J. Pleadings, Temple of Preah Vihear*, Vol. II, p. 85). To be sure, there is substance in the view that “a decision cannot be equitable when litigants do not understand the decision, how it was reached, nor why such legal rules should be applied to” the situation[1]. However generously one may be inclined to locate the boundaries of judicial discretion, it has always to be exercised on a disciplined basis and with reference to verifiable criteria. Yet, looking at the nature of the Court's functions in this case and at a certain indeterminacy in the circumstances to be taken into account, I consider that there is a sufficiency of reasoning to sustain its view that neither Norway's claim to the median line nor Denmark's claim to the 200-mile line is right, and that an equitable line is that established by its Judgment.

Part V. The Competence to Establish a Single Line

159 Denmark seeks a single line for the continental shelf and the fishery zone. That I understand as including two separate but congruent lines. Norway contends that, except where the application of international law would ordinarily result in two separate but congruent lines, Denmark's request cannot be granted in the absence of a supporting agreement by the Parties, and that there is in fact no such agreement. Denmark's reply is that —

(a) the authority of the Court to fix a single dual-purpose line flows from the fact that the case relates to the delimitation of two zones, and that the agreement of the Parties to request the Court to fix such a boundary is not necessary ;

(b) alternatively, if such an agreement is necessary, it can be derived from the fact that each Party in its separate submissions is in fact asking the Court to fix a single boundary.

160 As to the first question, it is necessary to begin by noticing the relationship between the boundary in the continental shelf and that in the fishery zone. Whatever might be their precise relationship to the exclusive economic zone, the continental shelf and the fishery zone are each an instituion known to law. That is certainly the case with the continental shelf. It is equally the case with the fishery zone. Going back a long way in time (D. P. O'Connell, *The International Law of the Sea*, Vol. 1, 1982, pp. 510 ff.; and *Fisheries Jurisdiction, I.C.J. Reports 1974*, p. 82, Judge de Castro, separate opinion), the idea of the fishery zone evolved through customary international law, the question of extent being a particularly thorny one (*Fisheries Jurisdiction (United Kingdom* v. *Iceland), Merits, I.C.J. Reports 1974*, p. 23, para. 52. And see *ibid*., *Jurisdiction, I.C.J. Reports 1973*, pp. 24 ff., Judge Fitzmaurice, separate opinion, and pp. 40 ff., Judge Padilla Nervo, dissenting). In the *Gulf of Maine* case, the Chamber was concerned with 200-mile fishery zones established in 1977 by both Parties, “basing themselves on the consensus meanwhile achieved at the Third United Nations Conference on the Law of the Sea” (*I.C.J. Reports 1984*, p. 282, para. 68. And see *ibid*., p. 265, para. 20, and p. 278, para. 58). The Chamber assumed that such a fishery zone was an institution known to law. Whether the establishment today of a fishery zone is in reality a limited use of a wider competence deriving from the newer institution of the exclusive economic zone is an interesting question, particularly in view of the responsibilities involved in the latter (see Carl August Fleischer, “Fisheries and Biological Resources”, in René-Jean Dupuy and Daniel Vignes, *A Handbook on the New Law of the Sea*, Vol. 2, 1991, pp. 1055 ff.). But I do not consider it necessary to enter into that issue. The assumption made by the Chamber in the *Gulf of Maine* case that a 200-mile fishery zone established in 1977 was an institution known to law should not be less valid for the fishery zones in this case, which were established in 1980.

161 Now, it is possible to conceive of two sets of rights co-existing within the same physical space. Rights ofthat kind would be susceptible of delimitation by a single line. But the rights conferred by the continental shelf and the fishery zone do not exist within the same space. The continental shelf, which exists *ipso jure*, confers rights in respect of the natural resources of the sea-bed and the subsoil. The fishery zone, which requires to be established, confers rights in respect of the living resources of the superjacent water column. The latter is not “a mere accessory” of the underlying continental shelf (*Gulf of Maine, I.C.J. Reports 1984*, p. 301, para. 119). Though physically in contact, the two institutions are both legally and spatially distinct (*Fisheries Jurisdiction (United Kingdom* v. *Iceland), Merits, I.C.J. Reports 1974*, pp. 45–46, para. 4, first sentence, joint separate opinion of Judges Forster, Bengzon, Jimenez De Arechaga, Nagendra Singh and Ruda; and *Gulf of Maine, I.C.J. Reports 1984*, p. 367, para. 12, Judge Gros, dissenting). Theoretically,

the only sense in which it is possible to establish a single line for them is by way of the establishment of two *similar* lines, one superimposed on the other. But even a single line in this sense can be established only where the criteria governing the delimitation of overlapping rights to each of the two sets of resources are the same; and they need not be[1]. The possibility of distinct lines was recognized in the *Gulf of Maine* case (*I.C.J. Reports 1984*, p. 314, para. 161).

162 Many of the resulting problems relating to a single-line delimitation were critically considered in the dissenting opinion of Judge Gros in the *Gulf of Maine* case (*ibid.*, p. 360). Obviously, parties can do many things by agreement which cannot be done by the Court. Where the parties have not agreed to a single line, such a line can be produced only if the criteria regulating the delimitation of the continental shelf happen to lead to the same result as the criteria regulating that of the fishery zone. Failing this concordance, the only way to prevent different boundaries from resulting is, by an appropriate process of selection, to use only such delimitation criteria as are common to both cases. But this could involve the non-use of some criteria the use of which would otherwise have been required by international law were the Court engaged in delimiting one space only. This was made clear in the *Gulf of Maine* case, in which the Chamber said:

> "In other words, the very fact that the delimitation has a twofold object constitutes a special aspect of the case which must be taken into consideration even before proceeding to examine the possible influence of other circumstances on the choice of applicable criteria. It follows that, whatever may have been held applicable in previous cases, it is necessary, in a case like the present one, *to rule out* the application of any criterion found to be typically and exclusively bound up with the particular characteristics of one alone of the two natural realities that have to be delimited in conjunction." (*Ibid.*, p. 326, para. 193 ; emphasis added.)

Thus the establishment of a single line might require the Court

> "to rule out the application of any criterion found to be typically and exclusively bound up with the particular characteristics of one alone of the two natural realities that have to be delimited in conjunction" *(ibid.)*.

And yet, under international law, the Court would be required to apply precisely such a criterion. Can the parties, by agreement, empower the Court to act otherwise, where the agreement is not one which takes effect under Article 38, paragraph 2, of the Statute of the Court?

163 It depends on the nature of the agreement. The parties may by agreement competently fix a boundary on a basis having nothing to do with the application of legal principles ; it does not follow that they could authorize the Court to fix the boundary on a similar basis, unless the agreement takes effect under Article 38, paragraph 2, of the Statute of the Court (which is not the case here). True, in the absence of *jus cogens* (scarcely applicable in relation to maritime delimitation), the parties can agree to derogate from rules of international law (*North Sea, I.C.J. Reports 1969*, p. 42, para. 72); but, although the jurisdiction of the Court is consensual, its proceedings are judicial and do not represent a delegated negotiation or a negotiation by proxy (see arguments of counsel for Canada in the *Canada/France Arbitration*, Transcript of the Canadian Pleadings, Vol. 11, p. 1088). However, an agreement empowering the Court to fix a single-line boundary must be presumed to contemplate that the Court will seek to apply equitable principles in selecting

criteria appropriate to a common boundary. On this basis, it is, in my view, competent for the parties by agreement to authorize the Court to fix a single boundary.

164 As noticed, Denmark however contends that an agreement is not necessary to enable the Court to establish a single boundary. It submits that in the *Gulf of Maine* case the basis on which the Chamber considered itself competent to do so was the circumstance that the delimitation in fact related to two areas, and not the fact that the Parties had agreed to request such a delimitation. In its view, the 1958 "Convention, dealing with only one dimension —the shelf —could not govern a two dimensional delimitation, i.e., shelf and superjacent waters" (CR 93/10, p. 20, 25 January 1993, Mr. Lehmann). By itself, that statement is true; the 1958 Convention, which applies only to the continental shelf, "could not govern a twodimensional delimitation". But the Chamber could not establish a single line unless it could competently make a selective use of the criteria normally applicable under international law to the delimitation of each zone, retaining some and rejecting others so as to produce a common group of criteria leading to a single line. Under general international law, if the relevant factors pointed to separately located lines, a judicial body would be bound to establish separately located lines ; the mere fact that the case before it involved the delimitation of two zones would not empower it to fix congruent lines. A party could not by simply filing an application relating to two areas unilaterally deprive the other party of its right to two non-congruent lines where these were ordinarily required by international law.

165 In my view, when the Chamber said that "there is certainly no rule of international law" preventing it from establishing a single line (*I.C.J. Reports 1984*, p. 267, para. 27), what it meant was that international law did not prevent it from acceding to the Parties' request for a single line, not that it could in any event fix a single line where separately located lines might otherwise be required. In making a selective use of criteria that would be otherwise applicable, rejecting some and retaining others, the Chamber was derogating from the normal principles of international law. Only the agreement of the Parties could empower it to derogate. Hence, on its true construction, the Judgment of the Chamber is to be understood as meaning that the source of the authority of the Chamber to fix a single line where two separately located lines might otherwise have been required under international law was the agreement of the Parties to ask for a single line. I interpret the *Guinea/Guinea-Bissau Arbitral Award* as resting on a tacit understanding that a single line was to be established (*Revue générale de droit international public*, 1985, Vol. LXXXIX, p. 504, para. 42).

166 On the first question, I am accordingly not persuaded by Denmark's submission that an agreement is not necessary.

167 As to the second question, concerning Denmark's alternative submission that there is an agreement, there is obviously no agreement in this case as there was in the *Gulf of Maine* case. Denmark, however, argues that each Party, in its submission, is in fact asking for a single line in respect of both the continental shelf and the fishery zone, and that this concurrence in submissions amounts in law to an agreement to request the Court to draw such a line. Norway is asking for congruent lines but on two important qualifying bases, first, that they should correspond with the median line only, and, second, that this correspondence should result from the operation of the criteria normally applicable at international law to the delimitation of each maritime area considered separately. Norway is not agreeable to any derogation from the normally applicable criteria so as to produce two congruent lines if those criteria would otherwise produce two non-congruent ones.

168 Hence there is no agreement. It follows that the only way in which the continental shelf and the fishery zone can have a single line (in the sense of two congruent lines) is if congruence is the incidental result of the operation of the normally applicable principles of international law. But two lines drawn independently for each area would coincide along their entire lengths only exceptionally. The factor concerning the location of fish stocks, relied on by the Court, may, in the circumstances of this particular case, be relevant to the delimitation of the fishery zone ; it is not relevant to the delimitation of the continental shelf. Thus, I cannot say that I have found the question of a single line to be without difficulty. The doubts which I have felt are not, however, sufficiently strong to prevent me from adhering to the Court's conclusion.

Part VI. The Judicial Propriety of Drawing a Delimitation Line

169 Norway submits that the Court should not undertake the drawing of a delimitation line. The submission was not made on the basis of jurisdiction, but it trenched sufficiently on this area to put one on enquiry as to the Court's competence, this being always a matter open to consideration. I shall accordingly address myself to this issue in the first place.

(i) Jurisdiction

170 The question which I propose to examine is whether the competence to determine the boundary is confided by international law exclusively to the process of agreement by the parties, with the result that the Court cannot determine it except on their joint request, and with the further consequence that, where, as here, there is no joint request, the Court can at most only provide guidelines to enable the parties themselves to determine the boundary by an agreement to be negotiated by them on the basis of such guidelines.

171 Without entering into details, I should first state that my understanding of the positions taken by the Parties is that they accept that the Court is competent to adjudge and declare what constitutes the boundary. The issue between them relates to a different question, namely, whether the Court's Judgment should be limited to a descriptive statement of what constitutes the boundary, or whether it should take the further form of including the actual drawing of the line. Neither Party has asked for guidelines on the basis of which negotiations will be undertaken with a view to determining by agreement what constitutes the boundary. Any negotiations visualized by Norway would be directed not to the question what constitutes the boundary, but to the technical question what is the specific line required to give expression to the Court's own judgment as to what constitutes the boundary.

172 The Parties having, in my view, accepted that the Court is competent to determine what constitutes the boundary, is it nevertheless possible to say that the Court lacks the necessary jurisdiction to do so ?

173 On my reading of the record, after eight years of negotiations, not only has there in fact been no agreement, but there has been a failure to reach agreement.

174 Taking, first, the case of the continental shelf, what is the position where there has been a failure to reach agreement? The failure to reach agreement means that the Parties have exhausted their own capacity to fix a boundary consensually on any basis whatever. So there is a dispute. It is not a dispute as to whether the Parties are under a duty to negotiate, for they have already negotiated, albeit unsuccessfully. It is a dispute as to what in fact is the boundary, there being no agreement as to what it is.

175 From this point onwards, it is necessary to read the 1958 Convention in partnership with any available procedure for the peaceful settlement of disputes. Theoretically, the failure of the Parties to determine the boundary by agreement does not preclude them at a later stage from still having recourse to agreement as a means of peaceful settlement of the dispute left over by such failure. But now, apart from the question of its practical usefulness, agreement is only one method among other available methods of settling the dispute.

176 The disputes settlement procedures of the 1982 Convention do not apply, and I express no opinion one way or another as to what the position might be if they did. Obviously, however, Article 36, paragraph 2, of the Statute of the Court is an available procedure for the settlement of disputes. Norway accepted that "it is Denmark's undisputed right to avail itself of the Court's general jurisdiction under Article 36, paragraph 2, of the Statute and the optional clause declarations" of the Parties made thereunder (CR 93/5, p. 21, 15 January 1993, Mr. Haug). There can be no doubt that a dispute relating to a maritime boundary is a legal dispute relating to a question of international law within the meaning ofthat provision. Referring to the machinery of this provision, Norway in fact recognized

> "that it lies within the scope and function of the Court to perform a delimitation of the continental shelf between Denmark and Norway, as well as a delimitation of the fishery zones between the same Parties, in the area between Jan Mayen and Greenland" (CR 93/11, p. 27, 27 January 1993, Mr. Haug).

Denmark, therefore, has an absolute right to invoke the Court's jurisdiction under that provision.

177 Bearing in mind that the dispute is one as to what is the boundary, the Court's response to it can only be to say what is the boundary. Depending on the adequacy of the material, the Court may be able to answer the question with more or less particularity. But I am unable to see how any proper sense of its judicial mission can compel the Court to avoid a direct response to the question submitted as to what is the boundary and to confine itself instead to giving guidance to the parties, which they have not sought, on what are the bases on which they should negotiate for the determination by agreement ofthat question. It would be especially beside the point, and somewhat gratuitous, for the Court to give such guidance where the parties have not committed themselves to negotiate on the basis of legal principles (as in the *North Sea* cases), for they are always at liberty to agree a boundary on the basis of simple convenience or expediency.

178 Thus the failure to reach agreement bequeathed a legal dispute as to what constitutes the boundary. That dispute is susceptible of judicial settlement via unilateral application under Article 36, paragraph 2, of the Statute of the Court.

179 Assuming, however, that a consensual reference to the Court is required, the real question is whether both Parties have consensually established a settlement procedure relating to disputes and, if so, whether such disputes include a dispute as to the boundary of the continental shelf. This undoubtedly is the case under Article 36, paragraph 2, of the Statute. Under that provision, the Parties have consensually established a scheme for settlement of disputes which include the instant dispute as one which raises a question of international law. Where such a dispute has been unilaterally referred to the Court under this consensually established procedure, it is not open to the Respondent to complain that the proceedings were instituted without its consent. There is either consent or there is not. If none, there is no jurisdiction. But Norway accepts that there is jurisdiction. Hence an argument based on the unilateral nature of the Application collides with the fact that, in a

fundamental sense, that unilateral Application is itself ultimately brought with the consent of Norway.

180 In my view, the foregoing approach would apply equally to the delimitation of the fishery zone in accordance with customary international law. There being a failure of the Parties to determine the boundary by agreement, there is a dispute as to what is the boundary. This being so, Denmark is entitled to invoke the machinery of Article 36, paragraph 2, of the Statute for the settlement of the dispute. And, again, the dispute being one as to what constitutes the boundary, the Court's response must be a response to that question, not to a question, unasked, as to what are the principles on which the Parties should negotiate for the settlement of the dispute.

(ii) Judicial Propriety and Restraint

181 The Court has not drawn a delimitation line. Thus, the substance of the Norwegian contention has prevailed. But the decision of the Court rests on the view that the drawing of a line by it could overlook possible deficiencies in the evidence, in the state in which it stands, concerning the technical aspects of such an operation. What I should like to make clear is that I do not understand the decision to be upholding Norway's contention in so far as this rests on the proposition that the mere non-consent of Norway operates as a factor to prevent the Court, on grounds of judicial propriety and restraint, from drawing a line.

182 Norway carefully distinguished between jurisdiction and admissibility, on the one hand, and judicial propriety and restraint, on the other. However, it submitted that the

> "Court may usefully draw guidance from the analogous analyses that have been performed in cases such as *Tunisia/Libya* or *El Salvador/Honduras*, where the same issues were dealt with in the narrower context of interpreting the consent of parties, and were therefore properly viewed as being directly related to the jurisdiction of the Court, or Chamber, rather than to the discretion and restraint that the Court may choose to bring to bear in the exercise of its judicial powers and competence in this difficult area" (CR 93/9, p. 53, 21 January 1993, Mr. Keith Highet).

That Norway's interpretation of those two cases is correct is shown by the Judgments in the cases (*I.C.J. Reports 1982*, pp. 38–40, paras. 25–30; and *I.C.J. Reports 1992*, pp. 582–585, paras. 372–378. And see *I.C.J. Pleadings, Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, Vol. IV, pp. 440–441, and Vol. V, pp. 50, 214–216, 282–285,353). And to those two cases, I think there could be added the *Libya/Malta* case (*I.C.J. Reports 1985*, pp. 22–24, paras. 18–19). They all bear on the question of competence, and do not, in my view, provide a safe analogy on the question of judicial propriety and restraint.

183 I understood counsel for Norway to be speaking of judicial restraint not in the kind of constitutional sense in which the concept has developed in certain municipal jurisdictions in response to the need to preserve a margin of appreciation in the exercise by each repository of State power of its allotted responsibilities[1]. The appeal was to judicial propriety and restraint not as limiting factors imposed by the relations between the elements of an institutionalized system within which a court may be functioning, but as factors which intrinsically influence the exercise of this Court's judicial function.

184 It was in this way that I understood counsel when he referred the Court to "the restraint articulated on the exercise of its judicial functions in the case concerning the *Northern Cameroons* (*I.C.J. Reports 1963*, p. 3)" (CR 93/9, p. 53, 21 January 1993, Mr. Keith

Highet). But there the Court was “relegated to an issue remote from reality“ (*I.C.J. Reports 1963*, p. 33). Hence, as it remarked :

> “The function of the Court is to state the law, but it may pronounce judgment only in connection with concrete cases where there exists at the time of the adjudication an actual controversy involving a conflict of legal interests between the parties. The Court's judgment must have some practical consequence in the sense that it can affect existing legal rights or obligations of the parties, thus removing uncertainty from their legal relations. No judgment on the merits in this case could satisfy these essentials of the judicial function.” (*Ibid*., pp. 33-34.)

In that case there was really no triable issue the determination of which could serve any useful purpose. To decide the case would accordingly have been to undertake an exercise outside the judicial mission. In the instant case, there is, by contrast, a triable issue relating to a legal dispute as to what is the delimitation line in the continental shelf and fishery zone lying between Greenland and Jan Mayen, and the determination ofthat concrete issue would unquestionably serve a useful purpose.

185 Counsel also referred the Court to Sir Hersch Lauterpacht, writing

> “in his book, *The Development of International Law by the International Court* (1982, rev. ed., Part Two, Chap. 5, pp. 75–90), under the several and associated rubrics of ‘judicial caution’ and ‘judicial restraint’, as distinguished, of course, from ‘judicial hesitation’ or ‘judicial indecision’” (CR 93/9, p. 53, 21 January 1993).

The exercise of inherently discretionary judicial powers apart, these rubrics encompass, *inter alia*, the need for caution in dealing with hypothetical or academic issues ; questions as to how sparingly or fully the Court should give reasons for decision ; and the question how far, if at all, the Court should deal with issues which, though arising, do not require determination in the light of the course taken by the reasoning relating to the decision finally taken. But I cannot think that these and other associated categories cover a case in which the real reason why it is asserted that the Court should as a matter of judicial propriety and restraint decline to exercise its admitted jurisdiction is that the Respondent has not been willing to co-operate in the evolution of some particular aspect of the litigation as fully as it might have done had the case been brought with its specific consent rather than by unilateral application.

186 In evaluating the submission that, as a matter of judicial propriety and restraint, the Court should not perform a delimitation in the absence of the consent of both parties to the Court doing so, it is helpful to consider the relationship between a statement of principles applicable to a particular delimitation and the carrying out of the delimitation itself.

187 In the *Libya/Malta* case, the Parties, by their Special Agreement, asked the Court to state the principles and rules applicable to the determination of their respective areas of the continental shelf, and also to indicate

> “how in practice such principles and rules can be applied by the two Parties in the particular case in order that they may without difficulty delimit such areas by an agreement…” (*I.C.J. Reports 1985*, p. 16).

The Special Agreement did not request the Court to draw a line, and the Court did not. Even so, the case illustrates the close, almost integral, relationship which exists between a statement of principles governing a delimitation and the actual drawing of a line. Commenting on the question how far the Court could go in indicating how in practice the relevant principles and rules could "be applied by the two Parties in order that they may without difficulty delimit such areas by an agreement", the Court said:

> "Whether the Court should indicate an actual delimitation line will in some degree depend upon the method or methods found applicable." (*Ibid.*, p. 24, para. 19. See also *ibid.*, p. 23, para. 18.)

Even though the Special Agreement had reserved to the Parties the function of drawing the line, the Court was prepared to "indicate an actual delimitation line" if it felt that, without doing so, it could not carry out its part of the task. So the relationship between a statement of delimitation principles and the drawing of a line expressive of the application of those principles can be close (see, also, with respect to *Tunisia/Libya*, the comments in Romualdo Bermejo, "Les principes équitables et les délimitations des zones maritimes : Analyse des affaires *Tunisie/Jamahiriya arabe libyenne et du Golfe du Maine*", *Hague Yearbook of International Law*, 1988, Vol. 1, p. 67).

188 That the drawing of a line is, indeed, an integral part of any delimitation exercise is apparent from the Court's remark in 1969 that

> "the process of delimitation is essentially one of *drawing a boundary line* between areas which already appertain to one or other of the States affected" (*North Sea, I.C.J. Reports 1969*, p. 22, para. 20; emphasis added).

So, too, in the *Aegean Sea Continental Shelf* case. In its Application Greece requested

> "the Court to adjudge and declare … what is the course of the bound ary (or boundaries) between the portions of the continental shelf appertaining to Greece and Turkey in the Aegean Sea …" (*I.C.J. Reports 1978*, p. 6, para. 12).

The Court said :

> "It is therefore necessary to establish the boundary or boundaries between neighbouring States, that is to say, to draw the exact line or lines where the extension in space of the sovereign powers and rights of Greece meets those of Turkey." (*Ibid.*, p. 35, para. 85.)

Thus, although denying jurisdiction, the Court had no hesitation in holding that the resolution of a continental shelf boundary dispute necessarily involved the drawing of "the exact line or lines" of delimitation.

189 In the case of a terrestrial boundary dispute, as where a watershed line is concerned, one accepts that the Court cannot take the "place of a delimitation commission", still less that it can mark "a new frontier line on the ground" (*Temple of Preah Vihear, I.C.J. Reports 1962*, p. 68, Judge Moreno Quintana, dissenting). In such a case —

> "Once the Court has indicated what it considers to be the correct line of the watershed, it will be for the Parties to determine how that line is to be given expression on the ground. The latter task is of a technical nature, and not within the judicial field which belongs to the Court." (*Ibid*., p. 69.)

But in the instant case no physical demarcation in the relevant areas is either visualized or required.

190 It is conceivable that a dispute could be presented to the Court as to the accuracy of an existing line, including a baseline. The normal way of resolving such a dispute would be for the Court not merely to pronounce upon "definitions, principles or rules", but to decide on the validity or otherwise of the specific method or line challenged in the case before it. That was the position in the *Fisheries* case (*United Kingdom* v. *Norway*) in which the Application was in fact made unilaterally under Article 36, paragraph 2, of the Statute of the Court (*I.C.J. Reports 1951*, pp. 118, 126 and 143). If the Court can properly do that in the case of a baseline, it should be equally proper for it to draw a delimitation line where it is necessary to do this in order to express its decision definitively on the concrete dispute before it. The drawing of a line is merely one way of expressing the decision reached with a view to achieving the kind of stability which it should be the object of a boundary decision to produce.

191 No doubt, as a general matter, in the absence of co-operation based on consent, there could be evidential and other difficulties (see generally, in relation to advisory proceedings, the *Eastern Carelia* case, *P.C.I.J., Series B, No. 5*, p. 28). But the absence of such co-operation does not necessarily disable the Court from deciding. Where the relevant material is before the Court, it would seem to me that a litigating party, as a party to the Statute, has a right to expect, and indeed to require, the Court to exercise its jurisdiction under the Statute. The existence of this duty has been noticed by the Court itself. In 1984 it observed that, barring circumstances which do not apply here, "it must be open to the Court, and indeed its duty, to give the fullest decision it may in the circumstances of each case" (*Continental Shelf (Libyan Arab Jamahiriya/Malta), Application for Permission to Intervene, I.C.J. Reports 1984*, p. 25, para. 40). In 1985 it added, "The Court must not exceed the jurisdiction conferred upon it by the Parties, but it must also exercise that jurisdiction to its full extent" (*Libya/Malta*, *I.C.J. Reports 1985*, p. 23, para. 19. And see *Frontier Dispute, I.C.J. Reports 1986*, p. 577, para. 45). As it was succinctly put by Judge Moreno Quintana, "The Court cannot refuse to discharge its judicial task" (*The Temple of Preah Vihear, I.C.J. Reports 1962*, p. 68, dissenting opinion).

192 I do not see that the thrust of these purposeful statements can be offset by the stress which counsel has placed on the role assigned to consent in delimitation matters (CR 93/9, p. 50, 21 January 1993, Mr. Highet). That role is clearly important. But it is just as clear that, in the absence of agreement, any dispute as to what is the delimitation line is a dispute cognizable under Article 36, paragraph 2, of the Statute and, in a properly constituted case, such as this, must be fully decided by the Court thereunder.

193 It is useful to bear in mind that there are two ways of moving the Court. One is by way of proceedings instituted pursuant to an agreement (of one kind or another) under Article 36, paragraph 1, of the Statute of the Court. The other is by way of proceedings instituted pursuant to the optional clause provisions of Article 36, paragraph 2, of the Statute. As between the same parties, both methods may well be applicable (*Electricity Company of Sofia and Bulgaria, P.C.I.J., Series A/B, No. 77*, p. 76). The availability of one method is not necessarily inconsistent with the concurrent availability of the other. It may with even greater justice be held that it cannot be right to use a theoretical but unavailable possibility of recourse to one method to limit the exercise of an existing right of recourse to the other.

That this is the substance of the issue arising may be seen from Norway's submission that —

> "Delimitation is inherently unsuitable for cases brought by unilateral application unless there is some form of agreement on the part of the respondent as to the role and powers of the Court." (CR 93/9, p. 81, 21 January 1993, Mr. Keith Highet.)

194 Norway admits that jurisdiction exists under Article 36, paragraph 2, of the Statute. Yet it seems to be saying that the case could only be brought under that provision if "there is some form of agreement on the part of the respondent as to the role and powers of the Court". But, if there is such agreement, the case might as well be brought under Article 36, paragraph 1, of the Statute. Norway's submission, if correct, would represent a restriction on the exercise of the Court's compulsory jurisdiction; it would operate to impose a hidden proviso to Article 36, paragraph 2, of the Statute, the effect of which would in practice be to exclude some cases from this provision and to limit the right to bring proceedings in respect of them to Article 36, paragraph 1, only. The gravity of this consequence is not mitigated by the fact that the argument has been made on the basis of judicial propriety and restraint.

195 The Court is always mindful of the consensual basis of its jurisdiction. But there is a limit to contentions based explicitly or implicitly on voluntarism. The Statute and the Rules prescribe a number of conditions for the exercise of the Court's power to decide disputes on a consensual basis. But once the power comes into play, I cannot see that any further consent is required for its effectual exercise. There is a conceivable exception where a case is brought pursuant to an agreement by the very terms of which some further consent is required before a particular issue is considered by the Court (see *Free Zones of Upper Savoy and the District of Gex, P.C.I.J., Series A/B, No. 46*, p. 165). But that is not the situation here.

196 In this case, Counsel for Norway himself expected that it would have been open to Denmark to say that "Norway cannot both be in the litigation and out of the case …" (CR 93/9, p. 78, 21 January 1993, Mr. Keith Highet). More particularly, as he also correctly remarked, "After all, it is a *litigation* that we are conducting, not a conciliation, or mediation procedure" (*ibid*., p. 79). But precisely because it is a litigation — a litigation duly instituted — the Court cannot act on extraneous considerations. Jurisdiction having been admitted, the fact that the case was not brought with the agreement of the Respondent is, by itself, not relevant to the manner in which the Court should approach the issue which it presents and express its decision thereon. Accordingly, had the Court judged that the available material was sufficient to enable it to draw a line, it could, in my opinion, properly have done so notwithstanding the non-consent of Norway to that particular step being taken.

(Signed) Mohamed Shahabuddeen.

Separate Opinion of Judge Weeramantry

Christopher Gregory Weeramantry

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Introduction

1. The observations that ensue indicate the reasons for my agreement with the Judgment of the Court. In view of the Judgment's intensive use of equity, they explore in somewhat extended form the jurisprudential content and practical application of that concept in a manner which can most appropriately be attempted in a separate opinion.

2. Against this background, it is not necessary in this opinion to recapitulate the several details of fact, which are set out in the Judgment. This opinion will attempt, rather, to examine the application of equity to those facts, explaining my support of the methods used and conclusions reached.

3. The ensuing analysis is undertaken against the background of the substantial body of creative work done by this Court in laying the foundations of an equitable jurisprudence for the evolving law of the sea. What “appears at first sight to be a jumble of different and

disparate elements”[1] may well yield, upon closer examination, some useful guidelines for the determination of a case such as this.

4. Although this opinion focuses on the field of maritime delimitation, it will also take in occasional glimpses, when necessary, of the broader equitable landscape lying beyond. This is rendered all the more necessary because application of equity in the field of maritime delimitation raises far-reaching juristic questions[2] and is currently passing through a critical phase[3].

Special Role Played by Equity in this Case

5. The Court's Judgment reveals the use of equity in several ways, and at various stages in the judgmental process.

6. It describes the equidistance-special circumstances rule of the 1958 Convention as expressing a general norm based on equitable principles (para. 46) and examines the “equitable principles-relevant circumstances” rule relating to delimitation of a continental shelf, fishery zone or all-purpose single boundary (para. 56). It also examines the effect of the customary rule which requires a delimitation based on equitable principles (paras. 46 and 71).

7. The Court gives its attention to the application of equitable procedures (para. 92), the effecting of an equitable division (para. 64), the need to arrive at an equitable result (paras. 54 and 90), the ensuring of an equitable solution (para. 65) and the process of evolving such a solution (para. 63). It notes the prima facie equitable character of the reasons underlying the equidistance method and the need for an equitable delimitation to take into account the disparity in coastal lengths (para. 65). It stresses that a result which is equitable in itself is the objective of every maritime delimitation based on law (para. 70), and refers to the equity of the delimitation line (para. 62).

8. The Judgment considers whether a given line is “equitable in its result” (para. 62), and it describes the line drawn by Denmark 200 nautical miles from the baselines of Eastern Greenland as “inequitable in its effects” (para. 87). It takes note of Norway's argument that proportionality is the test of the equitableness of a result arrived at by other means (para. 63) and Denmark's reference to “a method appropriate for an equitable delimitation line” (para. 62). It considers the manifestly inequitable results following from the application of the median line (para. 68).

9. Specific reference is made to the measure of discretion conferred on the Court by the need to arrive at an equitable result (para. 90). Recognizing the need to make proper provision for equitable access to fishery resources (paras. 75, 91 and 92), the Court makes a division according to which it considers that “the requirements of equity would be met” (para. 92).

10. Equity has thus played a role of overwhelming importance in the Court's decision, involving the application of equitable principles, equitable procedures and equitable methods. The decision reveals an intensive effort directed towards achieving an equitable solution and at testing the equitable nature of that solution. It draws in equity to address the problem in hand through a multitude of routes — treaty, customary international law and judicial decisions to name a few. The methods used involve both the *a priori* use of equity to work forwards towards a possible result and the *a posteriori* use of equity to test a result thus reached.

11. Since this case has drawn both upon the Court's general equitable jurisprudence and on its particular invocations in relation to the law of the sea, this opinion will deal with both these aspects. The special invocations of equity which give it redoubled emphasis in the law of the sea tend some- times to overshadow the applicability of general principles of equity, which still play a vital part in this field. To minimize the importance of general equitable considerations, especially at this incipient stage of the developing law of the sea, may cramp the evolution of the latter in what is perhaps its most formative phase. This opinion consequently devotes some attention to an examination of the ways in which equity, both in its general sense and in its special application to the law of the sea, can contribute to the solution of the varied problems encountered in this case.

Part A. General Equitable Jurisdiction of the Court

Conceptual Problems Associated with the Use of Equity

12. The issue whether equity should play a role in maritime delimitation is one which has been questioned by eminent authority, both judicial and academic, and must be seriously addressed if reliance is to be placed upon it. This is part of a larger question as to whether, indeed, although equity is clearly a part of public international law, its use is really necessary or useful, having regard to its uncertainties, its difficulties of definition and its lack of methodologies for the precise quantification of its findings.

13. Telders, for example, has expressed the view that, apart from the application of the principle of good faith, equity has no special legal significance[1]. Ripert, in his lectures before the Hague Academy in 1933, went even further to state that equity is a principle, but a principle of morality and not of law[2].

14. Indeed, judicial dicta of some judges of this Court have given strong expression to such a view. Vice-President Koretsky, for example, in the *North Sea Continental Shelf* cases, affirmed that equity, being of "a non-juridical, ethical character", ought not to be resorted to by this Court:

> "I feel that to introduce so vague a notion into the jurisprudence of the International Court may open the door to making subjective and therefore at times arbitrary evaluations, instead of following the guidance of established general principles and rules of international law in the settlement of disputes submitted to the Court." (*I.C.J. Reports 1969*, p. 166, dissenting opinion.)

Judge Tanaka put it even more strongly in his observation in the same case that, "Reference to the equitable principle is nothing else but begging the question." (*I.C.J. Reports 1969*, p. 196, dissenting opinion.) Other criticisms[1] describe equity as a doctrine "déroutée et déroutante", "a riddle wrapped in a mystery inside an enigma", as paradoxical, circular, fuzzy and lacking precise definition.

15. These conceptual criticisms of equity may be addressed at three levels — at the level of law in general, at the level of international law and at the level of the law of the sea.

16. At its most general level, equity has been seen as the source of that dynamism which is necessary for legal development. Thus, in the words of the eminent comparativist Puig Brutau, "equity is one of the names under which is concealed the creative force which animates the life of the law"[2].

17. At the level of international law, that creativity is well illustrated when one considers that equity has been the source that has given international law the concept of international mandates and trusts, of good faith, of *pacta sunt servanda*, of *jus cogens*, of unjust enrichment, of *rebus sic stantibus* and of abuse of rights. No doubt, the future holds for it a similarly vital creative role.

18. Viewed more specifically, in the context of the law of the sea, its potential for developing that incipient branch of international law is so far-reaching as to have attracted the comment that it is

> "a juridical arsenal from which the judge draws the tools which enable him to identify, evaluate, understand and give effect to circumstances recognized as juridically relevant in a particular case"[3] (translation).

19. What follows is an analysis of these tools by which equity helps to identify, evaluate, understand and give effect to the circumstances in a particular case. Thereafter, this opinion will address the question whether the uncertainties of equity render it a practically unsuitable tool for the determination of cases such as this.

Issues Arising from the Court's Reliance on Equity

20. This analysis centres around the following aspects of the reliance on equity in the Judgment:

— The Judgment of the Court, in common with most others in the field of maritime delimitation, resorts to equity not merely for principles but also for procedures and methods, and for the testing of tentative solutions reached. The one word "equity" covers all these applications, some of them quite distinct from others.

— The term "equity" as used by the Court, and in international law and in maritime delimitation generally, has a distinct meaning from equity as used in the sense of a corrective system standing apart from the law. Whenever the term equity is used in the Judgment, the term is not used in the latter sense, and this distinction must be kept in mind for an appreciation of the role of equity in this case.

— There has been no resort to equity *ex aequo et bono*. Nearly every decision applying equity to maritime delimitation has stressed that the species of equity employed is not equity *ex aequo et bono*. This necessitates an examination of the distinctions between that concept and the concept of equity actually employed. The various categories of equity and their relevance to this case call for examination in this context.

— The Judgment draws in equity through treaties, customary international law and judicial decisions, as well as broader concepts of equity which flow in from many sources. An examination of these varied sources will clarify the several ways in which the problem before the Court has necessarily attracted its operation.

— The Judgment uses equity *a priori* to work towards a result, and *a posteriori* to check a result thus reached. This raises important juristic issues.

— There are several purposes or ends for which equity has been used. These are varied and some of them are pertinent to this Judgment in particular and to maritime

delimitation in general. Not all the possible purposes and ends of equity are appropriate to maritime delimitation.

— Equity has many methods of operation, more than one of which has been used in the Judgment. These may not all be spelt out specifically, but one or more of them are in constant use in every exercise of that discretion, as indeed they are in this case. The ambit of judicial discretion — a matter specifically referred to in the Judgment — has been the subject of some controversy. In subscribing to the decision of the Court, I have accepted the legitimacy of such a use of judicial discretion and feel impelled to explain why I consider such use of discretion legitimate.

— The process of equitable decision-making, as in a boundary delimitation, is not a single process but can be broken up into its constituent stages. The decision in this case has proceeded through those stages as will be pointed out. An appreciation of those separate stages is an aid to understanding the actual operation of equity in this case.

These aspects will be discussed in the ensuing paragraphs in the order in which they have been set out.

Analysis of Equity with Reference to Maritime Delimitation

I. The Application of Equity

21. The application of equity to a given case can comprise the application of an equitable principle or principles, the adoption of an equitable procedure or procedures, the use of an equitable method or the securing of an equitable result. All of these aspects are relevant to the determination of the present case.

(a) Equitable principles

22. Equitable principles are in this discussion taken to include concepts, black-letter rules and standards or principles in the broader sense, as there is no need in this discussion to refine this category further. The important distinction drawn by jurists[1] between black-letter rules and standards or principles is hence not used for the purpose of this classification, and the term “equitable principles” is to be read as covering all of these.

23. The Chamber of this Court, in the case concerning *Delimitation of the Maritime Boundary in the Gulf of Maine Area*, had in mind a classification of this broad nature when it observed that there is a distinction:

> “between what are principles and rules of international law governing the matter and what could be better described as the various equitable criteria and practical methods that may be used to ensure *in concreto* that a particular situation is dealt with in accordance with the principles and rules in question” (*I.C.J. Reports 1984*, p. 290, para. 80).

The ensuing analysis proceeds upon the broad division between concepts and principles without making another specific category of “criteria”.

24. General equitable principles relevant to this case would include equitable principles applicable to the assessment of representations of State policy regarding maritime delimitation which other States have relied upon to their prejudice; equitable principles of interpretation in relation to relevant treaties; and principles of fairness in considering

whether large sections of the waters to be demarcated are unusable in consequence of their being frozen over for considerable periods.

(b) Equitable procedures

25. As with most areas of law, equity has both a substantive and an adjectival aspect. The application of equitable procedures of enquiry is necessarily an important part of equity. Procedural equity in its broadest form is the equity which ensures that in the process of enquiry and investigation leading to a decision, the parties enjoy the opportunity of a full and fair presentation of their respective cases to the court or tribunal. The procedural aspect of equity has an ancient origin and is rooted in popular concepts of fairness[1].

26. The equitable concern with procedural fairness gives rise to the principle involved in this case, that all relevant circumstances will be considered in determining how the maritime space in contention is to be delimited between the Parties, unless this consideration is prevented by a rule of law. The Court in its Judgment has therefore given its consideration to a wide range of factors — State practice, the conduct of the Parties, proportionality of coastlines, population, economic factors, the equidistance principle and the unusability of part of the maritime space in contention owing to drift ice. Whatever may be the eventual conclusion regarding the weight to be given to each factor, Parties are entitled to a consideration of such factors by the Court and in the absence of a legal principle rendering a particular factor irrelevant, the impact of that factor upon the case in hand needs to be assessed.

27. This is especially so having regard to the uniqueness of each particular case and the fact that its special circumstances may throw up for consideration some fact or circumstance never considered in the relevant jurisprudence up to that time. The fact that a considerable portion of the relevant area in this case is ice-bound for the greater part of the year is such a factor. As this Court pointed out in the *Gulf of Maine* case:

> "Although the practice is still rather sparse,... it too is there to demonstrate that each specific case is, in the final analysis, different from all the others, that it is monotypic and that, more often than not, the most appropriate criteria, and the method or combination of methods most likely to yield a result consonant with what the law indicates, can only be determined in relation to each particular case and its specific characteristics." (*I.C.J. Reports 1984*, p. 290, para. 81.)

Thus, there is "no legal limit to the considerations which States may take account of for the purpose of making sure that they apply equitable procedures" (*I.C.J. Reports 1969*, p. 50).

(c) Equitable methods

28. Among the practical *methods* listed by the Chamber in the *Gulf of Maine* case, as distinct from criteria and rules or principles which should be used for achieving an equitable result, are the drawing of an equidistance or median line, the division of the area in various segments using different methods in respect of each sector and the method of drawing a line perpendicular to the coast or to the general direction of the coast[1].

29. Many other suggestions appear in the literature, which could be described as methods stemming from equitable considerations[2]. As the jurisprudence on maritime delimitation develops, a refinement of methods appropriate to particular types of dispute may well emerge[3].

30. In the present case, the Court has used as its method the provisional adoption of the median line as its starting point and, having regard to its evaluation of the various considerations before it, moved that line eastwards, carefully dividing the relevant space into segments which again have been differently divided having regard to the considerations involved, such as the seasonal movement of fish and equitable access to fishery resources (para. 91). These methods are all grounded in equitable considerations and are, for the purposes of the present discussion, treated as equitable methods.

(d) Equitable results

31. The first three aspects mentioned are only the means towards the last, which, as the object and test of every determination according to equitable principles, calls for considered attention. As this Court observed in the *Continental Shelf (Libyan Arab Jamahiriya/Malta)* case:

> "It is however the goal — the equitable result — and not the means used to achieve it, that must be the primary element …" (*I.C.J. Reports 1985*, pp. 38–39, para. 45.)

32. The Court has at numerous points in its Judgment referred to the importance of achieving an equitable result. Some of these references are detailed in paragraphs 7 and 8 of this opinion. In paragraph 54, the Judgment states that "The aim in each and every situation must be to achieve 'an equitable result'" and in paragraph 56 it concludes that:

> "there is inevitably a tendency towards assimilation between the special circumstances of Article 6 of the 1958 Convention and the relevant circumstances under customary law, and this if only because they both are intended to enable the achievement of an equitable result".

33. Articles 74 (1) and 83 (1) of the 1982 Convention also highlight the importance of achieving an equitable solution. The Judgment, after referring to the "correction" of a median line delimitation in the *Gulf of Maine* case[1], similarly rejects the application of the median line in this case as leading to "manifestly inequitable results" (para. 68) in view of the great disparity of the lengths of coasts.

34. This concern with equitable results, despite the application of equitable principles, procedures and methods, is well founded in the Court's jurisprudence. The object of equitable principles is to obtain an equitable result. However equitable each principle may appear to be when considered in isolation, it may not necessarily produce an equitable result, as is demonstrated by the application of the equidistance principle to two opposite coastlines which are vastly different in length. As this Court has observed, "the term 'equitable principles' cannot be interpreted in the abstract; it refers back to the principles and rules which may be appropriate in order to achieve an equitable *result*" (*Continental Shelf (Tunisia/Libyan Arab Jamahiriya), I.C.J. Reports 1982*, p. 59, para. 70; emphasis added).

35. Even though, in the *North Sea Continental Shelf* cases, the Court appeared to stress the methods used, it also emphasized the importance of an equitable result, for, while it said that resort could be had "to various principles or methods, as may be appropriate, or a combination of them", this was subject to the proviso that "by the application of equitable principles, a reasonable result is arrived at" (*I.C.J. Reports 1969*, p. 49, para. 90). So, also,

the Court said: “it is necessary to seek not one method of delimitation but one goal” (*ibid.*, p. 50, para. 92).

36. This aspect was stressed also by this Court in the case concerning the *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*:

> “The result of the application of equitable principles must be equitable. This terminology, which is generally used, is not entirely satisfactory because it employs the term equitable to characterize both the result to be achieved and the means to be applied to reach this result. It is, however, the result which is predominant; the principles are subordinate to the goal.” (*I.C.J. Reports 1982*, p. 59, para. 70.)

37. The difference between the use of an equitable method and the achievement of an equitable result was well brought out in the joint separate opinion of Judges Ruda, Bedjaoui and Jiménez de Aréchaga in the *Continental Shelf (Libyan Arab Jamahiriya/Malta)* case:

> “To assert, as Malta has done, that the equidistance method should be applied, even if it produces a delimitation which is grossly disproportionate to the length of the relevant coasts, is an attempt to subordinate the equitable result to be achieved, to the method adopted. This is precisely the opposite of the fundamental rule of delimitation, namely, that the method to be adopted should be justified by the equity of the result.” (*I.C.J. Reports 1985*, pp. 82–83, para. 20.)

38. The *Gulf of Maine* case drew a clear distinction between the application of equitable criteria and the reaching of an equitable result. The process by which the Chamber determined the boundary line has been analysed as consisting of:

> (1) the delimitation of the boundary line through the use of equitable criteria -primarily the use of geographical configurations to set out the affected area and the subsequent equal division of that area;
>
> (2) the adjustment of that line, by the consideration of relevant circumstances including geographic “anomalies” and the proportionality of maritime area to coastal frontage;
>
> (3) the checking of the equitableness of the result so reached, by examining other factors such as economic impact and resource use patterns [1] .

39. The Judgment was specially useful in separating some of the different elements included in the equitable process and showing how more than one element could be used in combination[2].

40. It is interesting also to note from the opinion of Judge Oda in *Tunisia/Libya* that even as early as the 1958 Convention

> “the idea of an *equitable solution*, although not specifically mentioned in Article 6 of the 1958 Convention, lay at the basis ofthat provision …” (*I.C.J. Reports 1982*, p. 246, para. 144; emphasis added).

It is to be noted also that the Law of the Sea Convention uses the term “equitable solution” thus turning the spotlight on the equity of the result (see Arts. 74 and 83).

41. Having regard to the overall importance of the equitable result, it is not without interest that there is support in legal philosophy for the method of testing a solution by taking a view at its results. This additional juristic basis for checking a result for its equity or inequity comes from the "sense of injustice" which has an ancient history in the philosophy of jurisprudence. This is briefly considered in Section V, paragraphs 104–109, below.

42. The foregoing discussion shows that all four aspects of equity dealt with in this section come into play in this case, and an approach to the application of equity in this fashion helps to focus attention upon the particular aspect under examination.

II. Inapplicability of Equity as a System Separate from Law

43. It scarcely needs to be mentioned that the term equity, as used in the Court's Judgment or in the context of international law, is quite distinct from its use to designate separate systems of judicial administration such as existed in some legal systems for the purpose of correcting insufficiencies and rigidities of the law.

44. The equity of the common law system and the *aequitas* of the Roman law, exercised by the Chancellor and the *praetor* respectively, were the systems *par excellence* which give the word equity such overtones of interference with the law. The term equity as used in the law of the sea naturally does not absorb such associated meanings.

45. In view of the substantial influence exercised by these systems on the development of international law, the heavy overtones of equity's corrective influence over law tend to spill over into international law, necessitating a constant vigilance against this tendency. This is especially important, in relation to maritime delimitation, where there is a constant questioning as to whether the Court, in using equity, is overstepping its authority. As this Court observed in *Tunisia/Libya*:

> "In the course of the history of legal systems the term 'equity' has been used to define various legal concepts. It was often contrasted with the rigid rules of positive law, the severity of which had to be mitigated in order to do justice. In general, this contrast has no parallel in the development of international law; the legal concept of equity is a general principle directly applicable as law." (*I.C.J. Reports 1982*, p. 60, para. 71.)

46. In view of the importance of equity in these two systems, a brief note upon them ensues.

(a) Equity in common law

47. In the *Norwegian Shipowners ' Claims* case, the Permanent Court of Arbitration said :

> "The words 'law and equity' used in the special agreement of 1921 can not be understood here in the traditional sense in which these words are used in Anglo-Saxon jurisprudence.
>
> The majority of international lawyers seem to agree that these words are to be understood to mean general principles of justice as distinguished from any particular system of jurisprudence of the municipal law of any State."[1]

48. Some of the principles of equity, as evolved by the English Court of Chancery, may, however, be relevant to a matter concerning the law of the sea, not because they are part of the English law of equity, but because those principles accord with the concepts of general equity as more widely understood. Such concepts might conceivably include such notions as that equity looks to the intent rather than to the form, or that a person must not act contrary to his own representations on the faith of which others have acted. Items of State conduct, for example, may attract general principles of equity such as these.

(b) Equity in civil law

49. The *jus honorarium* built up by the Roman *praetor*, through his praetorian edict, served the purpose, according to Papinian, of aiding, supplementing or correcting the *jus civile*[1] —a useful summary of three different functions served by Roman equity. Roman equity thus stood as a system separate from the *jus civile*, at any rate until Hadrian in A.D. 125 froze the form of the edict, after which it ceased directly to be a source of new law. The corrective function of *aequitas* up to that time included action *contra legem*.

50. Though equity continued to fertilize the Roman law thereafter, this was achieved largely through the work of the jurists acting through the interpretation and adaptation of the law rather than by standing in opposition to it[2].

51. In view of the immense influence of the civil law upon international law, it bears repetition that the *aequitas* of the era of praetorian equity —a corrective equity standing separate from the law —is not an analogy for the equity of international law. The later tradition of the civil law, of law and equity integrating with each other to produce a harmonious whole, would be a truer analogy.

III. The Categories of Equity

52. As observed earlier, the Court in its Judgment has not used equity *ex aequo et bono*. Nor has it used absolute equity or equity *contra legem*.

(a) Equity ex aequo et bono

53. The issue has frequently been raised, in the context of maritime delimitation, as to whether the Court is resorting to a concept of equity more liberal than that which it is entitled to administer. This issue has come indeed to acquire the appearance of a question mark hanging over the use of equity in such cases and has resulted in frequent disavowals, in the jurisprudence of maritime delimitation, of resort to equity *ex aequo et bono*[3].

54. The extent of the concern registered in this regard is indicated in juristic literature which specifically raises the question whether there is indeed a difference between the equity administered by the Court and equity *ex aequo et bono*. Judge Jennings alerts us to the attendant dangers of litigants obtaining a decision *ex aequo et bono* whether they wanted it or not, and observes :

> "At any rate, the very serious question arises of what exactly is the difference between a decision according to equitable principles and a decision ex aequo et bono?"[1]

The question raised is truly a very serious one, for if this is indeed the case, the Court is extending itself into an area which it can only reach by the consent of parties[2]. Such uncertainties necessitate a close examination of the *ex aequo et bono* provision in Article 38, paragraph 2, of the Statute of the Court.

55. This phrase, which has its origins in the Roman law[3] is defined in the standard works of reference in terms that involve justice, fairness and conscience. Thus *Black's Law Dictionary* (5th ed., 1979, p. 500) defines it as a "phrase derived from the civil law, meaning, in justice and fairness ; according to what is just and good; according to equity and conscience". It will be seen that equity *ex aequo et bono* is thus not confined within limitations of existing rules of law but extends more widely, leaving aside considerations of what the law may be, regarding the matter under reference. It enters into the area of equity *contra legem*, as discussed below.

56. Equity *ex aequo et bono*, in the context of the Court's jurisprudence, is perhaps best approached through a perusal of the drafting history of the *ex aequo et bono* provision in the Statute of the Court.

57. One could perhaps identify three stages in the *travaux préparatoires* leading to the adoption of Article 38 (2) of the Statute :

(1) Earlier drafts of Article 38 of the Statute of the Permanent Court [4] did not contain a subsection dealing with decisions *ex aequo et bono*. The draft section read as follows :

> "Dans les limites de sa compétence, telle qu'elle est déterminée par l'article 34, la Cour applique en ordre successif:
>
> 1. Les conventions internationales soit générales, soit spéciales, établissant des règles expressément reconnues par les Etats en litige;
>
> 2. La coutume internationale, attestation d'une pratique commune acceptee comme loi;
>
> 3. Les principes généraux de droit reconnus par les nations civilisees;
>
> 4. Les décisions judiciaires et la doctrine des publicistes les plus qualifiés des différentes nations, comme moyens auxiliaires de détermination des régles de droit." [1]

(2) The discussions among the distinguished international jurists participating in the drafting Committee's meeting of 1 December 1920 [2] are of great interest. Mr. Fromageot (France) wished to widen the wording of the then Article 35 in order to enable a judgment of the Court to confirm an arrangement reached by the parties — a result which was not possible under the existing wording of the Article. In the course of the ensuing discussion, serious concerns were voiced about the effect of such an amendment. The Chairman (Mr. Hagerup) expressed the view that Mr. Fromageot's idea belonged rather to the sphere of arbitral jurisprudence and that its application would jeopardize the authority of a Court of Justice. Mr. Fernandes (Brazil) expressed a fear that the amendment would open the way to arbitrary decisions. Mr. Loder (the Netherlands) pointed out, however, that the Court would evidently not confirm proposals which were not well founded. During further discussion, Mr. Fromageot amended his proposal to add to Article 35 (3) the further words "the general principles of law and justice". He explained that the effect of his amendment would be to enable the Court to state as the sole reason for its judgment that the award had

seemed to it to be just. He explained further that this did not mean that the Court might disregard existing rules. Mr. Fromageot's amendment was adopted [3] .

(3) However, the amended Article 35 continued to cause concern. At the meeting of the Sub-Committee held on 10 December 1920, to adopt the final draft for submission to the Main Committee, it was the sole subject of further discussion. That discussion is recorded as follows :

> "During the discussion on the President's report, M. Politis (Greece) raised the question whether the text of Article 35, No. 3, adopted by the Sub-Committee, did actually express the Sub-Committee's opinion on the subject. This opinion was, according to M. Politis, that the Court should have the right to apply the general principles of justice only by virtue of an agreement between the parties. The actual text was wider, in so far as it left it to the discretion of the Court to decide when those principles could be applied. M. Politis consequently proposed to alter the paragraph as follows :
>
> > *The general principles of law and with the consent of the parties, the general principles of justice recognised by civilised nations.*
>
> After some discussion, M. Fromageot (France) proposed to meet M. Politis' point by adding at the end of Article 35, No. 3, the following:
>
> > *This provision shall not prejudice the power of the Court to decide a case ex aequo et bono if the parties agree thereto.*
>
> > *The Article thus amended was adopted."* [1]

58. In reporting this Article (renumbered Article 38) to the Main Committee, the Sub-Committee stated as follows :

> "The Sub-Committee has ... made the following changes in the Article :
>
> ... ...
>
> **(2)** At the end of No. 3 it has added a new clause in order to give a more flexible character to this provision and to permit the Court, if necessary and with the consent of the Parties, to make an award *ex aequo et bono*."[2]

Such was the genesis of the *ex aequo et bono* provision in Article 38 which has provoked so much reference in the cases on the application of equity in maritime boundary delimitations.

59. It is clear from this drafting history that earlier drafts of the Article were amended to allow for the possibility that parties could make their own agreements and ask the Court to embody them in a judgment, which the Court would do provided it conformed to general principles of law and justice. Thereafter even more flexibility[3] was introduced by introducing a separate *ex aequo et bono* provision not necessarily tied to "general principles of law and justice", and enabling the Court to make an order in accordance with its sense of justice if the parties so consented. There was clearly an ampler latitude given to the Court in an *ex aequo et bono* provision standing on its own rather than if the Court were to depend on a clause merely enabling it to decide in accordance with general principles of

law and justice. However the greater reach of that clause necessitated the safeguard of resting it upon the agreement of parties.

60. The expression *ex aequo et bono*, viewed against this drafting history, shows quite clearly that the concept travels far beyond equity *intra legem* or *praeter legem* as discussed below[1]. It refers to a decision untrammelled by rules of law but depending purely on the tribunal's sense of justice. When, as in the present case, the Court uses equitable concepts and procedures which enter its jurisdictional field through routes other than Article 38 (2) and so long as the Court does not act *contra legem*, it is acting in a field far removed from the vast expanses of equity *ex aequo et bono*. However, within its far more limited field of operation, it is well entitled to use the full and appropriate range of equitable principles, procedures and methods without being inhibited by concerns that it is travelling beyond its jurisdiction.

61. If the conceptual roadblock represented by *ex aequo et bono* is out of the way, a clearer path opens out for a fuller and more confident use of equity in the development of the law of the sea. This aspect was well summarized in the *North Sea Continental Shelf* cases, where the Court observed in the clearest terms:

> "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." (*I.C.J. Reports 1969*, p. 48, para. 88.)[2]

(b) Absolute equity

62. This term, also inapplicable to the present case, connotes the application of a just and fair solution irrespective of whether it overrides exist existing rules or principles of positive law, however well entrenched they may be. It is a disregard of the letter for the spirit of the law, a disregard of technicalities in favour of justice[1]. This would come close to the connotation of equity *ex aequo et bono* as discussed in the preceding section.

63. An illustrative and well-known example in the jurisprudence of international law of the use of the expression "absolute equity" is to be found in the *Orinoco Steamship Co.* case, 1910, where, in the words of the Permanent Court of Arbitration, the *compromis* required the US-Venezuelan Mixed Claims Commission to "give their decisions on the basis of absolute equity without regard to objections of a technical nature, or to the provisions of local legislation…". The umpire's recognition of local legislation in dismissing the claims on account of failure to exhaust local remedies and the debtor's failure to notify the cession of the debt in accordance with local legislation, was held to be a decision not in accordance with absolute equity and thus to be in disregard of the *compromis*[2].

64. The methods of equity *ex aequo et bono* and of absolute equity are not the methods of international law. "Above all, it is necessary to stop viewing equity as something which is in opposition to the law or as supplying a corrective to the law."[3]

(c) Equity praeter legem

65. This sense of equity refers to filling in gaps and interstices in the law. Even where there is no rule of law to provide for a matter, a decision has nevertheless to be reached, for the judicial function does not permit the court to abdicate the responsibility of judgment because the law is silent[4]. Consequently, the gap[5] has to be filled in some manner. Some would say that the judge is free to act in his discretion. Others would say the judge then

falls back upon equity as a guide. It is in this latter sense that the expression equity *praeter legem* is generally used.

66. In support of the view that equity should guide the judge in such cases, it could be said that judicial discretion does not then roam unbridled and at large, but, rather, is used in a disciplined way along the lines indicated by equitable concepts and principles. Within the parameters of those guidelines, that discretion will then be exercised though no rule of law has so far been formulated to govern the case.

67. Equity *praeter legem* receives juridical justification also from the fact, outlined elsewhere in this opinion, that the body of general equitable principles, as part of "general principles of law", is itself part of international law. Indeed, viewed strictly from that point of view, it ceases to be a category of its own but is merely an application of the law itself.

68. In the context of maritime delimitation, there are dicta in the jurisprudence of the Court that strongly support the view that the process in operation is one of the application of equity *praeter legem*:

> "Is not the conclusion therefore justified, to round off the enumeration of those international acts which refer to equity, that these acts constitute applications of the general principle of law which authorizes recourse to equity *praeter legem* for a better implementation of the principles and rules of law? And it would not be premature to say that the application of the principle of equity for the delimitation of the areas of the continental shelf in the present case would thus be in line with this practice." (*North Sea Continental Shelf, I.C.J. Reports 1969*, p. 141, Judge Ammoun, separate opinion[1].)

This aspect also receives some attention in the discussion, under item head VII *(f)* below, of the methods of equity.

(d) Equity infra legem

69. This is the category most relevant to the Judgment of the Court, for it is within its confines that the equity used by the Court has been administered. As the Court observed in the *North Sea Continental Shelf* cases:

> "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" (*I.C.J. Reports 1969*, p. 48, para. 88).

This was clearly a reference to equity *infra legem*[1].

70. In relation to the general jurisprudence of the Court, the operation of equity *infra legem* has been well summarized by Shabtai Rosenne in terms that:

> "It [the Court] has permitted the first steps to be taken towards creating a conception of international equity, not *contra legem* in the sense that it is sometimes said that a decision *ex aequo et bono* may be a decision *contra legem*; but *intra legem*, it being the substantive law, and not the agreement of parties, that calls for its application."[2]

71. Judge Ammoun offered an important warning against exceeding the limits of equity *infra legem* when he said, with reference to its opposite, equity *contra legem*:

> "This conception of Equity, which really consists of a possible derogation from general law in a particular case, has never been applied in international law. An international court which conferred such jurisdiction upon itself would appoint itself a legislator." (*Barcelona Traction, Light and Power Company, Limited, I.C.J. Reports 1970*, p. 333, para. 42.)

72. With special reference to maritime delimitation, a comprehensive doctrinal study has noted that:

> "the doctrine of equitable principles applicable to maritime delimitation has already achieved, both with regard to its procedural and substantive elements, a degree of clarity and predictability which is sufficient for it being recognized as a fundamental norm operating within, and not outside, the law"[3].

(e) Equity contra legem

73. Needless to say, equity as used in the Judgment is not of this category. The notion of equity being in opposition to the law and competing with it in some way by offering a set of alternative principles is not the image of equity that properly sets out the role of equity in international law. This aspect has already been discussed in Section II. In international law, equity is rather a force that supplements the law and helps it forward on its course of delivering just results in disputes between parties.

> "[T]he International Court has been very careful — and in this respect it may be possible to speak of a 'position' since fundamental questions of judicial policy are involved — to formulate its resort to 'equity' not in terms of 'opposition' to 'law', but in terms of fulfilling the law and if necessary supplementing it."[1]

Judge Hudson, in the *Diversion of Water from the Meuse* case, also stressed this aspect when he said,

> "A sharp division between law and equity, such as prevails in the administration of justice in some States, should find no place in international jurisprudence." (*P.C.I.J., Series A/B, No. 70*, p. 76, separate opinion.)

IV. The Routes of Entry of Equity

74. There are many routes of entry of equity into international law, and equity has been drawn into the judgmental process in this case through several of them. A concentration of attention on only one or other of these routes of entry can constrict the full scope of operation of equity in a given case.

(a) Equity as required to be applied by treaties

75. In relation to the matter before the Court, there is, of course, the pre-eminent example of Articles 74 and 83 of the 1982 Law of the Sea Convention expressly making equity applicable in the delimitation of maritime boundaries.

76. The invocation of equity by treaty is often a means by which a developing branch of the law is brought into line with contemporary thinking, thereby enabling perspectives which have not yet crystallized into legal rules to make their impact upon the law in question. The Law of the Sea Convention exemplifies this process, which can also be seen in treaties regarding contemporary concerns relating to earth resources such as food and space and in regard to economic matters and the settlement of disputes. Thus, the International Covenant on Economic, Social and Cultural Rights, 1966, deals with the "equitable distribution" of world food supplies (Art. 11); and the Convention on International Liability for Damage Caused by Space Objects requires compensation to be determined in accordance with "international law and the principles of justice and equity". The Charter of Economic Rights and Duties of States, 1974, likewise uses terms such as "equity", "equitable", "just", "equitable sharing", "equitable prices", "equitable terms of trade" (see Arts. 10, 14, 26, 28, 29); and the Protocol of the Commission of Mediation, Conciliation and Arbitration of the Organization of African Unity specifically draws equity into the settlement of disputes (Arts. 29 and 30)[1].

77. The specific invocation of equity by the Montego Bay Convention thus follows a time-honoured practice in international law, which can be traced back through the centuries[2].

(b) Equity as contained in customary international law

78. Customary international law has been invoked in the Judgment as a source of equity, especially in the context of giving meaning to the expression "relevant circumstances" under international law (Judgment, para. 56). Those relevant circumstances have been shown to be assimilated with the special circumstances of Article 6 of the 1958 Convention, as both are intended to enable the achievement of an equitable result *(ibid.)*.

79. The Court is required by Article 38 (1) of its Statute to decide such disputes as are submitted to it "in accordance with international law". There is an impressive body of authority to the effect that equity is part of customary international law. Friedmann, writing of the changing structure of international law, has observed:

> "There is thus overwhelming support for the view developed by Lauterpacht, Manley Hudson, De Visscher and Dahm that equity is part and parcel of the modern system of administration of justice."[3]

So, also, Judge Hudson observed in his individual opinion in the *Diversion of Water from the Meuse* case, "What are widely known as principles of equity have been long considered to constitute a part of international law…"[1] — a view which received the support of Judge Jessup in the *North Sea Continental Shelf* cases[2]. In the *Fisheries Jurisdiction* case (*United Kingdom* v. *Iceland*)[3], Judge Dillard cited this opinion with approval. Judge Hudson, writing extra-judicially, has observed, "equity is an element of international law itself"[4].

80. In regard to the law of the sea and the delimitation of boundaries of the continental shelf and the exclusive economic zone, equity has been recognized by this Court as part of international law — as in the *North Sea Continental Shelf* cases[5], and the *Tunisia/Libya* case[6]. Thus in the *North Sea Continental Shelf* cases, the Court considered it inequitable that the convexity or concavity of a coastline should deny equal treatment to States with coastlines that are comparable in length[7]. The requirement of a degree of proportionality between the shelf awarded to a State and the length of its coastlines was likewise looked upon as a principle of equity. So, also, equity did not require a "refashioning" of geography[8].

(c) Equity as a general principle of law[9]

81. There are several categories of general principles of law applied by international law; and equitable principles, concepts and procedures, such as have been applied in the Judgment, find a place in more than one of them.

82. Citing the *Gentini* case concerning international law's recognition, through equity, of the principle of prescription, while denying recognition of local laws of prescription, Professor Bin Cheng states:

> "The process applied in the *Gentini Case* [10] of tracing a general principle from rules of positive law universally applied *in foro domestico* through the general feeling of mankind for the requirements of equity and to equity itself, is a striking reminder of Descamps' proposal for the application in international law of 'objective justice' or 'equity' as evidenced by the '*conscience juridique des peuples civilisés*' and confirms the belief drawn from the *travaux préparatoires* of the Statute of the Permanent Court of International Justice that this proposal is not very different from the ultimately adopted formula of 'the general principles of law recognised by civilised nations' in Article 38 I (c) of the Court's Statute."[1]

Many classifications of such general principles are possible and the first three items in a five-fold classification by Schachter[2] show again under how many heads of this classification the principles of equity used by the Court could have been drawn:

> "(1) The principles of municipal law 'recognized by civilized nations'.
>
> (2) General principles of law 'derived from the specific nature of the international community'.
>
> (3) Principles 'intrinsic to the idea of law and basic to all legal systems'…"

83. Equity in its general sense, such as the Court has used, finds a place in all of these categories. Regarding the first clause, which of course is the language of Article 38, paragraph 1 (c), of the Statute of the International Court of Justice and the Permanent Court of International Justice, Schachter points out that some of the participants at the drafting stage of this clause had in mind equity and principles recognized by the "legal conscience of civilized nations"[3]. Elihu Root, who prepared the draft finally adopted, had intended however to refer to principles actually recognized and applied in national systems[4]. It would be correct to say also that international law, as discussed by eminent commentators[5] and by this Court, has looked for universal acceptance by legal systems rather than purely municipally adopted principles for this purpose. Equity clearly comes under this head. Part C of this opinion deals with the universal aspect of equity in some greater detail.

84. The second category would comprise such principles as *pacta sunt servanda*[1] which came into international law from the natural law tradition which was inextricably linked with equity in the broader sense. The third category includes such ideas as reciprocity and equality of parties before a tribunal, which are basic to all law.

85. The special influence of equity in its general sense is evident in all these categories and as the concept of a common law of mankind gathers momentum and principles relating to

an equitable sharing of resources become more urgently required, this route of entry of equity will perhaps assume increasing importance in developing the law of the sea.

86. Schwarzenberger, in commenting on “general principles of law recognised by civilised nations” as contained in the Statute of the Court, lists seven achievements of the draftsmen of that clause. One of them, which fittingly summarizes this discussion is that, “They [the draftsmen] opened a new channel through which concepts of natural law could be received into international law.”[2] Equity would represent a heavy item of traffic along that channel.

(d) Equity as embodied in the decisions of courts and tribunals

87. Article 38, paragraph 1 *(d)*, of the Court's Statute mentions that, subject to the consideration that decisions of the Court shall have no binding force except between the parties and in respect of the particular case, judicial decisions shall be a subsidiary means for the determination of the law.

88. The jurisprudence of this Court has now reached a stage where a considerable body of equitable principles is contained within the decisions of the Court and where there is frequent resort to equity as an aid towards the process of decision[3]. Through their adoption by the Court, they have thus entered the mainstream of international law.

89. The *Fisheries* case (*I.C.J. Reports 1951*, p. 116) is an outstanding early example[1], but since then there has been much development of this concept in the context of maritime delimitation through a series of decisions of this Court making explicit references to the application of equitable principles.

90. The heavy reliance in the Judgment on judicial decisions thus draws in equity through yet another source. Dependence on such cases as the *North Sea Continental Shelf* cases, the *Libya/Malta* case and the *Gulf of Maine* case has provided avenues not only for the entry of equity into maritime delimitation but for the construction, out of those equitable principles, of a coherent body of equity-based maritime jurisprudence. Any consideration of problems relating to the law of the sea must thus, as in this case, have regard to this considerable body of decisions which, through their adoption of equitable principles, have made the fertilizing influence of equity an integral part of maritime law.

(e) Equity as expounded in the writings of the publicists

91. Going back to the fountainheads of international law, one sees that Grotius incorporated into international law the idea that equity could complement the administration of international justice, for he cites Aristotle's references to “the perception of what is fair”, “the quality of fairness”, and “justice”[2]. Aristotle's definition of justice as “the correction of that in which the law, by reason of its general character, is at fault” is also cited. Indeed, Grotius' comment goes so far as to suggest even the application of equity “outside the rules of justice, properly so-called”. Grotius is no doubt here using the term “rules of justice” in the sense in which we would speak of “rules of law”.

92. One cannot fail to note, in this regard, the heavy reliance by Grotius on natural law, in his pioneering work on the construction of the basic principles of the law of the sea. The law of the sea may perhaps be described as an area of international law which is particularly sensitive to equitable influences.

93. The process initiated by Grotius goes on to this day and the great publicists of each generation have, through their own writings, incorporated considerations and principles of

equity into their contributions, which have been assimilated into the corpus of public international law[3].

(f) Equity as justice

94. In the *North Sea Continental Shelf* cases, the Court stated, "Whatever the legal reasoning of a court of justice, its decisions must by definition be just and therefore in that sense equitable." (*I.C.J. Reports 1969*, p. 48, para. 88.) Equity as part of justice which the court is bound to administer then becomes part of its general jurisprudence. Equity in the sense of a quest for the just solution offers a firm substratum for a considerable part of the Court's reasoning.

95. In his separate opinion in *Barcelona Traction, Light and Power Company, Limited, Second Phase*, Judge Fitzmaurice, citing a standard work on equity (*Snell's Principles of Equity*, 26th ed., 1966, pp. 5–6), said:

> "as the author of the passage cited points out… equity is not distinguishable from law 'because it seeks a different end, for both aim at justice…'. But, it might be added, they can achieve it only if they are allowed to complement one another.' (*I.C.J. Reports 1970*, p. 86, para. 36.)

96. In *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, this Court observed,

> "Equity as a legal concept is a direct emanation from the idea of justice. The Court whose task is by definition to administer justice is bound to apply it." (*I.C.J. Reports 1982*, p. 60, para. 71.)

This Court and its predecessor have of course been careful to point out that the fact that it dispenses justice does not entitle it to ignore the rules of law. The need to administer justice does not, in the words of the Permanent Court, entitle it to "base its decision on considerations of pure expediency" (*Free Zones of Upper Savoy and the District of Gex, P.C.I.J., Series A, No. 24*, p. 15).

97. Kelsen and some other authorities[1] have expressed the view that the Court's function is to decide cases in accordance with international law and on no other grounds. Kelsen says, for example, that the Statute of the Court requires that the Court decide disputes in accordance with international law and does not mention justice, thus leading to the view that the Court is not authorized to decide disputes in accordance with justice[2].

98. Such views, with great respect, do not take into account the fact that much of international law already embodies equity, and that equity was a principal route through which many basic concepts entered the corpus of international law and became part of it. They also do not take into account the fact that to shut the gates to the entry of this stream of influence into the corpus of international law is to cramp the development of the latter.

(g) Equity as drawn in by the United Nations Charter

99. The Charter of the United Nations in Article 1 sets out as one of the Purposes of the United Nations that "To maintain international peace and security" it shall "bring about by peaceful means, and in conformity with the principles of justice and international law, [the] adjustment or settlement of international disputes…". The International Court has been set up within that framework as one of the principal organs of the United Nations and is thus obliged to act in the adjustment and settlement of international disputes "in conformity with the principles of justice and international law". Equity as an inherent part of justice, if not of international law itself, thus enters into the Court's jurisprudence. Its significance in this regard can be measured from the fact that the maintenance of international peace and

security being among the foremost of the objects of the United Nations and all its agencies, a primary means of achieving this object, namely, the principles of justice and international law must themselves have primary importance. Indeed, justice and equity are inherent attributes of peace itself, which is foremost among the objects international law aims at achieving[1]. The obligatory nature of this aspect becomes clearer when one considers also that the earlier draft of the Charter contained the words "*with due regard* to justice and international law" which were changed to "*in conformity with*" as the earlier phrase was not considered to be sufficiently emphatic[2].

100. So, also, the Preamble to the Charter expresses as one of the fountainheads of the whole concept of the United Nations the determination of the peoples of the United Nations "to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained". Shabtai Rosenne rightly uses this aspect to point out that the unity of equity with law and justice must therefore be seen in terms of a "monad" of equity, law and justice (connoting a lack of opposition among them) rather than the "triad" of law, justice and equity conceptualized by Sohn[1].

101. It needs scarcely to be stressed that every portion of the Charter is as basic to the operation of the Court as the Court's own Statute, for the two are one integrated document. The Court's warrant to use equity in this case as in all others is thus mandatory and comes direct to it from its fundamental statutory source. It is worthy of note, also, that the intimate linkage of justice and equity as set out in the United Nations Charter, with the law of the sea, was eloquently underlined by the President of UNCLOS III, Mr. H. S. Amerasinghe, at the very commencement of the Conference, when he said, in his opening address as President:

> "If the Conference resolved to be guided by the principles of justice and equity, and if it showed a spirit of mutual understanding, goodwill and compromise, it would not only be living up to the high expectations of the United Nations Charter but also handing down to posterity one of the supreme achievements of the Organization."[2]

(h) Equity as embodied in State practice

102. A number of items of State practice have been placed before the Court in support of propositions concerning their respective positions which the Parties seek to infer from them. State practice would within limits be evidentiary of customary international law. In so far as the State practice relied upon relates to the delimitation of maritime boundaries, it is important to note that equitable considerations, such as the principle of equidistance, often provide the background against which States negotiate on such matters. The resulting arrangements may therefore incorporate principles of equity. To the extent that State practice helps to build up international law, international law would then have, built into it through this source, some of the principles of equity. Concretized in this fashion, their equitable origins may be obscured, but we may nevertheless sometimes recognize them in the State practice they helped to evolve.

V. A priori and a posteriori Employment of Equity

(a) The positive or a priori use of equity to construct a result

103. The positive use of equity would of course be illustrated in the Court's Judgment by the application of equitable concepts and the use of equitable procedures and methods towards the achievement of an equitable result.

(b) The negative or a posteriori use of equity to test a result

104. This has been touched on already in paragraphs 31–42. It was there pointed out that the application of the equidistance principle, itself a principle of equity, can on occasion yield a result which is not equitable, as pointed out by this Court on more than one occasion. Where there is a vast disproportion in coastlines, as in the *Libya/Malta* case, that would be a means for using equity in the sense of testing whether the result would be inequitable. So, also, in the present case, the vast disproportion between the lengths of the coastlines of Greenland and Jan Mayen has been used in testing whether the result obtained by equitable principles and methods is in fact inequitable. Such a role of equity can indeed be looked at as "not so much the positive assurance of an equitable result as the negative avoidance of an inequitable one"[1], but it has both practical value and theoretical justification.

105. The use of equity in this sense is analogous to the use of injustice as a test of justice, which has a long history in philosophical thought. Although justice by its very nature is incapable of comprehensive formulation, injustice by its very nature is often a matter of instant detection. Likewise, though that which is equitable cannot be formulated in advance in terms of a comprehensive set of rules[2], that which is inequitable can be readily identified as such when a situation has occurred or a proposal is mooted.

106. This line of thought regarding justice has an ancient lineage[3]. Aristotle wrote in the *Nicomachean Ethics* regarding the sense of injustice that, "The many forms of injustice make the forms of justice quite clear"[1], a theme also taken up by modern jurists[2]. Whereas the response to the concept of justice is merely contemplative, the response to a situation one senses as unjust is a more positive one[3]. The enlistment of the sense of injustice in the service of justice thus enjoys strong philosophical justification. The "sense of injustice" is "largely retrospective and corrective", while "the deficiencies it identifies can be finally repaired only by a body of doctrine that is prospective and creative"[4]. This is an illustration of the fact that "theories of justice in all their rich diversity of content and mode of presentation, cannot safely be discarded even from the most practical concern"[5].

107. In short,

> "We are confronted here with the difference between, on the one hand, the question of the definition of equity *in abstracto* and, on the other hand, the question of whether a *concrete* situation, measure or decision is equitable."[6]

108. All this is not to say, however, that relevant rules of equity applicable to a given object can never be formulated in advance. They can, up to a point, as the juristic learning on that topic matures, but they can never be formulated totally and the sense of injustice or the sense of the inequitable will always continue to offer assistance in the pursuit of the equitable solution.

109. With reference to boundary delimitation, no code of justice or equity, however precisely formulated, can cover all possibilities in advance. However, a solution once presented, can immediately attract a sense of injustice, which would then result in its rejection and the search for another which does not produce the same reaction. The stress upon the need for an equitable solution and the rejection of any solution which, though reached in accordance with equity, is inequitable, is thus one which has philosophical support.

VI. The Uses of Equity

110. The uses of equity are manifold and more than one of them may be in operation simultaneously in a given case such as that before the Court. This aspect of equity is best appreciated by using any of the well-known classifications of the use of equity. Oscar Schachter's analysis, for example, in his course on general international law at the Hague Academy in 1982 itemized five uses[1]:

(a) equity as a basis for “individualized” justice tempering the rigours of strict law;

(b) equity as introducing considerations of fairness, reasonableness, and good faith;

(c) equity as offering certain specific principles of legal reasoning associated with fairness and reasonableness, to wit, estoppel, unjust enrichment and abuse of rights;

(d) equity as furnishing equitable standards for the allocation and sharing of resources and benefits;

(e) equity as a broad synonym for distributive justice and to satisfy demands for economic and social arrangements and redistribution of wealth.

111. To this list may be added some others such as those listed below as methods of operation of equity. There may be some overlap between the two groups, for some of these uses of equity may also be listed as methods and vice versa.

112. Of the five categories listed above, it is clear that at least the first four have relevance to this case.

113. *(a)* Though Schachter mentions “individualized justice” in the sense of tempering the rigours of strict law, equity can be used to deliver “individualized justice” without in fact operating in conflict with a rule of law. The use of equity in this sense for maritime delimitation was well put by Judge Jiménez de Aréchaga in the *Tunisia/Libya* case:

> “the judicial application of equitable principles means that a court should render justice in the concrete case, by means of a decision shaped by and adjusted to the relevant ‘factual matrix’ of that case. Equity is here nothing other than the taking into account of a complex of historical and geographical circumstances the consideration of which does not diminish justice but, on the contrary, enriches it.” (*I.C.J. Reports 1982*, p. 106, para. 24, separate opinion.)

114. In many cases of maritime disputes including the present this aspect is of great relevance, for each case calls for individualized treatment within the context of whatever rules of customary or treaty law may be relevant. No conflict with those rules is implied but an operation within them, as more fully discussed in the section on equity *intra legem*. This use of equity to help shape the decision to the “factual matrix” of the case is very much in use in the present case as evidenced by the variety of factors considered by the Court, at least one of which — the ice factor — has perhaps not been considered in the Court's jurisprudence before.

115. The rationale of the individualized approach was also well expressed by Judge Jiménez de Aréchaga in the following terms:

> "Its [the Court's] having authority to apply equitable principles does not entitle a court to reach a capricious decision in each particular case, but to reach that decision which, in the light of the individual circumstances, is just and fair for that case. Equity is thus achieved, not merely by a singular decision of justice, but by the justice of that singular decision."[1]

116. *(b)* Equity as considerations of fairness and reasonableness is also clearly in operation in this case.

117. *(c)* Equity as the basis of specific principles of legal reasoning has also been used, as when the Court considers whether the conduct of parties has been such as to amount to an estoppel. This becomes relevant in the present case in assessing, for example, the effect of the past conduct of the Parties in relation to equidistance in demarcating boundaries.

118. *(d)* Equitable standards for the allocation and sharing of resources and benefits of course lie at the heart of this dispute and in the context of the sharing of natural resources it has been shown elsewhere in this opinion that equity is playing an increasingly important international role.

119. Useful analogues to equity's role in relation to the sharing of maritime space come from space law and riparian law. Space law takes in the concept in the Moon Treaty, 1979 (Agreement governing the Activities of States on the Moon and other Celestial Bodies), which prescribes "the *equitable* sharing by all States parties" in the benefits derived from those resources and also in the allocation of "slots" for the geostationary communication satellites in outer space. The relevant treaties dealing with the allocation of these slots, such as the Convention of the International Telecommunication Union, invoke equity for this purpose through their reference to "equitable access" as a goal[1].

120. A closer analogy, where a resource is to be divided between two States, would be the rights of littoral and riparian States to lakes and rivers. The Lac Lanoux Arbitration of 1957 between France and Spain[2] is an illustration of equitable principles of good faith and a just balance between the interests of the parties being used to determine the respective rights of two States. The Helsinki Rules on the Uses of the Waters of International Rivers (adopted by the International Law Association in 1966) and the Resolution on Pollution of Rivers and Lakes (adopted by the Institut de droit international in 1979) show a heavy dependence on equity in relation to the sharing of resources.

121. *(e)* Equity in the sense of distributive justice and redistribution of wealth is not involved in the present case. With reference to maritime boundary delimitation, this Court has observed:

> "While it is clear that no rigid rules exist as to the exact weight to be attached to each element in the case, this is very far from being an exercise of discretion or conciliation; nor is it an operation of distributive justice." (*Continental Shelf (Tunisia/Libyan Arab Jamahiriya), I.C.J. Reports 1982*, p. 60, para. 71.)

VII. The Methods of Operation of Equity

(a) Through balancing the interests of the parties

122. True equity, it has been said, "consists in holding in the best equilibrium the considerations of equity invoked by both parties"[3]. The Judgment in this case has considered a number of circumstances and evaluated their resultant effect in a manner that can be so described. This is not only a well-accepted method of equity, but has ample

support from the jurisprudence of this Court and of arbitral tribunals in maritime delimitation cases.

123. In the *Tunisia/Libya* case, the Court defined its task as an obligation "to balance up the various considerations which it regards as relevant in order to produce an equitable result" (*I.C.J. Reports 1982*, p. 60, para. 71).

124. Judge Jiménez de Aréchaga, in his separate opinion in the same case, pointed out that:

> "To resort to equity means, in effect, to appreciate and balance the relevant circumstances of the case, so as to render justice, not through the rigid application of general rules and principles and of formal legal concepts, but through an adaptation and adjustment of such principles, rules and concepts to the facts, realities and circumstances of each case." (*Ibid*., p. 106, para. 24. See, also, *ibid*., *Judgment*, paras. 71 and 107 on the "balancing process".)

The process outlined by Judge Jiménez de Aréchaga describes very closely the process followed in the Judgment of the Court.

125. This notion of the balancing of considerations to reach an equitable result goes back very far in international law. The decisions of the Commissions set up under the Jay Treaty of 1794[1], and authorized to employ equity in their determinations, have been analysed as having been reached through "the necessary process of adjustment, of the weighing of one consideration against another"[2].

126. A reference to the process of balancing up all relevant considerations was made also in the *North Sea* cases where the Court observed:

> "In fact, there is no legal limit to the considerations which States may take 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." (*I.C.J. Reports 1969*, p. 50, para. 93.)

127. The Tribunal hearing the *Delimitation of the Continental Shelf between the United Kingdom and France* case[3] also engaged itself specifically in the task of balancing the factors presented to it by the respective parties in determining the boundary line in the Channel Islands.

128. Of comparative interest, from a related area of the law, is the following methodology described in Article V, paragraph 3, of the Helsinki Rules on the Uses of Waters of International Rivers:

> "The weight to be given to each factor is to be determined by its importance in comparison with other relevant factors. In determining what is a reasonable and equitable share, all relevant factors are to be considered together and a conclusion reached on the basis of the whole."

(b) Through an equitable interpretation of a rule of law or of a treaty or set of facts

129. One of the important functions of the equitable approach in all judicial processes is to provide a method of interpretation. This can relate to the interpretation of a rule of law or of a document, or indeed of a set of facts. Literal interpretations, wedded to the letter of the law and to formalism, contrast with liberal interpretations, based upon an equitable approach. Whether it be a rule of law or a treaty or a factual situation that is under interpretation, the same duality of approach is possible, with widely varying consequences.

130. Schwarzenberger spells out this aspect of equity in terms that,

> "The rule of equity, as it has grown, demands reasonableness and good faith in the interpretation and application of treaties."[1]

131. This could be more specifically addressed in terms of a choice not between two but among several available interpretations. In the words of De Visscher:

> "Equity can be something other than an independent basis of decision, as when in a decision which in other respects is founded on positive law *(intra legem)*, the judge chooses among several possible interpretations of the rule the one which appears to him, having regard to the particular circumstances of the case, most in harmony with the demands of justice."[2]

132. In this case, one of the major questions addressed by the Court has been the interpretation, in accordance with equity, of the "special circumstances" mentioned by the 1958 Convention.

(c) Through tempering the application of strict rules

133. This is the classical Aristotelian concept of equity, described thus by Aristotle, in the *Nicomachean Ethics*:

> "The reason for this is that law is always a general statement, yet there are cases which it is not possible to cover in a general statement… This is the essential nature of the equitable: it is a rectification of law where law is defective because of its generality."[1]

134. Equity could thus adopt a dominant attitude and correct a law that is defective, or adopt a soft or more lenient interpretation of a law, thus tempering its rigidity without conflicting with it. The former attitude is, as already noted, inapplicable to international law.

135. However, the latter aspect of flexibility, which is relevant, is captured by Aristotle in the same work in his comparison of the indefiniteness of equity to the "leaden rule used by Lesbian builders", which "is not rigid but can be bent to the shape of the stone"[2]. In the context of maritime delimitation, each case presents upon the facts a different shape from every other, and equity adjusts itself around that shape in the manner described because it is flexible, where a rigid rule would scarcely do it justice. The Judgment in this case does no less.

(d) Through the choice of an equitable principle

136. This is an aspect relevant to the judicial processes involved in the present case, for there are many equitable principles (and procedures and methods) that can be used. The Court, for reasons stated, has made its choice among these in deciding upon the line of delimitation it has chosen.

137. The judicial function by its very nature involves a choice among competing principles all of which in one way or another have relevance to the matter in hand. What principles a court adopts from the range of choice available is determined by a weighing of considerations such as those of relevance, immediacy to the problem, practical value in the particular circumstances, and the degree of authority of the principle. These are matters in which a court's experience and sense of judgment will provide it with guidance. In such situations, an important additional guide would be, within the limits of choice available in law, the court's sense of justice, fairness and equity.

138. In relation to maritime delimitation, apart from a few specific principles such as the equidistance-special circumstances rule (which have already emerged), it would be a matter for the court, among the range of general principles (and procedures and methods) available, to make such a choice as is in accordance with law and its sense of justice.

139. This is another illustration of what Julius Stone describes as the “element of evaluative choice” that is part and parcel of the judicial process[3]. To use another expression of that eminent jurist, “leeways of judicial choice”[1] exist within the concept of equity, as indeed they do in most departments of the law. The fact that international law is involved, rather than domestic law, does not alter the nature of the judicial process. Equity never was nor ever will be a completely objective department of legal knowledge. In the words of a well-known treatise, “Equity may play a dramatic role in supplementing the law or appear unobtrusively as part of legal reasoning.”[2]

(e) Through the use of judicial discretion

140. Some aspects of this have already been dealt with in so far as judicial discretion relates to the choice of an appropriate principle for application. Judicial discretion also comes into operation in regard to the choice of an appropriate solution from among a range of choices, all of them equally available on the basis of the Court's reasoning. Indeed, this aspect is particularly relevant in the present case, for, in theory, an infinite number of possible lines of delimitation would be available within the framework of the principles which the Court has chosen to follow.

141. This aspect assumes even more relevance having regard to the express averment in paragraph 90 of the Judgment that the adjustment of the median line would be within “the measure of discretion conferred on the Court by the need to arrive at an equitable result”. I agree with this assertion of judicial discretion, for it is an explicit averment of what is often an implicit assumption. It is essential to point out, if one may borrow the combined judicial and academic wisdom of O. W. Holmes and Julius Stone, that, in matters such as this, there are no unique answers which are “‘right’ in some absolute sense, as if judgment consists of ‘adding up one's sums correctly’”[3]. The court, as distinct from an arbitrator or conciliator, works within certain parameters set by law[4]. It exercises its discretion within the parameters thus set, and, where it uses the flexible tools of equity, it uses them *infra legem*. But yet, as with every exercise of judicial discretion, there is a range of choices available to the judge within a broad framework of permissible limits. Where the choice falls within that range depends upon the judge, and how he makes his choice depends on the guiding principles he employs. This is not an area of lacunae in the law, for, though the law can offer

guiding principles, it is by its very nature incapable of covering entirely the innumerable permutations and combinations of fact that present themselves in a given case.

142. The use of judicial discretion may not be one of the great illuminated places of the law but, within it, equity is *par excellence* one of the lights[1] available to a judge in determining his preference amidst the leeways of choice available[2]. Equity here may consist of specific principles that have emerged from equity, or equity in the broad and general sense already discussed. Either way equity can enter international law and make a vital contribution to its continued development. Since the use of judicial discretion within the prescribed parameters is thus a necessary and intrinsic part of the judicial process, a court exercising its discretion in a case such as this does not exceed its judicial function in making its considered choice, within those limits, on the basis of its sense of the fair and equitable. Nor does it need to feel inhibited, in the exercise of that very proper function, by concerns that it is trespassing beyond the limits of the judicial function. Viewed thus, the whole spectrum of equitable applications, uses and methods stretches out before the Court, enabling the best choice to be made from the range available within the limits of its authority.

(f) Through filling in gaps and interstices in the law

143. This has already been dealt with in the context of equity *praeter legem*.

(g) Through following equitable procedures

144. This has already been dealt with in classification I *(b)* above.

(h) Through the application of equitable principles already embedded in the law

145. Many principles of equity such as unjust enrichment, good faith, contractual fairness and the use of one's property so as not to cause damage to others are already embedded in positive law. In the field of international law the position is the same. When one applies such a rule of positive law, one is thus giving effect at the same time to a principle of equity. At what precise time a particular rule of equity takes on also the mantle of a rule of law is often a difficult question to decide. The results reached would often be the same, and probing the matter further may then be a merely academic exercise.

(i) Through its use in negative fashion to test a result

146. This has already been dealt with in classification V *(b)* above.

VIII. The Stages of Equitable Decision-Making[1]

147. It is perhaps helpful, in analysing a judgment involving the use of equity, to note that equity has not been applied in one sweeping operation, but that it is a careful and ordered process involving sequential stages which can be separately examined. The Judgment of the Court in this case applies equity in this ordered fashion and has my support in regard to the decision taken at each of these stages. These stages could of course be differently analysed, but the following stages perhaps represent the Court's approach to the problem.

(a) The identification of the area of the dispute

148. The earlier part of the Judgment carefully considers this aspect in some detail (para. 21), specifying the three areas involved. The extent of the relevant area is also specified.

(b) The preparatory phase of assembling the relevant circumstances

149. As in this case, the next task that presents itself is to assemble the relevant circumstances. In so doing, the Court would independently assess the relevance of each circumstance. The Judgment of the Court indicates what circumstances it considers

relevant. The particular circumstances involved in this case are referred to in Part B of this opinion.

150. In working on this preparatory phase the Court would be guided by the equitable procedure of considering every item relevant to the matter under examination. The decision whether a matter has relevance or not would naturally be dependent also on any applicable rules of law, for the equity the Court is here using is not equity *contra legem*. This aspect is of crucial importance in determining for example whether such circumstances as population or economic factors should be taken into account.

(c) The decisional phase

151. This has a three-fold aspect — decisions in regard to the appropriate rules, whether of law or equity that have to be employed; decisions in regard to the assessment of the facts found to be relevant under head *(b)*; and the application of rules of law or equity to those facts to produce a practical result.

152. Once the relevant circumstances are determined, their weight has to be assessed. What weight would, for example, be given to the ice factor in this case in working out a principle of fair division? What is its weight both intrinsically and when matched against the other relevant factors? What is the weight to be given to proportionality in the light of the disproportionate coastal lengths involved?

153. Thus each factor needs to be assessed for its intrinsic importance and for the weight it carries amidst the totality of relevant factors.

(d) The confirmatory phase

154. The Court would then reach a result, but that result needs to be tested, for equitable principles or procedures do not automatically lead to an equitable result. As already noted, while equidistance might represent an equitable principle or method, it could lead to a result which is not equitable. A result must not be unjust. The philosophical underpinnings of this concept have already been discussed in relation to the *a posteriori* use of equity in category V above.

155. This short survey of the handling of equity in the Judgment, and of possible approaches to the application of equity, will show the multitude of heads and the diversity of routes through which equity becomes available to the Court. It is hoped, also, that this analysis will have shown the inevitability of the entry of equity into a problem such as that confronting the Court, the productive role it can play through judicial decision and otherwise in constructing the law of the future and the fact that equity is a vital and integral part of positive law which one neglects only at the cost of legal development.

Uncertainties in the Use of Equity

156. It is intrinsic to the operation of equity that there are some uncertainties in regard to the extent of its application and the results which emerge. This has already been noted in an earlier part of this opinion. Some of the causes of these uncertainties, with special reference to maritime delimitation, are separately considered below with a view to addressing the question whether there is in equity, as is sometimes alleged, a quality of uncertainty which renders it an unsuitable instrument for determining the claims of parties in a matter such as this.

(a) Absence of mechanisms for precise quantification

157. To expect greater precision is to ignore the very nature of equity[1]. One is reminded here of the Aristotelian aphorism that only so much precision can be achieved as the subject-matter will allow. The factual material which equity deals with is in most cases rarely assessable in quantifiable terms. Equity has no fine balances at its command to weigh human conduct, no graded units of value with which to measure the particular mix of varied factors a given case may present. It makes in most cases an overall assessment on the basis of legal principle and human experience and will not be able, in mathematical fashion, to produce a result precisely calibrated to match the circumstances, if, indeed, such a result were at all possible, having regard to the nature of the subject-matter.

158. When therefore a court, as in this case, translates an equitable finding into a delimitation, it is only in terms of an assessment of the equities as closely as it can and not with any suggestion that the resulting cartographic delimitation mirrors the exact ratio of equities involved. Certainties such as are contended for here do not exist even in the realm of the law, leave alone the realm of equity[2].

(b) Lack of definiteness in the scope of equity

159. Equity's seeming weakness in defying comprehensive definition[3], or precise quantification is at the same time one of its strengths, for it has given it the flexibility to make a prime contribution to the development of the law. Try as one may to achieve the desirable goal of certainty, this remains elusive, for

> "the finest legal dissertations on equity will never succeed in completely eliminating what is perhaps an irreducible core of judicial subjectivism…" (*Continental Shelf (Libyan Arab Jamahiriya/Malta), I.C.J. Reports 1985*, p. 90, para. 37, joint separate opinion of Judges Ruda, Bedjaoui and Jiménez de Aréchaga).

Elsewhere in this opinion, reference has been made to the series of seminal principles equity has contributed to international law. These have proceeded from its quality of flexibility, its ability to handle new situations for which legal precedent affords no guidance, and its conformity with justice and fairness. In maritime delimitation law, likewise, these qualities will no doubt assist it in shaping that body of law in equitable fashion, and each individual decision based on equity, such as the present case can contribute to this end. The day equity is completely captured in a definition or formula, its creativity would be at an end.

(c) Lack of crystallization of equitable results

160. In the special field of the law of the sea, equitable concepts remain largely undefined and their theoretical foundations unclear. This is but natural, particularly in such an actively developing field, for as De Visscher has observed,

> "if one views the matter historically, rules of law have at all times been largely the offshoots of equity before being crystallized within the positive legal order"[1].

The danger of overconceptualization of equitable principles has indeed been noted by this Court in the context of the law of the sea[2], however great the apparent need to concretize the application of equity in this field.

(d) Changing nature of the law of the sea

161. An additional circumstance making for uncertainty in this field should also be noted — namely that the uncertainties of equity are compounded, in relation to the law of the sea, by the fact that the law of the sea itself has been undergoing a process of spectacular change. Some cases such as the *1969 North Sea Continental Shelf* cases and the 1982 *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* case occurred before the Law of the Sea Convention was signed, whereas others such as the 1985 *Continental Shelf (Libyan Arab Jamahiriya/Malta)* case and the 1985 *Guinea/Guinea-Bissau* cases occurred after. Maritime delimitations such as are sought in this case straddle the Geneva Convention of 1958 and the Montego Bay Convention of 1982, with all the conceptual changes occurring between 1958 and the present day.

162. Not only was a new dimension given by that Convention to the applicability of equity but the very concepts to which it was being applied — such as that of the exclusive economic zone — were in a state of dynamic evolution. New concepts unknown in the 1950s such as that of the exclusive economic zone were gathering strength even as older concepts such as that which based the continental shelf on a natural prolongation were losing momentum. It is no cause for surprise that flexible principles superimposed upon so fluid a subject should have failed to produce a greater predictability of legal result.

(e) The resort to fact-intensive rather than rule-intensive procedures

163. An important aspect which the Court must address in maritime delimitation cases is the extent to which it should concentrate on the variable facts of each separate case rather than on a search for overriding rules which are common to all[1]. The juristic literature describes the former as fact-intensive rather than rule-intensive procedures, and points to the concentration on fact-intensive procedures as an additional cause of uncertainty in this area of the law. However, the type of enquiry involved in the present case necessarily requires heavy reliance on fact-intensive procedures. Additionally, the crystallization of equitable rules relating to delimitation has not yet reached a stage of sufficient maturity to be a comprehensive guide[2]. Fact-intensive procedures must therefore continue to play a significant role in maritime delimitations.

164. In the history of maritime delimitation, there have indeed been attempts to reduce the solution of this problem to rule-intensive procedures specified with nearly mathematical precision[3]. The effort at one stage to erect the concept of equidistance into a rigid rule was another attempt at rule-intensive solutions aimed at achieving a predictable certainty of result.

165. The self-limiting nature of such formulae is clear, especially in the light of later experience revealing the relevance of numerous factors, some of which may not have been foreseen, and some of which — such as State conduct — cannot possibly be the subject of pre-set assessments. Legal concepts cannot thus be locked into the rigours of mathematical method.

Part B. Particular Invocations of Equity in Maritime Delimitation

Long-standing Recognition of Equity in the Law of the Sea

166. Apart from the general applicability of equity in international law which would, in any event, draw it into disputes in relation to the law of the sea, it has also been specifically drawn into the law of the sea by treaty, proclamation, judicial and arbitral decisions and State practice. Equity has long been specifically drawn into the law of the sea in this fashion. This aspect is dealt with in the Judgment of the Court and I shall deal with it only in outline. It will suffice for present purposes to note that its invocation in the Truman Proclamation (of 28 September 1945) was coeval with the very birth of the continental shelf

doctrine. The statement in that Proclamation that the determination of boundaries, where the continental shelf extended to the shores of another State or was shared with another State, was to be *in accordance with equitable principles* was a significant early indication that the law of the sea would, in its formative phase, lean heavily on equity.

167. A landmark event was the Geneva Convention of 1958 which will be considered below. However, even before this, the régime of equity in this field was well established:

> "It is generally admitted that in State practice prior to the Geneva Conference of 1958 the tendency was to refer in general terms to the delimitation of continental shelf boundaries or 'equitable principles'…" (*North Sea Continental Shelf, I.C.J. Reports 1969*, p. 91, Judge Padilla Nervo, separate opinion.)

168. In the jurisprudence of this Court in maritime disputes, the equitable approach received recognition in 1951 in the Anglo-Norwegian *Fisheries* case[1]. The development of this trend, through a series of cases[1] until the latest decisions of this Court, has entrenched equity as a key legal factor in this field. This trend is evident also in the arbitral decisions[2].

169. In the deliberations during UNCLOS III, the role of equity in relation to the law of the sea progressively achieved increasing recognition, till it became enshrined as a cardinal principle in the final draft of the Convention, in Articles 74 and 83. In achieving this status, equity displaced other suggested criteria such as equidistance which had appeared in earlier drafts as the prime consideration for delimitation. Indeed, a deep concern for equitable considerations permeates the Convention (see Arts. 160 (2) *(d)*, 161 (1) *(e)*, 162 (2) *(d)*, 163 (4), 274 *(a)*).

170. So much importance has equity gained in this regard that it has been described as "currently gaining ground as the central principle of maritime boundary delimitation over the 1958 equidistance-special circumstances rule"[3].

The Use of Equity in the 1958 Geneva Convention

171. The 1958 Geneva Convention on the Continental Shelf provides by Article 6 that, where the same continental shelf is adjacent to the territories of the two States whose coasts are opposite to each other, the boundary of the continental shelf appertaining to such States shall be determined by agreement between them:

> "In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary is the median line, every point of which is equidistant from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured."

172. Judge Oda has observed that, although not specifically mentioned in Article 6, the idea of an equitable solution lay at the basis of that provision[4] which can perhaps be regarded as having inferentially attracted equity into delimitation.

173. There are two pointers in the Article to the area of enquiry in which the Court should engage itself —

(i) any agreement between the parties, and,

(ii) in the absence of such agreement, whether any line other than the median line is justified by special circumstances.

174. Under each of these heads, there are matters which arise for consideration.

175. Under the first head, there is the Agreement of 1965 between Norway and Denmark which is considered in the Judgment of the Court. I respectfully express my agreement with the conclusion of the Court that that Agreement does not relate to the maritime area in dispute in the present case.

176. Under the second head, the Court has been addressed on a number of factors — relative populations, proportionality of coastlines, respective landmasses and economic importance to the appurtenant coast, to mention a few. These matters will receive consideration later in this opinion. It is my view that none of them can be ruled out *in limine* on the basis of a general principle of irrelevance relating to any one category.

177. As was observed by the Court of Arbitration in *Delimitation of the Continental Shelf between the United Kingdom and France* in 1977:

> "the rôle of the 'special circumstances' condition in Article 6 is to ensure an equitable delimitation; and the combined 'equidistancespecial circumstances rule', in effect, gives particular expression to a general norm that, failing agreement, the boundary between States abutting on the same continental shelf is to be determined on equitable principles"[1].

The Use of Equity in the 1982 Montego Bay Convention

178. The "equitable solution" formula contained in the Convention (Arts. 71 (1) and 83 (I)) — a compromise between that favoured by the equidistance group[2] and that favoured by the equitable principles group[3] — gave further recognition to the role of equity.

179. As is observed in a contemporary text on the régime of islands under international law:

> "The most distinctive feature of the provision [on the economic zone and continental shelf in the Informal Single Negotiating Text] was the abandonment of the 1958 equidistance-special circumstances model in favour of a formula based on the principle of equitable delimitation."[1]

180. The acceptance by both groups[2] of phraseology including "an equitable solution" despite the wide disparities in the positions of the two groups gives equity a position of special importance in this sensitive and controversial area of international law, thus creating a special need for a fuller investigation of all the implications of the phraseology so adopted[3].

Categories of Relevant Factors Are Not Closed

181. In paragraphs 122–128 above dealing with the operation of equity through the balancing of interests, attention has been given to the way in which the various relevant circumstances are weighed against each other. Reference was there made to the *North Sea* cases which stated that there was no legal limit to the considerations which States take account of for this purpose[4]. So, also, in the *Libya/Malta* case, this Court observed:

> "For a court, although there is assuredly no closed list of considerations, it is evident that only those that are pertinent to the institution of the continental shelf

> as it has developed within the law, and to the application of equitable principles to its delimitation, will qualify for inclusion." (*I.C.J. Reports 1985*, p. 40, para. 48.)

182. No complete list can be made, if for no other reason than that each case is unique and one can never foretell what circumstances may surface or achieve importance in the unknown disputes of the future. Moreover, each item — such as State conduct or national security — is infinitely variable and, more often than not, is itself a conglomerate of factors which themselves need to be assessed and evaluated. This Court's description of each as "monotypic"[1] thus aptly captures its individuality.

183. It may be noted that, although the 1961 Helsinki Rules on the Uses of Water of International Rivers, contained in Article V, paragraph 2, a list of relevant factors, the list is expressly stated to be non-exhaustive.

184. From these preliminary observations to what extent can the process be carried forward of developing equitable principles in relation to maritime delimitation?

185. Since "there is no legal limit to the considerations which States may take account of"[2], it would seem, for example, that they cannot be limited to the purely geographic. Geographic factors may perhaps be used as the starting point for an enquiry of this nature, and it is right to stress their importance. However the equitable solution yielded by the application of the principles of equity is not attained by the mere application of geographically based principles such as the equidistance principle. In the anxiety to concretize equitable principles by relating them to demonstrable and quantifiable data such as geographic data we may perhaps shut out important considerations relevant to equity. Definiteness of principle is no doubt an important value to be striven after[3], but it could be bought at too high a price at an incipient stage of development of a legal concept.

186. Among the factors taken into consideration in the *Tunisia/Libya* case were not merely geographical factors but historical and political factors as well. Among these were the history of the enactment of petroleum licensing by each party and the grant of successive petroleum concessions[4], and such indicia as were available of the line or lines which the parties themselves had considered equitable or acted upon as such[5].

187. When one ventures outside the areas of pure geography and geology, one encounters considerations which are of immense importance in the real world — matters such as population, security, history, practical usability, political status and economic dependence. Doubtless they will have different values in individual cases varying from the minimal to the immensely influential and these will need to be taken into consideration and evaluated.

188. In the *Delimitation of the Continental Shelf between the United Kingdom and France*, the United Kingdom relied upon such matters as demography and economics[1] and, though the court did not regard them as exercising a decisive influence on the delimitation, it held that they could support and strengthen, but not negative, any conclusions indicated by the geographical, political and legal circumstances2. To quote Judge Jiménez de Aréchaga again:

> "All the relevant circumstances are to be considered and balanced ; they are to be thrown together into the crucible and their interaction will yield the correct equitable solution of each individual case." (*I.C.J. Reports 1982*, p. 109, para. 35.)

189. Equity was by very definition the process by which situations which could not be provided for by the specific letter of a legal rule were taken into account where the purely mechanical application of the rule would shut them out. It would be a negation ofthat flexibility which is a characteristic of equity if we were at this early stage in the development of maritime demarcation to introduce into it the very element of rigidity which equitable doctrine was devised to prevent. As this Court observed in *Tunisia/Libya*, no attempt should be made to overconceptualize the application of the principles and rules applicable to the continental shelf (*ibid*., p. 92, para. 132).

The Equidistance Principle

190. It is necessary to consider the status of the equidistance method, as Norway lays great store by it, not only in its own right but also by virtue of the 1965 Agreement between the Parties.

191. Speaking in general terms, three possible ranks may be assigned to this rule:

(i) the status of a mandatory rule either under customary international law or, where parties are bound by the Convention, in the absence of agreement or justification of a different rule by other circumstances;

(ii) a status of priority over other equitable factors to be considered;

(iii) a status of parity with other equitable factors.

(i) Is it a mandatory rule?

192. In the *North Sea Continental Shelf* cases, this Court, while viewing the equidistance rule as one of great practical convenience and wide applicability, held that the equidistance method was neither prescribed by a mandatory rule of customary international law (*I.C.J. Reports 1969*, p. 46, para. 83, p. 53, para. 101) nor an inherent necessity of continental shelf doctrine (*ibid*., pp. 35–36). Placing the rule in the context of its equitable origins, the Court observed:

> "It was, and it really remained to the end, governed by two beliefs; — namely, first, that no one single method of delimitation was likely to prove satisfactory in all circumstances, and that delimitation should, therefore, be carried out by agreement (or by reference to arbitration); and secondly, that it should be effected on equitable principles. It was in pursuance of the first of these beliefs that in the draft that emerged as Article 6 of the Geneva Convention, the Commission gave priority to delimitation by agreement, — and in pursuance of the second that it introduced the exception in favour of 'special circumstances'. Yet the record shows that, even with these mitigations, doubts persisted, particularly as to whether the equidistance principle would in all cases prove equitable." (*Ibid*., pp. 35–36, para. 55.)

193. The *Gulf of Maine* case also made this clear:

> "The Chamber must therefore conclude in this respect that the provisions of Article 6 of the 1958 Convention on the Continental Shelf, although in force between the Parties, do not entail either for them or for the Chamber any legal obligation to apply them to the single maritime delimitation which is the subject of the present case." (*I.C.J. Reports 1984*, p. 303, para. 125.)

194. This Court tersely summarized the jurisprudence on this point when it observed in the *Libya/Malta* case,

> "The Court is unable to accept that, even as a preliminary and provisional step towards the drawing of a delimitation line, the equidistance method is one which *must* be used…" (I.C.J. Reports 1985, p. 37, para. 43.)

195. If the rule is to have a mandatory status under the Convention, this can only occur in the absence of agreement and in the absence of justification by special circumstances. Where special circumstances exist, as they do in this case, the equidistance rule cannot in any event be mandatory.

196. Although the equidistance rule may be basically equitable in conception and origin, it is by its very nature and definition inflexible, contrasting in this respect with the flexibility of equity which enables the latter to accommodate itself to varying and unforeseeable conditions which must depend on each particular case.

(ii) Does it have priority over other factors?

197. This Court also expressed itself on this aspect in the *North Sea Continental Shelf* cases, when it said that this rule did not have a privileged status in relation to other methods[1]. State practice, as the Court observed, often resorted to this rule but it showed also that in many cases other criteria had been resorted to, when they were found to offer a better way to reach agreement.

198. As the Chamber observed in the *Gulf of Maine* case, "Nor is there any method of which it can be said that it must receive priority" (*I.C.J. Reports 1984*, p. 315, para. 163).

199. In the *Libya/Malta* case, this Court observed that

> "the equidistance method has never been regarded, even in a delimitation between opposite coasts, as one to be applied without modification whatever the circumstances" (*I.C.J. Reports 1985*, p. 48, para. 65).

(iii) Does it have parity with other factors?

200. The previous discussion shows that the equidistance rule, important though it be, is one of the multiple factors that need consideration in the context of any delimitation case. What can be said of these different factors is that they may assume different degrees of importance in the context of different cases, but that there is no ranking order among them. This was the position under the 1958 Convention but, after the 1982 Convention, the matter has been made clearer still.

201. It is perhaps not without significance that the equidistance rule does not appear in either Article 74 or Article 83 of the Convention on the Law of the Sea, 1982, although the Revised Single Negotiating Text (RSNT) of 1976[2], and the Informal Composite Negotiating Text (ICNT) of 1977[3] as well as the two revised texts of the latter contained a reference to the median or equidistance line "where appropriate"[4].

202. The Court of Arbitration in *Delimitation of the Continental Shelf between the United Kingdom and France*, 1977, placed the equidistance rule in context when it observed that:

> "even under Article 6 [of the 1958 Convention] it is the geographical and other circumstances of any given case which indicate and justify the use of the equidistance method as the means of achieving an equitable solution rather than the inherent quality of the method as a legal norm of delimitation"[1].

The Court went on to observe that the equidistance method, like any other method, was "a function or reflection of the geographical and other relevant circumstances of each particular case"[2].

203. The status of parity of the equidistance method when compared with others was well expressed by the Arbitral Tribunal in the dispute between Guinea and Guinea-Bissau, 1985, when it said:

> "Le tribunal estime pour sa part que l'équidistance n'est qu'une méthode comme les autres et qu'elle n'est ni obligatoire ni prioritaire, même s'il doit lui être reconnu une certaine qualité intrinsèque en raison de son caractère scientifique et de la facilité relative avec laquelle elle peut être appliquée."3

The "Special Circumstances" Principle

204. "Attempts made at the Geneva Conference on the Law of the Sea to strike out the alternative of 'special circumstances' and to make the equidistance method the only rule were rejected by a large majority." (*North Sea, I.C.J. Reports 1969*, p. 93, Judge Padilla Nervo, separate opinion.) This is readily understandable when one considers that

> "in certain geographical circumstances which are frequently met with, the equidistance method, despite its known advantages, leads unquestionably to inequity…" (*ibid., Judgment*, p. 49, para. 89).

205. This principle articulates the rule of procedural equity that all material circumstances relevant to the matter in hand should be taken into account in reaching an equitable result and that no legally relevant circumstances should be left out of consideration unless there is compelling reason to do so.

206. As was observed by the Court of Arbitration in *Delimitation of the Continental Shelf between the United Kingdom and France* in 1977:

> "the rôle of the 'special circumstances' condition in Article 6 is to ensure an equitable delimitation; and the combined 'equidistancespecial circumstances rule', in effect, gives particular expression to a general norm that, failing agreement, the boundary between States abutting on the same continental shelf is to be determined on equitable principles"[1].

207. Every case is different and, while general guidelines exist such as the equidistance principle in the absence of other or competing factors, it is for the Court to decide in each case what are the appropriate factors to be taken into account and what weight should attach to them. It is too early in the history of maritime delimitation for any determining principles to be laid down by this Court as to the relative importance of one factor over the other. It may be that when these determinations are made on a case-by-case basis, some guidelines will in course of time emerge.

The "Relevant Circumstances" Principle

208. As the Court of Arbitration observed in 1977 in *Delimitation of the Continental Shelf between the United Kingdom and France*:

> "The choice of the method or methods of delimitation in any given case, whether under the 1958 Convention or customary law, has therefore to be determined in the light of those circumstances [i.e., geographical and other relevant circumstances of each particular case] and of the fundamental norm that the delimitation must be in accordance with equitable principles."[2]

209. It is also to be stressed, before approaching a consideration of each of these factors, that they will be approached not from the standpoint of either Norway or Denmark but from the standpoint of the two territories in question — Jan Mayen and Greenland — as if these were independent territories competing for maritime rights, for it is clear that whatever maritime rights these territories enjoy are generated by their relevant coastlines and not by considerations that they are part of some larger political entity.

210. I agree with the Court in its careful consideration and overall evaluation of the various relevant factors enumerated by it. While doing so, I would like, however, to emphasize that consideration should not be limited to factors which are geophysical in their nature.

211. In each case there surfaces for consideration a varied mix of factors. Apart from the different nature of the mix in each case, any one factor, such as population or economy, will naturally present itself differently in each case. For example, the population factor may be of little relevance or no relevance in one case, while in another it may assume considerable significance. So, also, with economic factors or indeed any other factor one may care to name. Any general proposition that population or economy are irrelevant because, unlike geophysical configurations, they may change with time is juristically untenable and not in conformity with the flexibility of equity.

212. In other words, I respectfully endorse the findings the Court has reached on the respective items arising for consideration in this case. Access to fishery resources is a matter to which the Court has rightly devoted particular care and attention and I am in agreement with this approach and with its resultant effect upon the overall delimitation. I would, however, add a few observations on some of the matters considered.

(a) Population

213. For example, while agreeing with the weight the Court gives to the population factor in the present case, I would stress that no general proposition can be laid down that the population factor is in all cases irrelevant.

214. One can visualize a case where a particular coast has sustained a teeming population for several centuries and the coast facing it has no population whatsoever and has been uninhabited as far as historical memory extends. Cases such as that need to be considered as and when they arise and cannot be left out of consideration on any general principle that the population factor is irrelevant. Such an approach would be contrary to equitable principles and procedures.

215. Reference may also be made in this context to the Anglo-French Arbitration, in which it is significant that among the factors advanced by the United Kingdom was the fact that the Channel Islands were "populous islands of a certain political and economic

importance”[1]. The Court observed that it “accepts the equitable considerations invoked by the United Kingdom as carrying a certain weight”[2].

216. It is true that factors such as population or lack of it are changeable over time. A piece of land which is today barren and uninhabited may in a hundred years be the centre of a numerous and thriving population just as a thriving population of today may, for reasons which cannot now be foreseen, be reduced to a few struggling survivors some generations from today. These are factors inherent in the nature of human life and settlement but on the basis of such lack of certainty, these factors ought not, in my view, to be totally disregarded by an overriding general principle applicable in all cases.

217. When the Law of the Sea Convention spelt out in Article 121 (3) that rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf, it was perhaps giving expression to the concept that population and economic life are relevant to the enjoyment of exclusive economic zones and continental shelf entitlements. It was not rocks *per se* that were excluded from these rights but rocks which lacked the possibility of sustaining habitation or economic life, thus indicating the importance of these factors in attracting exclusive economic zone and continental shelf entitlements, in an appropriate case.

218. The Law of the Sea Convention could not have adopted a divided rationale in its different parts on this vital question, and if it considered population and economic life to be a vital and determining factor in regard to the question whether rocks attracted these entitlements, it could not have considered that in regard to other geographical configurations population and economic life were irrelevant and to be ignored.

(b) Economic factors

219. Similar considerations apply to economic factors. On this aspect, it must be pointed out that this is an area in which the jurisprudence of the Court has not thus far been conclusive, despite the trend of recent decisions to treat economic factors as irrelevant. In the *Gulf of Maine*[1], when the dispute was clearly about resources, Canada argued for the preservation of fishing patterns established over the past ten to fifteen years while the United States contended that it was virtually entitled to a monopoly over the Georges Bank fishery. Although the Chamber dismissed these arguments as irrelevant in law, yet it did not altogether ignore them, holding that data as to human and economic geography, although

> “ineligible for consideration as criteria to be applied in the delimitation process itself, may … be relevant to assessment of the equitable character of a delimitation first established on the basis of criteria borrowed from physical and political geography” (p. 340, para. 232).

In other words, these factors could in fact be used to test the equity of the result. The Chamber placed stringent limitations on such use, limiting it to cases where the results were

> “radically inequitable, that is to say, as likely to entail catastrophic repercussions for the livelihood and economic well-being of the population of the countries concerned” (*I.C.J. Reports 1984*, p. 342, para. 237).

Yet we have here a recognition, however restricted, that such factors can play a part in the overall result[1].

(c) State practice

220. So, also, in considering individual acts of State practice, an important limiting factor is that the special circumstances and political considerations that lie behind a particular arrangement between two countries are often veiled in obscurity unless the parties themselves record or state those facts[2]. This is well illustrated in the present case in relation to Norway's own treaty with Iceland, for Norway herself accepts that there were special political considerations lying behind that arrangement. As stated in paragraph 560 of Norway's Counter-Memorial, "The political bargain struck between Norway and Iceland was exceptional …", and in the same paragraph, the arrangement giving Iceland a 200-mile zone is described as a "concession made in favour of Iceland" which "produced a boundary which reflects no norm of equitable delimitation". On Norway's own submission, these circumstances render an agreement atypical, which might otherwise be relied upon as an item of State practice.

221. Another variable factor in relation to State practice is the fact that the effect given to islands for equidistance purposes has sometimes been a partial effect, thus introducing an additional element of flexibility. For example, the Greece-Italy Agreement of 24 May 1977 gives to the Greek islands involved a varying effect, ranging from full effect for the large islands of Corfu, Kefallinia and Zakinthos to lesser effects for the islands of Othonoi and Mathraki.

222. Other instances of partial effect also exist, such as the Iran-Oman Agreement of 25 July 1974, where the presence of the small island of Umm al Faiyarin belonging to Oman does not cause a proportional deviation of the demarcation line between Oman and Iran. Had this island been given full effect, the line would have moved considerably closer to the Iranian coast than it appears on the map (Reply of Denmark, Ann. 71).

223. So also in the United Kingdom-Ireland Agreement of 7 November 1988 (Reply of Denmark, Ann. 72), the Stilly Isles have not been given full effect.

224. Nor is the jurisprudence of this Court markedly different in this regard. The Court itself has in more than one of its judgments given less than full effect to small islands in relation to the equidistance principle. The half-effect basis of delimitation was used in *Tunisia/Libya*[1] in regard to the Kerkennah Islands, and in the *Gulf of Maine* case[2] in regard to the Canadian Seal Island. The half-effect basis was also used by the Court of Arbitration in the case concerning the *Delimitation of the Continental Shelf between the United Kingdom and France* in relation to the Scilly Isles, for

> "abating the disproportion and inequity which would otherwise result from giving full effect to the Scilly Isles as a base-point for determining the course of the boundary"[3].

(d) The ice factor

225. On the ice factor, likewise, one would hesitate to say that there can be a general proposition that it can have no bearing. In the present case, the factors are such that although the ice is a real geophysical factor that impinges on the usability of the waters in question, it is so situated that it does not make a difference significant enough to affect the result.

226. However, while in these days of climatic change there may be some changeability in drift ice patterns, there may well be cases where drift ice or the freezing of the seas for the greater part of the year have, throughout recorded history, rendered ice-bound the sector adjacent to the coastline of one party, while the sector adjacent to the coastline of the other remains largely unaffected. In such a case this seems indeed to be a factor pertinent to the

question of equitable division, for it intrinsically affects the usability of the areas to be demarcated.

227. These are but extreme cases. However, they serve the purpose of showing that possible avenues of enquiry ought not to be foreclosed.

(e) National security

228. Similar considerations apply to factors bearing on national security which again will vary from case to case and may in a given case assume considerable importance. The observation in *Libya/Malta* cited in the Judgment (para. 81) to the effect that security considerations are not unrelated to the concept of the continental shelf bears this out (*I.C.J. Reports 1985*, p. 42, para. 51).

(f) The conduct of parties

229. Regarding the conduct of parties, this has been fully dealt with by the Court. Conduct can, in an appropriate case, assume importance as, for example, where it amounts to an admission or an estoppel, but I agree that it does not constitute an element which could influence the particular delimitation in the present case.

230. While the items of conduct relied upon do not thus become sufficiently significant to affect the present decision, the possibility must always remain open in future cases that any one or more of such factors can assume sufficient significance to affect a delimitation.

(g) Disproportion in coastal length

231. The disproportion in length of the coastlines, however, assumes importance in this case. The Court in its Judgment has dealt with this aspect at length and I am in agreement with the Court's reasoning and conclusion on this matter.

232. The equitable aspects involved in this question of disproportion or proportionality may be briefly set out as follows:

(a) Disproportion in coastal lengths of the magnitude present in this case is clearly a relevant circumstance requiring consideration both on the basis of prior decisions and on the basis of equitable principles.

(b) The principle of proportionality does not mean a division of maritime space on a proportionate basis. This Court observed in the *Libya/Malta* case that it rejects any attempt to "define the equities in arithmetical terms" (*I.C.J. Reports 1985*, p. 55, para. 75). As the Court there observed:

> "The Court does not consider that an endeavour to achieve a predetermined arithmetical ratio in the relationship between the relevant coasts and the continental shelf areas generated by them would be in harmony with the principles governing the delimitation operation." *(Ibid.)*

(c) The factor of proportionality applies only to coastlines and not to landmass, for "it is the coastal length that matters" (*ibid.*, p. 73, Judge Sette-Camara, separate opinion).

(d) Proportionality can legitimately be used as a test to verify the equity of a delimitation.

> "In the view of the Court, there is no reason of principle why the test of proportionality, more or less in the form in which it was used in the *Tunisia/Libya* case, namely the identification of 'relevant coasts', the identification of 'relevant areas' of continental shelf, the calculation of the mathematical ratios of the lengths of the coasts and the areas of shelf attributed, and finally the comparison of such ratios, should not be employed to verify the equity of a delimitation between opposite coasts, just as well as between adjacent coasts." (*I.C.J. Reports 1985*, p. 53, para. 74.)

(e) The Court would use proportionality as an instrument for correcting disproportionality where —

> "the flagrant disproportion in the lengths of coasts is such that the correction of any line according to a reasonable ratio is indispensable for achieving an equitable result" (*ibid*., p. 73, Judge Sette-Camara, separate opinion. See, also, Anglo-French Arbitration, *RIAA*, Vol. XVIII, p. 58, para. 101).

(f) The application of the principle of proportionality is an instance of the use of the sense of injustice to test the justice of a result, as described in paragraphs 104–109 above.

(g) Even though the equidistance principle is based on equitable considerations, equidistance is only a prima facie solution. The fact of gross disproportionality as in this case would suffice to move the Court away from that prima facie solution.

(h) Such disproportion constitutes a special circumstance within the meaning of Article 6, paragraph 1, of the 1958 Convention as well as a relevant circumstance under customary international law.

Part C. Equity Viewed in Global Terms

233. At the conclusion of this survey of the applications of equity in the Judgment of the Court, it would be appropriate to examine the concept briefly in global terms. Given the crucial importance of equity to the law of the sea, and given also that the law of the sea is still at a critical and formative phase, no examination of equity's influence upon the law of the sea is complete without a search for concepts, principles and attitudes that range further afield in a global sense. Such a universal view can only strengthen maritime law, both in its conceptual content and in its authoritative force. The concepts of equity currently drawn upon by international law do not represent the totality of the available corpus of equitable thought wherewith to strengthen the equitable approach to the problems of maritime law. Such perspectives can also offer insights of value in the determination of a case such as this.

234. The International Court of Justice, specifically structured to embody a "representation of the main forms of civilization and of the principal legal systems of the world" (see Article 9 of the Statute of the Court), is under a particular obligation to search in all these traditions and legal systems for principles and approaches that enrich the law it administers, and in the context of the present case, this applies to the contributions that equity can make to the law of the sea.

235. A search of global traditions of equity in this fashion can yield perspectives of far-reaching importance in developing the law of the sea. Among such perspectives deeply ingrained therein, which international law has not yet tapped, are concepts of a higher trust of earth resources, an equitable use thereof which extends inter-temporally, the "*sui generis*" status accorded to such planetary resources as land, lakes and rivers, the concept

of wise stewardship thereof, and their conservation for the benefit of future generations. Their potential for the development of the law of the sea is self-evident.

236. Such perspectives are to be found in many traditions and civilizations, and the ubiquitous nature of the principle of equity has already been noted in the jurisprudence of this Court.

237. With special reference to the Law of the Sea, Judge Ammoun observed in the *North Sea Continental Shelf* cases:

> "Incorporated into the great legal systems of the modern world referred to in Article 9 of the Statute of the Court, the principle of equity manifests itself in the law of Western Europe and of Latin America, the direct heirs of the Romano-Mediterranean *jus gentium*; in the common law, tempered and supplemented by equity described as accessory; in Muslim law which is placed on the basis of equity (and more particularly on its equivalent, equality) by the Koran and the teaching of the four great jurisconsults of Islam condensed in the Shari'a, which comprises, among the sources of law, the *istihsan*, which authorizes equity-judgments; Chinese law, with its primacy for the moral law and the common sense of equity, in harmony with the Marxist-Leninist philosophy; Soviet law, which quite clearly provides a place for considerations of equity; Hindu law which recommends 'the individual to act, and the judge to decide, according to his conscience, according to justice, according to equity, if no other rule of law binds them'; finally the law of the other Asian countries, and of the African countries, the customs of which particularly urge the judge not to diverge from equity and of which 'the conciliating role and the equitable nature' have often been undervalued by Europeans; customs from which sprang a *jus gentium* constituted jointly with the rules of the common law in the former British possessions, the lacunae being filled in 'according to justice, equity and good conscience'; and in the former French possessions, jointly with the law of Western Europe, steeped in Roman Law.
>
> A general principle of law has consequently become established, which the law of nations could not refrain from accepting, and which founds legal relations between nations on equity and justice." (*I.C.J. Reports 1969*, pp. 139–140, Judge Ammoun, separate opinion; footnotes omitted.)

238. The list of sources cited by Judge Ammoun provides a vast resource from which to quarry the elements of the universal sense of justice and fairness that underlies the meaning of equity. Some other important sources should also be mentioned — the fine analyses of justice in Greek[1] and Judaic[2] philosophy; the equity-impregnated concept of "dharma" in Hindu jurisprudence[3]; the elaborately researched concept of fairness and justice in Buddhism[4]; the Christian tradition of justice and conscience as "weightier matters of the law" as opposed to mere legalism[5]; and the Qur'anic injunction:

> "If thou judge
>
> judge in equity between them
>
> for God loveth those
>
> who judge in equity"[1]

which has been the subject of extensive commentary over the centuries by the jurists of Islam[2].

239. The sophisticated notions of reasonable and fair conduct currently being unveiled by modern researches in African[3], Pacific[4] and Amerindian[5] customary law, and the principle of deep harmony with the environment which underlies Australian Aboriginal customary law[6] add to the reservoir of sources available.

240. What emerges is a notion of equity broad-based upon global jurisprudence which speaks therefore with greater authority. Notions of the supremacy of international law, its impregnation with concepts of righteousness, the sacrosanct nature of earth resources, harmony of human activity with the environment, respect for the rights of future generations, and the custody of earth resources with the standard of due diligence expected of a trustee are equitable principles stressed by those traditions — principles whose fuller implications have yet to be woven into the fabric of international law. Such an approach can also give to equity, especially in its application to the increasingly important area of planetary resources such as the sea, a deeper and more insightful meaning than it would bear if the search were less than universal. It also emphasizes the long-term perspectives that need to be kept in view as a developing branch of the law settles into the conceptual mould which gives it shape for the foreseeable future.

241. Two examples of such broader perspectives which are specially relevant to the law of the sea and which are drawn from two widely different legal traditions will illustrate this proposition. They highlight the principles of conservation of earth resources and safeguards against environmental pollution which are of particular importance to the law relating to such an important earth resource, and are not without relevance to maritime boundary delimitation cases. This case itself has highlighted the importance of conservation as a factor constituting the background to the dispute before it, for the near extinction of the capelin, one of the richest resources of this maritime region, was a compelling circumstance leading to the international negotiations preceding this case.

242. The first illustration of such a broader perspective comes from traditional legal systems such as the African, the Pacific, and the Amerindian, which contained a deeply ingrained respect for the earth, the atmosphere, the lakes and the seas, which the evolving law of the sea can consider with profit[1]. Among Pacific societies, for example, land had metaphysical connotations which prevented it from being seen as a saleable commodity like items of merchandise[2]. Respect for these elemental constituents of the inheritance of succeeding generations dictated rules and attitudes based upon a concept of an equitable sharing which was both horizontal in regard to the present generation and vertical for the benefit of generations yet to come[3].

243. The second illustration comes from Islamic law which enshrines another deeply relevant equitable idea — the idea that earth resources such as land cannot be the subject of outright ownership as is the case with movables, but are the subject of trusteeship for the benefit of all future generations. Such a juristic concept dictates the principle that such resources must be treated with the care due to the property of others and that the present must preserve intact for the future the inheritance it has received from the past. In such equitable principles may lie a key to many of the environmental concerns which affect the land, the sea and the air space of the planet.

244. Such transcending equities, as visualized by those systems, add new dimensions to the equitable framework within which the equities of the law of the sea can evolve, and add authority to this structure. They underscore the special responsibility of a tribunal delimiting maritime areas to pay due emphasis to the universal nature of the material out of which it is moulding the law of the future.

245. To place these conclusions in an elegant setting:

> "Behind the diverse facades of legal systems we discern the substantial identity of the underlying principles of equity which link legal systems together, as in a Gothic cathedral the multiplicity of its rhythms of stone unite with the fundamental impulses of the mind and of nature."[1]

246. Not without reason did the emerging law of the sea find in equity a general area of agreement among participants at UNCLOS who came to its meetings representing widely different backgrounds and widely divergent interests.

* * *

247. This brief survey of a vast topic -the contribution of equity to an individual decision — is intended to indicate the many ways in which it contributes to the process of judgment and can contribute to the development of the law of the sea. While not intended to be a comprehensive exposition, it could also serve the limited purpose of drawing attention to aspects of its operation which, by remaining implicit, may remain unexplored.

248. International law throughout its history has been richly interwoven with equitable strands of thought. Of equity perhaps more than of any other department of legal thought it could truly be said that, "Under the surface eddies created by the decisions of individual cases, there surges a mighty tide of the fundamental principles of justice."[1] That tide needs to be drawn into service to its fullest potential as the developing law of the sea moves towards its fuller maturity.

(Signed) Christopher Gregory Weeramantry.

Separate Opinion of Judge Ajibola

Prince Bola Adesumbo Ajibola

1 I have voted in favour of the Judgment in this case in which the Court, in effect, dismissed the claims of both Denmark and Norway. The Court rejected the submission of Denmark "that Greenland is entitled to a full 200-mile fishery zone and continental shelf area vis-à-vis the Island of Jan Mayen". It also rejected Norway's submission that outright median lines constitute the boundary for the purpose of delimitation of the relevant areas of the continental shelf and fisheries zones between Greenland and Jan Mayen. Furthermore, I am firmly and strongly supportive of the decision of the Court as to the applicable laws both in terms of the area of the continental shelf and that of the fishery zone. The decision once again reinforces and confers a seal of approval upon the jurisprudence of the Court consistently enunciated and firmly established since the *North Sea Continental Shelf* cases in 1969.

2 The reason why I feel I must write this separate opinion is that there are some areas of the Judgment which I personally consider are in need of further elaboration, and which I now intend to deal with.

Basic Procedural Issue

3 There seem to be some procedural problems relating to jurisdiction which require a measure of clarification in this case, even though no preliminary objections have been raised by Norway. There are sufficient indications contained both in the written pleadings and, even more so, in the oral arguments of the Parties, which of necessity enjoin a careful appraisal.

The initial application of Denmark as presented to the Court is a request :

> "to decide, in accordance with international law, where a single line of delimitation shall be drawn between Denmark's and Norway's fishing zones and continental shelf areas in the waters between Greenland and Jan Mayen".

4 On the other hand, Norway's response to the Danish application is a submission that the Court must draw two lines. In Norway's own words, the Coasked:

> "*to adjudge and declare that:*
>
> (1) The median line constitutes the boundary for the purpose of delimitation of the relevant areas of the continental shelf between Norway and Denmark in the region between Jan Mayen and Greenland;
>
> (2) The median line constitutes the boundary for the purpose of delimitation of the relevant areas of the fisheries zones between Norway and Denmark in the region between Jan Mayen and Greenland".

In other words the request of Norway is not for a dual-purpose single line as requested by Denmark but rather one line for the continental shelf boundary and the other one for the fishery zone.

5 Added to the question of a line or lines is the second contention of Norway that, in a case of this nature, the actual delimitation cannot be effected by the Court; that the Court should rather content itself with a mere declaratory judgment. On this point Norway asserts that

> "the adjudication should result in a judgment which is declaratory as to the bases of delimitation and which leaves the precise articulation (or demarcation) of the alignment to negotiation between the Parties" (CR 93/9, p. 52).

As was observed in the Judgment of the Court, this particular view of Norway affects the mode of presentation of its case. For example, while Denmark in all its submissions and oral arguments lays claim to a 200-mile limit off the coast of Greenland, Norway restricts itself throughout to a claim repeatedly based on the median line.

6 The third argument of Norway — still on procedure — is that the unilateral application as filed in this case is inappropriate to the matter in hand. Norway says:

> “Delimitation is inherently unsuitable for cases brought by unilateral application unless there is some form of agreement on the part of the respondent as to the role and powers of the Court.” (CR 93/9, p. 81.)

7 This assertion of Norway — coupled with others already mentioned — is sufficient to compel the Court to consider carefully, even *proprio motu*, whether this is not a case in which the question of its competence and apparent jurisdiction is not being called into question by Norway. Perhaps the case is a “unicum” for this reason. Virtually all the celebrated cases on maritime delimitation were submitted to the Court on the basis of a Special Agreement between the parties. Thus (1) the *North Sea Continental Shelf* cases (*Federal Republic of Germany/Netherlands*; *Federal Republic of Germany/Denmark*), (2) the *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* case, (3) the case concerning *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)* all fell within the category of cases brought to the Court by Special Agreement.

8 In this regard, a few questions need to be raised and examined:

9 Is it possible for the Court, in the light of all the submissions of both Parties and of their written pleadings and oral arguments, to draw any line/lines of delimitation as requested by Denmark? Should the Court in fact draw a dual-purpose single line as requested by Denmark or two lines as demanded by Norway? What form of judgment should the Court have handed down in this case — should it have given merely a declaratory judgment or have aimed at a full settlement of the case?

10 Norway's request for two coincident single lines is not without reason and quite understandable. Of the two strands of maritime delimitation involved in this case one is the continental shelf boundary, which Norway considers to be governed by the Agreement entered into between it and Denmark on 8 December 1965 as well as the 1958 Geneva Convention on the Continental Shelf and on the basis of which Norway argues it is already in place between both Parties. The second delimitation involved is that of the fishery zone which Norway contends should also be delimited by the median line ' even though it ultimately agrees that customary international law is applicable in that context. In the light of such statement of fact, it may therefore be quite logical for Norway to advance this request.

11 There is also the issue of a special agreement as raised by Norway in fairly emphatic terms:

> “It seems to be oblivious of the basic legal principle that the consent of parties is required in order to have the Court engage in a delimitation of maritime areas — just as the consent of parties would be required for them to effect the delimitation themselves.” (CR 93/9, p. 50.)

12 Has Norway any ground to advance this view so strongly? Norway does not give the Court its reasons and no authority is cited to this effect. But a careful examination of the provisions of some relevant Conventions may throw sufficient light on the way in which Norway has approached this particular problem.

13 Article 6, paragraph 1, of the 1958 Geneva Convention on the Continental Shelf states:

> "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*." (Emphasis added.)

14 In fact this is the Convention that both Parties agree is binding on them with respect to the delimitation of the continental shelf. Similarly Article 74 of the 1982 United Nations Convention on the Law of the Sea (which is not yet in force), deals with the delimitation of exclusive economic zones between States with opposite or adjacent coasts and primarily stipulates that such a delimitation "shall be effected by agreement on the basis of international law". The same form of words advocating "Agreement" is to be found in Article 83 of the 1982 Convention which deals with delimitation of the continental shelf between States with opposite or adjacent coasts. There are similar provisions in other Geneva Conventions of 1958 especially the Geneva Convention on the Territorial Sea and the Contiguous Zone (see Article 12).

15 However, it cannot validly be argued that the absence of an agreement — be it special or general — can prevent the Court from carrying out its task of deciding any legal matter referred to it for a decision on the merits. That may be the reason why all Norway can urge in the circumstances is "judicial restraint". Hence Norway elects to:

> "remind the Court of the restraint articulated on the exercise of its judicial functions in the case concerning the Northern Cameroons (*I.C.J. Reports 1963*, p. 3) or of the substantial thought that was devoted to this and to cognate subjects by the late Judge Sir Hersch Lauterpacht…".

16 It is my considered opinion that Norway's appeal for caution in this regard is misplaced and that the Court is right in rejecting it. Once an application is properly and validly placed before the Court, it is in duty bound to deal in accordance with international law with all such disputes as are submitted to it. To that end, it is required to apply international conventions, international custom, general principles of law recognized by civilized nations, judicial decisions, etc. Here it may be desirable to quote the important provision of Article 38, paragraph 1, of the Statute which empowers:

> "The Court, whose function is to decide in accordance with international law such disputes as are submitted to it,… [to] apply:
>
> **(a)** international conventions, whether general or particular, establishing rules expressly recognized by the contesting States;
>
> **(b)** international custom, as evidence of a general practice accepted as law;
>
> **(c)** the general principles of law recognized by civilized nations;
>
> **(d)** subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."

17 In my opinion, there is no doubt that this case clearly falls within the ambit of paragraphs *(a)* and *(b)* above. The relevance and the application of international conventions, whether bilateral or multilateral, are clear and there are many of them invoked in this case, notably the 1958 Geneva Convention on the Continental Shelf and the

1965 Treaty between both Parties. Customary international law is also invoked in this case, especially with regard to the fishery zone.

18 Therefore, if the Court is of the opinion that it should give more than a declaratory judgment and proceed to draw a line or lines in this case, it has a sufficient mandate and competence to do so. If the Court considers that the solutions advocated by either Denmark or Norway, or even both of them, fail to accord with the correct application of the general principles of international law in order to settle this dispute, it is free to apply whatever it considers to be just and proper in accordance with the law.

19 According to the Danish application, the jurisdiction of the Court is validly invoked since both Parties have accepted, by their declarations, its compulsory jurisdiction under paragraph 2 of Article 36 of the Statute and the case has also been brought in a manner that accords with the provisions of Article 40, paragraph 1, of the same Statute. Whatever may therefore be the objection or hesitation of Norway in relation to this case, it cannot hold water in the light of its declaration of acceptance of the compulsory jurisdiction of the Court, and the Court is fully empowered to determine any issue placed before it, in order to reach an effective decision on the merits of the dispute in question, whether in relation to the drawing of one or more lines, and despite the fact that no special agreement has been entered into between the Parties in this case.

20 If Norway strongly felt (as it vigorously contends) that the Court for whatever reason has no jurisdiction or is incompetent in any way to draw any line whatsoever in a matter of this nature, it was free to raise a preliminary objection as to jurisdiction and admissibility before the Court. But this, Norway has failed to do.

21 One may therefore ask why Norway did not pursue this line of action. My hypothesis is that the answer is to be found in Norway's oral arguments, when it explains that:

> "Norway was therefore faced with a dilemma. On the one hand, it did not wish to file preliminary objections to the jurisdiction of the Court, *in view of the optional clause declarations of the Parties and the broad scope of Article 36, paragraph 2, of the Statute*." (CR 93/9, p. 50; emphasis added.)

22 So, Norway anticipates — perhaps rightly — that if a preliminary objection had been raised in relation to Denmark's application before the Court, it could well have been rejected by the Court as the final arbiter on this issue or any issue for that matter, having regard to the power of the Court under Article 36, paragraph 6, of the Statute.

Conclusion on the Issue of Procedure

23 Perhaps I may effectively summarize this view of mine by referring to the attitude of the Court in the case concerning the *Northern Cameroons (Cameroon* v. *United Kingdom)* (*I.C.J. Reports 1963*, p. 17) where it dealt with the issue of what one may consider "technicalities" or formal requirements — which to my mind constitute the most serious problem in this case before the Court. The attitude of the Court was clear when it declared that it would not allow mere formalities to prevent it from doing justice on any substantive matter pertaining to any dispute placed before it. In that regard, it stated specifically that it was following the line of reasoning of the Permanent Court of International Justice. What the Court is most concerned with is that the matter before it must "reveal the existence of a dispute in the sense recognized by the jurisprudence of the Court…".

24 The classical pronouncement of the Court on this point was expressed in the following terms:

> "The Court cannot be indifferent to any failure, whether by Applicant or Respondent, to comply with its Rules which have been framed in accordance with Article 30 of its Statute. The Permanent Court of International Justice in several cases felt called upon to consider whether the formal requirements of its Rules had been met. In such matters of form it tended to 'take a broad view'. (*The 'Société Commerciale de Belgique'*, P.C.I.J., Series A/B, No. 78, p. 173). The Court agrees with the view expressed by the Permanent Court in the *Mavrommatis Palestine Concessions* case (P.C.I.J., Series A, No. 2, p. 34):
>
> > "The Court, whose jurisdiction is international, is not bound to attach to matters of form the same degree of importance which they might possess in municipal law.'" (*I.C.J. Reports 1963*, pp. 27–28.)

25 Once the Court is convinced that there is an issue or issues in dispute (and I presume that this is so in the case before us), then it ought to proceed to a decision on the merits.

26 Perhaps it may be considered judicially appropriate to refer at this stage to the final award in the *Delimitation of the Continental Shelf between the United Kingdom and France* case, where the Court of Arbitration dismissed all the preliminary objections alleging a lack of jurisdiction, in favour of dispensing substantial justice between both parties, thereby deciding positively on the dispute as presented to it. Maybe justice is not doing "something, nothing" (to borrow the words of Shakespeare in *Othello*), especially in this Court whose decision is final and binding without any possibility of an appeal to any other or further appellate court.

Line or Lines

Drawing a line or lines of delimitation in maritime boundary cases is nothing new for the Court; one may even say that it is familiar with the exercise. For example, such a request was made to the Court in the *Gulf of Maine* case in 1984 when, by special agreement between Canada and the United States of America, the Chamber was requested to describe and determine the course of the maritime boundary in terms of geodetic lines connecting geographic co-ordinates of points between the coasts of the two Parties. In the present case, as already stated, there is no special agreement to guide the Court. It is also observed from the available evidence and arguments before the Court, that while Denmark has presented some relevant materials to assist in the drawing of the requested single line of delimitation, Norway was not sufficiently forthcoming in this regard, or at best the materials are scanty. Detailed geodesic base lines and base points connecting geographic co-ordinates in terms of destinations, longitudes and latitudes are sufficiently provided by Denmark, especially in its final submissions. The issue is even further complicated in that the materials supplied by Denmark are based on its request and assumptions for a single line delimitation, and not on two lines. Of course, as has already been indicated, Norway stresses that the Court should reject the submission of Denmark relating to a single line, and urges the need for judicial circumspection.

27 Once one has concluded that the Court can draw any line/lines, the next issue on which the Court must decide is whether to draw a dualpurpose single line or two coincidental lines. Whatever decision is reached on this point must accord with the relevant applicable law in this case. It cannot be denied that the Court is dealing with two distinct institutions of maritime delimitation — the continental shelf boundary and the fishery zone — in response to Denmark's request on which Norway joins issue with it. The present case is not

like *Libya/Malta* where the Court's role was confined to the delimitation of the continental shelf. Whatever may be the ultimate decision in this case, it is only prudent, judicially desirable and even legally mandatory to keep, at least prima facie, these two régimes distinct, since separate decisions have to be taken on each of them. The two lines may eventually coincide by operation of the applicable law (which in effect may amount to a distinction which will not ultimately make any difference), but the distinction must first be drawn quite independently.

28 I am, therefore, persuaded that separate legal consideration has to be given to the régime of the continental shelf area apart from that of the delimitation of the fishery zone.

29 This case will undoubtedly constitute a landmark in the development of the jurisprudence of this Court on maritime delimitation. In this respect, as already mentioned, one can consider it to be unique, and the Court is now asked, perhaps for the first time, to tackle this question head-on. In a number of cases adjudicated upon either by the Court, its Chamber or arbitral tribunals, parties have invariably, in their *compromis*, agreed on single line delimitation. It is also observed that judges have put questions to the parties on this particular issue on a number of occasions. For example, during the oral proceedings in the *Tunisia/Libya* case, the question was put as to whether, in view of the *identity* between the provisions of the 1982 Convention on the delimitation of the continental shelf boundary and the exclusive economic zone, the delimitation of these two areas ought or ought not to be different, and whether the circumstances to be taken into consideration in each area should not be different as well. The conflicting approach of parties to these two jurisdictions is better described by Professor Prosper Weil in his book on *The Law of Maritime Delimitation — Reflections* where he advanced this germane hypothesis:

> “It is obvious what is at stake here. If one of the parties has obtained, by agreement or through judicial means, a continental shelf delimitation which seems to it to be unfavorable, it will quite naturally seek to obtain a different delimitation for the exclusive economic zone; the other party, in contrast, will want to extend to the exclusive economic zone the favorable delimitation it has obtained for the continental shelf.” (P. 118.)

30 Judges and jurists alike are very much aware of this development, not only in respect of litigation and arbitrations on the issue of drawing a single line, but also with regard to State practice which has in fact favoured a single line, perhaps because of the convenience it offers. Opinions are divided too. There are judges whose beliefs and reasoning support the unity of delimitation by a single line, while there are others who believe that there should be a duality of delimitation lines in appropriate cases. The case-law thus far, as already indicated, has tended to approach the issue with caution. One is not very much surprised by this, since the issue was left unresolved during the debate at UNCLOS III on the nature of the relationship between these two jurisdictions. However, a careful study of Article 74 and Article 83 of the 1982 Convention on the Law of the Sea (which, even though not yet in force, nonetheless reflect the current international customary law), may throw some light on this problem.

31 The régime of the exclusive economic zone was treated independently under Article 74, while that of the continental shelf jurisdiction was dealt with under Article 83. The two Articles use identical language. Again, it is also correct to suggest that whatever the argument might be in favour of the duality of delimitation lines, it has been whittled down by the provision of Article 56, paragraph 3, of the 1982 Convention which states that “The rights set out in this article [on the exclusive economic zone] shall be exercised in accordance with Part VI” (which deals with the continental shelf). However, this point which seems to favour the unity of delimitation should not be pressed any further. One should

perhaps go back to the history and background of the continental shelf theory, which attained undisputed recognition and acceptance after the 1945 Truman Proclamation, and which also established the distinction between the water column and rights to the sea-bed and the duality of these two maritime jurisdictions.

32 The differentiation, or perhaps confusion, is even more pronounced with the current innovation of creating fishery zones to coexist with the exclusive economic zone. However, in this particular case of delimitation involving Greenland and Jan Mayen, the facts are such as to render inevitable the concept and even the application of a duality of lines. It is not denied by both Parties that they are bound in their treaty relations by Article 6 of the 1958 Geneva Convention on the Continental Shelf. Thus it becomes imperative for the Court, in this case, to consider and adjudge independently on the continental shelf régime and the fisheries jurisdiction.

33 It must be recognized, and accepted, that a single delimitation line has the advantage of convenience and practical utility. That, in fact, must be the reason why the State practice leans heavily towards this solution. The issue of vertical superimposition of rights is a problem and complication that States would prefer to avoid. What is relevant here, is the applicable law and the legal consideration to be given to the problem of a single delimitation line as claimed by Denmark.

34 The present situation is not to be compared with the situation in the case concerning *Delimitation of the Maritime Boundary in the Gulf of Maine Area* where the Chamber made the following observation:

> "With regard to this second aspect, the Chamber must observe that the Parties have simply taken it for granted that it would be possible, both legally and materially, to draw a single boundary for two different jurisdictions. They have not put forward any arguments in support of this assumption. The Chamber, for its part, is of the opinion that there is certainly no rule of international law to the contrary, and, in the present case, there is no material impossibility in drawing a boundary of this kind. There can thus be no doubt that the Chamber can carry out the operation requested of it." (*I.C.J. Reports 1984*, p. 267, para. 27.)

35 Again, the situation in the case in hand is unlike that which prevailed in the *North Sea Continental Shelf* cases where the Federal Republic of Germany, though a signatory of the 1958 Geneva Convention on the Continental Shelf, had never ratified that Convention; this fact in effect excluded the consideration of the 1958 Geneva Convention on the Continental Shelf, as distinct from the current trend in the customary international law which is much influenced by the 1982 Montego Bay Convention on the Law of the Sea.

36 It has further been argued in some quarters that the need for a duality of maritime delimitations has been marginalized considerably since the physical characteristics of the sea-bed, which used to be a distinct consideration, now seem to be merging with the exclusive economic zone and that it can no longer be maintained that the equitable criteria for the two régimes of maritime delimitation are justifiable. Another point advanced is that the "distance criterion" must now apply to the continental shelf boundary as it applies to the exclusive economic zone. These points were made in paragraph 34 of the Judgment in the *Libya/Malta* case. Relating this current trend of customary international law to the case in hand may not be appropriate, because in the present case the Parties are specifically bound by the 1958 Geneva Convention on the Continental Shelf which came into force in 1964, was ratified by Denmark in 1963, and also ratified by Norway in 1971 and which both Parties recognize is binding upon them. It may be appropriate to conclude the statement of my views on this particular question by quoting again from Professor Weil's *Law of*

Maritime Delimitation — Reflections which recognized this problem couched in the following terms:

> "one cannot exclude the possibility that a continental shelf delimitation agreement concluded at a time when the theory of natural prolongation prevailed, may have been inspired by physical considerations now out of date. Its extension to the exclusive economic zone would in that case no longer be convincingly justifiable." (P. 135.)

Entitlement versus Delimitation

37 Initially, the application of Denmark to the Court seems to present no problem, as it takes the form of a simple straightforward request to the Court for a single line delimitation, in accordance with international law, of the fishery zone and continental shelf area in the waters between Greenland and Jan Mayen. However, the subsequent submissions of Denmark present both legal and geophysical difficulties. In its Reply the Danish Government submits that the Court should:

> "(1) … adjudge and declare that Greenland is *entitled* to a *full 200-mile fishery zone and continental shelf* area vis-à-vis the Island of Jan Mayen; and consequently
>
> (2) … draw a single line delimitation of the fishery zone and continental shelf area of Greenland in the waters between Greenland and Jan Mayen at a distance of *200 nautical miles* measured from Greenland's baseline, the appropriate point of which is given by straight lines (geodesies)…" (emphasis added).

38 This claim of Denmark drew a sharp reaction from Norway and the claim of 200 miles by Denmark on behalf of Greenland was characterized as "eccentric". In the words of Mr. Haug, which were subsequently supported and substantially repeated by Professor Brownlie (counsel for Norway):

> "while the first application was simply for a single line of *delimitation*, the principal submission was changed to ask for a declaratory judgment of *entitlement* to a full 200-mile fishery zone and a full 200-mile continental shelf vis-à-vis the Norwegian island of Jan Mayen…
>
> The question of entitlement is sensitive for States in various regions of the world. In my respectful submission a decision which appeared to give some degree of support for the *eccentric Danish thesis* would militate against the development of a stable régime of maritime boundary delimitation in the future." (CR 93/5, pp. 13 and 15; emphasis added.)

39 Is Denmark's claim one of entitlement or delimitation? Is the Danish submission lacking in clarity as argued by Norway? In the *Libya/Malta* case, Libya sought to undermine the claim of Malta because of its (Malta's) size and insular nature, but the Court remarked that "the entitlement to the continental shelf is the same for an island as well as for a mainland". The issue of entitlement emanates from the State's sovereignty over the coast to which such rights attach with regard to its continental shelf *ipso facto* and *ab initio*. The rules and principles of international law confer on Greenland a basic entitlement relating to the continental shelf, no less than that which they confer on Jan Mayen; this in effect ensures an equal entitlement prima facie to both coasts. Therefore, Greenland is entitled to claim the 200-mile outer limit (where such can be claimed) just as Jan Mayen is equally entitled to claim the same. If, therefore, Greenland is claiming in this case an outer boundary limit line

of 200-miles within the waters between it and Jan Mayen, where the entire distance between the two of them is 250 miles, then it is not difficult for one to understand Norway's argument that this is a claim for entitlement rather than a request for a delimitation.

40 The Danish position is clearly stated in its Reply, as follows:

> "The Government of Denmark does not, however, question Jan Mayen's status as an island under international law, as is evidenced by the fact that Denmark did not object to the establishment of Jan Mayen's 200-mile fishery zone to the east towards the open sea… [The] Danish contention is that *an equitable boundary* line in the waters between Greenland and Jan Mayen 'should be drawn along the outer limit' of Greenland's fishery zone — to borrow the term used by Norway in describing the delimitation line between Iceland and Jan Mayen." (Reply, p. 152, para. 414; emphasis added.)

41 Having regard to the above statement of the position taken by Denmark, one can perhaps understand and even sympathize with its reasons for asserting such a claim, which to my mind is more of a claim of entitlement than a call for a delimitation. What amounts to an equitable boundary or an equitable solution for that matter is for the Court, not Denmark, to decide. The principle of non-encroachment is bound to take into consideration the whole of the relevant area, including the area in dispute, as well as the area of overlapping entitlement and any areas in the process of delimitation.

42 The position was made clear in 1969 in the *North Sea Continental Shelf* cases when the Court stated:

> "More important is the fact that the doctrine of the just and equitable share appears to be wholly at variance with what the Court entertains no doubt is the most fundamental of all the rules of law relating to the continental shelf, enshrined in Article 2 of the 1958 Geneva Convention, though quite independent of it, — namely that the rights of the coastal State in respect of the area of continental shelf that constitutes a natural prolongation of its land territory into and under the sea exist *ipso facto* and *ab initio*, by virtue of its sovereignty over the land, and as an extension of it in an exercise of sovereign rights for the purpose of exploring the seabed and exploiting its natural resources. In short, there is here an inherent right. In order to exercise it, no special legal process has to be gone through, nor have any special legal acts to be performed. Its existence can be declared (and many States have done this) but does not need to be constituted." (*I.C.J. Reports 1969*, p. 22, para. 19.)

43 The reasons for Denmark's submission requesting the 200-mile fishery zone and continental shelf vis-à-vis Jan Mayen are not far fetched. One reason may perhaps be found in its argument that Norway must "concede" to Greenland the same 200 miles outer limit as it conceded to Iceland by virtue of an agreement which it sees as constituting a precedent. But another reason is the undeniable difference in size (and coastal lengths) of Greenland and Jan Mayen. Denmark initially considered Jan Mayen to be a rock (possibly falling within the scope of Article 121 of the 1982 Convention on the Law of the Sea), but later conceded that it is an island; albeit one which "sustains no population… and has never done so" — "the visualization of Greenland as a mainland and of Jan Mayen as a small island detached from its mainland coast" (CR 93/1, pp. 25 and 23).

44 Over two centuries ago, Vattel wrote that “A dwarf is no less of a man than a giant. A small Republic is no less of a State than the most powerful Kingdom.” (*Dictionnaire de la terminologie du droit international*, Paris, Sirey 1960, under “Egalité”, p. 248.) Thus however small the island of Jan Mayen may be, this cannot affect its rights under international law with respect to the issue of entitlement and the non-encroachment principle.

45 Finally, on this point, I am inclined to support this view which receives support from a relevant paragraph of the Judgment in the *Aegean Sea Continental Shelf* case, where the Court again confirmed that:

> “The reason is that legally a coastal State's rights over the continental shelf are both appurtenant to and directly derived from the State's sovereignty over the territory abutting on that continental shelf.... it is solely by virtue of the coastal State's sovereignty over the land that rights of exploration and exploitation in the continental shelf can attach to it, *ipso jure*, under international law. In short, continental shelf rights are legally both an emanation from and an automatic adjunct of the territorial sovereignty of the coastal State.” (*I.C.J. Reports 1978*, p. 36, para. 86.)

Equitable Principles and Delimitation

46 I have no difficulty whatsoever in agreeing with the Court in the matter of the applicable law in this case. After observing that it has never had occasion to apply the 1958 Geneva Convention, the Court proceeds to state that since both States are parties to that Convention, and there being no joint request for a single maritime boundary as in the *Gulf of Maine* case, then the 1958 Geneva Convention is applicable to the delimitation of the continental shelf boundary between Greenland and Jan Mayen. The Court then goes on to say that Article 6, paragraph 1, of the Geneva Convention is applicable to the continental shelf, but that does not mean that this treaty law is to be interpreted and applied exclusively and without reference to international customary law on the subject or independently of the fact that a fishery zone is also located in these waters. It is the role of customary international law that I wish to amplify here in order to emphasize its importance and relevance, as well as touching on its genesis in order to appreciate once again the evolution of the applicability of equitable principles and their development over the past four decades.

47 To begin with, one may ask what is the customary international law applicable in this case? The Court boldly enunciated it in its 1985 Judgment in the case concerning the *Continental Shelf (Libyan Arab Jamahiriya/Malta)* in the following terms:

> “*Judicial decisions are at one* — and the Parties themselves agree (paragraph 29 above) — in holding that the delimitation of a continental shelf boundary must be effected by the application of equitable principles in all the relevant circumstances in order to achieve an *equitable result*.” (*I.C.J. Reports 1985*, p. 38, para. 45; emphasis added.)

48 Thus one can say that the relevance of equitable principles, as a fundamental legal régime governing maritime boundary delimitation, has now been firmly entrenched by the jurisprudence of the Court supported by international arbitral tribunals. It may therefore be

desirable, before examining these rules and principles of international law, to quote a full statement of their content:

> "What general international law prescribes in every maritime delimitation between neighbouring States could therefore be defined as follows:
>
> (1) No maritime delimitation between States with opposite or adjacent coasts may be effected unilaterally by one of those States. Such delimitation must be sought and effected by means of *an agreement*, following negotiations conducted in good faith and with the genuine intention of achieving a positive result. Where, however, such agreement cannot be achieved, delimitation should be effected by *recourse to a third party* possessing the necessary competence.
>
> (2) In either case, delimitation is to be effected by the application of *equitable criteria* and by the use of*practical methods capable of ensuring, with regard to the geographic configuration* of the area and other *relevant circumstances*, an equitable result." (*I.C.J. Reports 1984*, pp. 299–300, para. 112; emphasis added.)

49 A careful analysis of this definition will show that it is a very comprehensive and all-embracing statement, and that the principles it formulates are essential to a fair and just judgment. But that is not to say that it has not given rise to certain attendant problems and criticisms. However, before going into this, it may be necessary to re-examine its historical background in a nutshell, in order to justify and fortify the Court in its adherence to this fundamental norm of international law in the field of maritime boundary delimitation and also to stress its apparently universal acceptability.

50 Equitable principles in maritime delimitation as established today are not the "creation" of the Court. Perhaps one can regard the Court's role as that of a "foster parent". The applicability of equitable principles received its first authoritative formulation in 1945, as the Court recognized when it stated that:

> "Such a review may appropriately start with the instrument, generally known as the 'Truman Proclamation', issued by the Government of the United States on 28 September 1945. Although this instrument was not the first or only one to have appeared, it has in the opinion of the Court a special status." (*I.C.J. Reports 1969*, p. 32, para. 47.)

51 Before that date, ideas had been advanced by jurists, publicists and technical experts on various theories of how best to approach the nature and extent of conflicting rights exercisable over the continental shelf. Two principles emerge from the Proclamation. The first is that the coastal States have original, natural and exclusive or even vested rights to the continental shelf of their shores, to the exclusion of other coastal States. This principle is reflected in Article 2 of the 1958 Geneva Convention on the Continental Shelf. The first two paragraphs of that Article are important enough to mention here:

> "1. The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources.

> 2. The rights referred to in paragraph 1 of this article are exclusive in the sense that if the coastal State does not explore the continental shelf or exploit its natural resources, no one may undertake these activities, or make a claim to the continental shelf, without the express consent of the coastal State."

52 The other principle which is more relevant to this opinion relates to agreements based on "equitable principles". It lays down that boundaries "shall be determined by the United States and the State concerned in accordance with equitable principles". As a part of its assignment of developing and codifying international law, the International Law Commission of the United Nations took up this juridical project between 1950 and 1956 but no definite rule was formulated by the Commission, and the general trend of opinion among its members was still in favour of agreement or referral to arbitration. However, during this period, the Commission referred the matter to a Committee of Hydrographical Experts which eventually produced, in 1953, a report favouring equidistance — understandably enough, given its convenience. It should be noted that equidistance was only one of the four methods suggested to the experts. Even after the adoption of the Report of the Committee of Experts in favour of equidistance, there were still doubts and hesitation in the minds of some of the members of the Commission:

> "on such grounds for instance as that its strict application would be open, in certain cases, to the objection that the geographical configuration of the coast would render a boundary drawn on this basis inequitable" (*I.C.J. Reports 1969*, p. 35, para. 53).

53 An independent observer in the arena of maritime boundary delimitation would have no difficulty in discerning the existence of a "running battle" between the two schools of thought in this field, with those upholding equitable principles on one side, and those advocating the "equidistance principle" on the other side, each constantly pointing out the defects and weaknesses in the arguments of the other. The so-called "equidistance principle" continues to win the battle as far as State practice is concerned, because of its relative convenience (which cannot be denied), but that is all that can be said for it, since the method is quite inadequate to meet all global situations, especially where the geographical configuration would render such a method inequitable as in the present case. It is because of this patent defect in the method that the Court rejected it as not forming part of the customary law and deserving the status of nothing more than one method among others.

54 Historically therefore, as I have pointed out above, the equitable principle, as developed over the years from the time of the Truman Proclamation to the period when it received the attention of the International Law Commission, has now been fully developed and has achieved the status of an accepted rule of law within the jurisprudence of the Court and that of international arbitral tribunals.

55 In common law, the traditional role of equity as a system standing separate from the law is sharply at variance with its role and meaning in international law, and especially in the field of maritime boundary delimitation. "The classical role of equity" as known to common law

> “is to modify the rule of law where it might, if strictly applied, work injustice. Thus law and equity working together should serve the end of justice by introducing flexibility, adaptability and even limitations upon the application of legal rules.” (Sir Robert Jennings in *Staat und Völkerrechtsordnung*, pp. 400–401.)

56 What then is meant by equity or equitable principles in maritime boundary delimitation? An answer was given in the 1982 *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* case, where the Court defined that concept in the following terms:

> “Equity as a legal concept is a direct emanation of the idea of justice. The Court whose task is by definition to administer justice is bound to apply it. In the course of the history of legal systems the term ‘equity’ has been used to define various legal concepts. It was often contrasted with the rigid rules of positive law, the severity of which had to be mitigated in order to do justice. In general, this contrast has no parallel in the development of international law; the legal concept of equity is a general principle directly applicable as law.” (*I.C.J. Reports 1982*, p. 60, para. 71.)

57 The Court shed light on this as far back as 1969, when it defended it as follows:

> “in short, it is not a question of applying equity simply as a matter of abstract justice, but of applying a rule of law which itself requires the application of equitable principles, in accordance with the ideas which have always underlain the development of the legal regime of the continental shelf in this field” (*I.C.J. Reports 1969*, p. 47, para. 85).

58 Some of the grey areas of equity need to be examined and considered here. Take for example the maxim that equality is equity, or “equity did delight in equality”. Well, that may be positively so in common law, but may not necessarily hold good in the field of international law. Hence in 1969, the Court pronounced that “Equity does not necessarily imply equality” and went on to state that:

> “There can never be any question of completely refashioning nature, and equity does not require that a State without access to the sea should be allotted an area of continental shelf, any more than there could be a question of rendering the situation of a State with an extensive coastline similar to that of a State with restricted coastline.” (*Ibid*., pp. 49–50, para. 91.)

59 In the *Gulf of Maine* case in 1984, the Chamber was confronted with a choice between the criteria applicable, and resolved to favour and apply one that was “long held to be as equitable as it is simple — equal division”. Perhaps, in the absence of any special circumstance, the Judgment in the *Gulf of Maine* case is a good example of equity implying equality. In that case, the Chamber concluded:

> “In short, the Chamber sees in the above findings confirmation of its conviction that in the present case there are absolutely no conditions of an exceptional kind which might justify any correction of the delimitation line it has drawn. The Chamber may therefore confidently conclude that the delimitation effected in compliance with the governing principles and rules of law, applying equitable criteria and appropriate

methods accordingly, has produced an equitable overall result." (*I.C.J. Reports 1984*, p. 344, para. 241.)

60 A similar conclusion was reached by another Chamber in 1986 in the *Frontier Dispute* case where it concluded that although

> "'Equity does not necessarily imply equality' (*North Sea Continental Shelf, I.C.J. Reports 1969*, p. 49, para. 91), where there are no special circumstances the latter is generally the best expression of the former" (*I.C.J. Reports 1986*, p. 633, para. 150).

61 But all these concordant declarations do not mean that there are no inherent problems with the "interpretation and application" of equitable principles. Even the Court in one of its Judgments alluded to these problems and draw a distinction as well as suggesting an amendment to an "unsatisfactory terminology":

> "The result of the application of equitable principles must be equitable. This terminology, which is generally used, is not entirely satisfactory because it employs the term equitable to characterize both the result to be achieved and the means to be applied to reach this result. It is, however, the result which is predominant; the principles are subordinate to the goal." (*I.C.J. Reports 1982*, p. 59, para. 70.)

62 In the present case, the Court has decided to start with a provisional median line which I perfectly agree with. Then it moves on to correct the line applying the equitable procedure in order to obtain an equitable result. Whatever may be the method or principle employed, the ultimate result is what is important — an equitable result likewise deriving from the principle.

63 There is also the criticism constantly levelled against the Court regarding its application of equitable principles, i.e., that its decisions are *ex aequo et bono* which can only be invoked when requested for under Article 38, paragraph 2, of the Statute of the Court. This contention that decisions of the Court are an exercise of discretion or conciliation has been refuted by the Court in many of its Judgments.

64 The Court made its position abundantly clear even in the Judgment in 1969 in the *North Sea Continental Shelf* cases:

> "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* …" (*I.C.J. Reports 1969*, p. 48, para. 88.)

65 A similar view was again expressed in the *Tunisia/Libya* case when the Court said that:

> "Application of equitable principles is to be distinguished from a decision *ex aequo et bono* … While it is clear that no rigid rules exist as to the exact weight to be attached to each element in the case, this is very far from being an exercise of

discretion or conciliation; nor is it an operation of distributive justice." (*I.C.J. Reports 1982*, p. 60, para. 71.)

66 This important assertion disclaiming the use of equity *ex aequo etbono* can also be found in the Judgment of the Chamber in the *Gulf of Maine* case and in the Arbitral Award in the *Guinea/Guinea-Bissau* case.

67 To conclude this discussion of equitable principles, and despite all of their alleged "defects", they have worked effectively for over two decades, and have received overwhelming support from the entire world community as reflected in the 1982 Convention on the Law of the Sea, and all the United Nations Conferences on the Law of the Sea. They are now the fundamental principles which customary international law brings to the task of maritime delimitation and perhaps constitute the *fons et origo* of its future development. The judicial process, like the law, is dynamic. It will continue to develop and be improved upon. The use of equitable principles in this field is definitely on course and equity is not floundering in uncharted seas. There will always be room for fine-tuning, but there is no doubt that the international customary law of maritime boundary delimitation, now solidly based on equitable principles, has come to stay.

Solving the Equation

68 This present case is an important one in the history of the development of customary international law on maritime boundary delimitation. It is a delimitation case in which the Court has to resolve the dispute between the Parties even in the absence of a special agreement. It is also the first case relating to the maritime area of the North-East Atlantic where the effect of ice on that maritime area was an issue in the dispute. Moreover, and most importantly, this is the first case before the Court that has required a definitive interpretation and application of the 1958 Geneva Convention on the Continental Shelf, in particular Article 6, paragraph 1, thereof. In this case, both Parties agree that they are bound by the provisions of the Convention which was signed by Denmark on 29 April 1958, and subsequently ratified on 12 June 1963; Norway acceded to it on 9 September 1971.

69 Hence, the first direct inference is that the median line method of delimitation is applicable to any matter of maritime delimitation in respect of the continental shelf boundary between Greenland and Jan Mayen. Even the Danish Memorial admits (on p. 59, para. 210) and confirms that the 1958 Convention remains in force as between both States.

70 The point of departure, however, between Denmark and Norway is that while Norway insists that the median line as stipulated in Article 6 of the 1958 Convention applies without any condition or reservation, Denmark argues that the rule in Article 6 is one of equidistance-special circumstances, and that Jan Mayen is a special circumstance *"par excellence"*.

71 The crux of the matter is accordingly the question of whether Jan Mayen is a special circumstance *par excellence*. Unfortunately, Denmark did not elaborate on what it considered to constitute a special circumstance of that kind. From the evidence before the Court, it was established by Denmark and apparently conceded by Norway, that Jan Mayen is a relatively small, isolated and uninhabited island. As to population it was common ground between both Parties that there are about 25 persons on the island at any given time, and that their presence is mainly connected with meteorological activities. In paragraphs 206 and 207 of the Danish Memorial, Jan Mayen was described as a desolate island without natural resources of any significance. Mining and hunting activities were once attempted there, but have since been abandoned. It has no harbour (natural or artificial) and even attempts to construct a port there for a fishing base were subsequently

given up. The question is whether this geographical, economic, and social feature of Jan Mayen is enough to give it the status of a special circumstance *par excellence* in international law. Some of the important considerations that could so qualify Jan Mayen may now have to be received.

72 The first such consideration is whether Jan Mayen is a rock. If it is a mere rock, then its legal position may have to be related to Article 121, paragraph 3, of the 1982 Convention on the Law of the Sea in which a rock is defined as that "which cannot sustain human habitation or economic life of [its] own" and "shall have no exclusive economic zone or continental shelf". So it is clear from this definition that if Jan Mayen is a rock, it may not be entitled to an exclusive economic zone and continental shelf, unlike an island. But here there can be no doubt, especially after Denmark's presentation of its arguments at the hearings, that Jan Mayen is not a rock but an island. This legal status of Jan Mayen was accepted by Denmark during the oral presentation of its case, and Jan Mayen was also referred to as an island in its pleadings. If, therefore, Jan Mayen is not a rock but an island, it can be defined under Article 121, paragraphs 1 and 2, as "a naturally formed area of land surrounded by water, which is above water at high tide" and:

> "the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf of an island are determined in accordance with the provisions of this Convention, applicable to other land territory" (United Nations Convention on the Law of the Sea, Part VIII, Art. 121).

73 The conclusion which must inevitably be reached here is that since Jan Mayen is acknowledged to be an island, it is entitled to the considerations that would normally be attached to *other land territory*. Hence, it is like any territory entitled to its own continental shelf and fisheries zone in the same manner as Greenland, and for this purpose cannot constitute a special circumstance.

74 Another suggestion on special circumstances that may be worthy of consideration at this point is whether Jan Mayen is an incidental special feature. If it is, it may then amount to a special circumstance under Article 6 of the 1958 Geneva Convention. Perhaps it is necessary to put in perspective the important provision of Article 6, paragraph 1, which is the Article being examined here:

> "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 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." (Emphasis added.)

75 Here, it is difficult to assert that Jan Mayen is an incidental special feature. In this regard, the decision in the *North Sea Continental Shelf* cases may well be very relevant, even though there is no similarity between the geographical situation in the case between the Federal Republic of Germany, Denmark and the Netherlands, and this case before the Court. In the geographical situation of this case, there is no consideration of "quasi-equality as between States", as was found to exist in the *North Sea Continental Shelf* cases (*Federal Republic of Germany/Denmark*; *Federal Republic of Germany/Netherlands*).

76 It may therefore not be correct to state that Jan Mayen will have such a distorting effect in any sense whatsoever. The median line issue here is not between mainland Norway and Greenland — the distance between which is well over 700 miles with high seas in between. It follows that the issue of a small island close to the median line or located in such a way as to bring about a distorting effect does not arise in this case and for this reason the issue of incidental special features does not arise.

77 What again is left to be considered here is whether, as in the *North Sea Continental Shelf* cases, there is a geographical situation which may bring Jan Mayen into the ambit of provisions relating to the "presence of islets, rocks and minor coastal projections" (*I.C.J. Reports 1969*, p. 36, para. 57). As I have already pointed out, the situation here is different. Jan Mayen is neither an islet, nor a rock, nor a minor coastal projection.

78 Having treated the question of special circumstances as it relates to the equidistance method under Article 6, paragraph 1, of the Geneva Convention on the Continental Shelf, I shall now turn my attention to the other side of the equation referred to in the jurisprudence of the Court as "relevant circumstances". While one may venture to say that special circumstances relate to geophysical peculiarities in respect of coasts of States, the term "relevant circumstances" is perhaps wider in scope, but similar in purpose and content.

79 However, an examination of the pronouncements by the Court on "relevant circumstances" as a pertinent consideration in cases of maritime boundary delimitation points to some ways in which international law continues to develop.

80 In the *North Sea Continental Shelf* cases, the Court states:

> "In fact, there is no legal limit to the considerations which States may take 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." (*I.C.J. Reports 1969*, p. 50, para. 93.)

81 On the other hand, not all factors that come within the category of "relevant circumstances" in general are in fact relevant in every case. This again was made clear by the Court in the *Libya/Malta* case when it declared that although there was no legal limit to the considerations which the State might take into account yet "only those that are pertinent to the institution of the continental shelf as it has developed within the law … will qualify for such inclusion" (*I.C.J. Reports 1985*, p. 50, para. 48).

82 It is now clear that, apart from geographical configuration, "relevant circumstances" also accommodate all other circumstances such as population, socio-economic structures, security, conduct of the parties, etc., where these are relevant. The equitable principles of customary international law which, as already stated, constitute the applicable law in this case with regard to the fishery zone, equally require account to be taken of proportionality (as in the case of the continental shelf) or what should better be called the disparity of coastal lengths of the Parties, as a relevant circumstance. If we therefore take a critical look at the length of the coastline of Greenland in comparison with that of Jan Mayen we may say that the difference is clear (the length of the coast of Greenland is 524 kilometres, while that of Jan Mayen is 54.8 kilometres). It is also clear that under the equitable principles of

customary international law such a disparity of coastal lengths is a relevant circumstance to be taken into consideration because:

> "While every case of maritime delimitation is different in its circumstances from the next, only a clear body of equitable principles can permit such circumstances to be properly weighed, and the objective of an equitable result, as required by general international law, to be attained." (*I.C.J. Reports 1985*, p. 55, para. 76.)

83 A clear picture has now emerged of the possible link between the concept of "relevant circumstances" as enshrined in the equitable principles of customary international law and "special circumstances" as a noticeable peculiarity in the geographical configuration of the coastlines of Greenland and Jan Mayen. This link (or what has been termed the "footbridge" by one great jurist) was a component of the decision reached by the Anglo-French Court of Arbitration, an arbitral tribunal that had the opportunity of applying the provisions of Article 6, paragraph 1, of the Geneva Convention on the Continental Shelf in 1977. In its Award the link was effected thus:

> "In short the rôle of the 'special circumstances' condition in Article 6 is to ensure an equitable delimitation; and the combined 'equidistance-special circumstance rule', in effect, gives particular expression to a general norm that, failing agreement, the boundary between States abutting on the same continental shelf is to be determined on equitable principles. In addition, Article 6 neither defines 'special circumstances' nor lays down the criterion by which it is to be assessed whether any given circumstances justify a boundary line other than the equidistance line. Consequently, even under Article 6 the question whether the use of the equidistance principle or some other method is appropriate for achieving an equitable delimitation is very much a matter of appreciation in the light of the geographical and other circumstances." (*Reports of International Arbitral Awards (RIAA)*, Vol. XVIII, p. 45, para. 70.)

84 We now have all the necessary components or ingredients of the equation which has to be resolved in this case and in all subsequent cases on maritime boundary delimitation. On the one hand, the provision of Article 6, paragraph 1, of the Geneva Convention on the Continental Shelf enjoins all States to settle all their delimitation matters by *agreement* and then goes on to say that, if this fails the equidistance method should be applied unless there are "special circumstances". On the other hand, general international law also postulates that all delimitation matters should be resolved by agreement between the parties and that, in the event of a failure to reach agreement, equitable principles should be applied. Such an equitable procedure must have regard to "relevant circumstances".

85 In the first case, the resolving of delimitation matters by agreement is common to both sets of provisions. There is also a requirement to give consideration to geophysical or other peculiarities which are termed either "special circumstances" or "relevant circumstances" and the method advocated by the Convention is equidistance, while general international law requires the application of equitable principles. Thus the end result of solving the equation is special circumstances/equidistance being equal apparently to relevant circumstances/equitable principles. In other words agreement/special circumstances/ equidistance equals agreement/relevant circumstances/equitable principles. One however is encapsulated in the other as was found by the Court of Arbitration in the Anglo-French case which declared that

> “In the view of this Court, therefore, the rules of customary law are a relevant and even essential means both for interpreting and completing the provisions of Article 6.” (*RIAA*, p. 48, para. 75.)

86 In my final appraisal, therefore, the supreme contribution of current customary international law as compared to the special circumstancesequidistance rule (as in this case where both these institutions of maritime boundary delimitation have to be considered) is that the ultimate rule of law is the application of equitable principles; this is the contemporary law on this matter. In conclusion to this part of my opinion I should like to give a classic example of solving equations similar to the one that presents itself in this case. It reads thus:

> “The Court accordingly finds that the Geneva Convention of 1958 on the Continental Shelf is a treaty in force, the provisions of which are applicable as between the Parties to the present proceedings under Article 2 of the Arbitration Agreement. This finding, the Court wishes at the same time to emphasise, does not mean that it regards itself as debarred from taking any account in these proceedings of recent developments in customary law. On the contrary, the Court has no doubt that it should take due account of the evolution of the law of the sea in so far as this may be relevant in the context of the present case.” (*Ibid*., p. 37, para. 48.)

87 This decision is inter-temporal in tone, but there is no doubt that it reflects the current view of the law on maritime boundary delimitation —law is dynamic and moves with the times.

(Signed) Bola Ajibola.

Dissenting Opinion of Judge Fischer

Paul Henning Fischer

To my regret I am unable to concur in the decision of the Court for the reasons which I shall briefly set forth below. My remarks will concentrate on the principal divergence of views.

On the other hand, I am in agreement with some of the reasoning of the Court.

1. I agree, for example, with the description of what can be called the relevant area and the area of overlapping claims (synonymous with the “disputed area”). However, I do not share the Court's view that the so called “area of overlapping potential entitlement” is relevant. It is a fact that Norway has claimed median lines constituting the delimitation of the continental shelf and the fisheries zones as it is a fact that Denmark has claimed a delimitation line 200 nautical miles from East Greenland. The claims of the Parties are decisive, not the entitlement.

The distinction in this case between “entitlement” and “delimitation” is important and must always be kept in mind. I will revert to this matter in another context.

The case is characterized by a rather simple geography: the extensive, well-defined coast of East Greenland confronting the equally well defined but much smaller coast of West Jan Mayen.

2. I also agree with the Court in rejecting the principal contentions of Norway that median lines delimitation in respect of the continental shelf areas and the fisheries zones between Greenland and Jan Mayen are “in place”. These contentions were mainly based on the 1965 Agreement, the 1958 Convention on the Continental Shelf and the conduct of the Parties, especially of Denmark. The Court did rightly not accept any of these arguments.

3. On the whole I agree with the Court as to the question of whether there should be one line of delimitation as claimed by Denmark or two — coinciding — lines as claimed by Norway. The Court is — even without an agreement between the parties — competent to declare that a delimitation of the shelf and of the fisheries zones should be based on a single line. The fact that the present case has been brought before the Court by the unilateral application of Denmark has therefore not been relevant.

The legal paths leading to the final outcome of either a single line or two (coinciding) lines are or may be different. However, when the result is attained, is there then any difference between a single line on a given geographical position or two coinciding lines on this same position? In my view, there is not. It is the location of the delimitation which matters, not whether the delimitation is effected by one line or two coinciding lines.

4. I agree with the Court that the legal sources governing the case are the 1958 Convention (Art. 6) as regards the continental shelf and customary law as regards the fisheries zone. I do not, however, consider the 1958 Convention to be the sole legal source concerning the continental shelf delimitation, as Article 6 of that Convention has to be interpreted according to and to be supplemented by customary law.

The Court itself has mentioned the tendency towards assimilation of the “special circumstances” of Article 6 and the relevant circumstances of customary law, because both aim to promote the achievement of an equitable result.

5. I disagree with the Court when it deduces from Article 6 that it is appropriate provisionally to draw a median line as a first stage in the delimitation process.

By means of this legal method the Court has been able to reach its decision of establishing a delimitation line located between the lines claimed by the two Parties.

The approach whereby the Court first used a provisionally drawn median line and then enquired whether special circumstances required another boundary is set forth in the Judgment after the Court's rejection of the Norwegian contentions that median lines are in place, but before it considers whether the Danish claims are equitable or justified. The Court apparently arrived *a priori* at the conclusion that those claims would lead to an inequitable result.

I do not consider this manner of proceeding to be the proper one. In my view, the Court should, after having examined the Norwegian claims, have examined the Danish claims and only then, if the Danish claims were found to lead to an inequitable result, should it have considered whether a provisional line — the median line or another line -could appropriately be used.

6. The Court has in my view not produced any substantial arguments in favour of the use of the median line as a starting point for the delimitation process.

I do not see how one can defend the contention that Article 6 of the 1958 Convention justifies this method. The Article does not contain any provisions about using the median line as a provisionally drawn line.

The Court has assumed that the striking difference in the length of the two relevant coasts constitutes “special circumstances” within the meaning of Article 6, which means that a delimitation line other than the median line has to be established. It is difficult to understand how it can then conclude that a median line should be used as a provisional line.

7. The Court has referred to the *Continental Shelf (Libyan Arab Jamahiriya/Malta)* case where the tracing of a median line by way of a provisional step in a process to be continued by other operations was considered to be the most judicious manner of proceeding with a view to the eventual achievement of an equitable result.

Reference has also been made to the Anglo-French Court of Arbitration which, in 1977, applied the equidistance line as a provisional line. These cases are however so different from the present one in respect of geographical and other factors, that there seems to be no justification from drawing any conclusions from them as to the appropriateness of using a provisional median line in the present case.

It is, moreover, possible to adduce other cases with different standpoints, as for instance the case concerning the *Continental Shelf (Tunisia/ Libyan Arab Jamahiriya)*:

> “Nor does the Court consider that it is in the present case required, as a first step, to examine the effects of a delimitation by application of the equidistance method, and to reject that method in favour of some other only if it considers the result of an equidistance line to be inequitable.” (*I.C.J. Reports 1982*, p. 79, para. 110.)

8. It seems to me that the Court, when deciding to use a median line as a provisional line, has accorded a preferential and unwarranted status to the median line.

This attitude corresponds to the general attitude of the Court in this case to the effect that prima facie a median line between opposite coasts results in an equitable solution. This does not, in my opinion, correspond to the developments in international law since 1958 especially as codified by the 1982 Convention on the Law of the Sea, which has diminished the significance attached to the median line principle, seen as no more than one means among others of reaching an equitable result.

I do not think that, in the absence of an agreement, the median line according to Article 6 of the 1958 Convention can be considered as the main rule while “special circumstances” constitute the exception. The two alternatives are, in my opinion, placed on the same footing. The primary task is therefore, to examine whether in the present case there are special circumstances which justify a boundary other than the median line and, if so, where such a line is to be drawn.

Article 6 contains no indication of the precise nature of “special circumstances” but it is generally accepted that those circumstances are such as to lead to an equitable solution.

9. The claims of Denmark to a delimitation line running 200 nautical miles from the coast of Eastern Greenland have, as mentioned, been examined by the Court only in the context of the adjustment of the provisional median line and were rejected on the grounds that the allocation of the whole of the disputed area and its resources to one of the Parties would not have been considered equitable. The Court has also asserted that the coast of Jan Mayen, no less than that of Eastern Greenland, accords full title to the maritime areas recognized

by customary law, i.e., in principle up to a limit of 200 miles from the baseline, and that the attribution to Norway of no more than the residual area left after giving full effect to the eastern coast of Greenland would run counter to the superior requirements of equity. According to the standpoint of the Court, neither of the States with opposite coasts can require the other State to renounce its claim to the full maritime area. This leads me to think that the Court has not drawn a clear distinction between “entitlement” and “delimitation”.

10. The distinction between the two concepts is important, because the law applicable to the basis of entitlement to areas of continental shelf or fishery zones, is different from — albeit complementary to — the law applicable to the delimitation of such areas (see the case concerning the *Continental Shelf (Libyan Arab Jamahiriya/Malta), I.C.J. Reports 1985*, pp. 29–30, para. 27).

Denmark has not questioned Jan Mayen's status as an island and, consequently, has neither questioned its entitlement to a fishery zone and a continental shelf, nor objected to its 200-mile zone towards the open sea.

Delimitation does not by definition and necessarily have to lead to a partition of the disputed area. No legal norms exist which would prevent a judicial solution of a delimitation dispute from being one in which one of the Parties is left with its full zone vis-à-vis the other Party, if such a solution is found to be equitable.

11. Customary law concerning the delimitation of the continental shelf and/or of economic zones has been applied in a number of cases by the International Court of Justice (*North Sea Continental Shelf* cases, 1969; Tunisia/Libya, 1982; Gulf of Maine, 1984; Libya/Malta, 1985) and by other international tribunals (*United Kingdom/France*, 1977); *Guinea/Guinea-Bissau*, 1985; *Canada/France*, 1992). Some cases were concerned solely with the continental shelf (*North Sea Continental Shelf* cases; *Tunisia/Libya*; *Libya/Malta*; *United Kingdom/France*), while other cases were also concerned with the delimitation of economic zones and the territorial sea (*Guinea/Guinea-Bissau* and *Canada/France*).

In all cases concerning maritime delimitation, customary law prescribes that a delimitation is to be effected by the application of equitable principles (criteria) capable of ensuring an equitable result (*Continental Shelf (Tunisia/Libyan Arab Jamahiriya), I.C.J. Reports 1982*, p. 59, para. 70; *Delimitation of the Maritime Boundary in the Gulf of Maine Area, I.C.J. Reports 1984*,p. 299, para. 112; *Continental Shelf (Libyan Arab Jamahiriya/Malta), I.C.J. Reports 1985*, p. 38, para. 45).

Customary law does not define the term “equitable”, which is used to characterize both the result to be achieved and the means to be employed in order to attain it. It is, however, the result which is predominant, so that the equitableness of a principle (criterion) is assessed in the light of its usefulness for the purpose of arriving at an equitable result. The equitableness of the result is to be determined by a balancing up of all the relevant factors of the particular case (*North Sea Continental Shelf* cases, *I.C.J. Reports 1969*, p. 50, para. 93). International tribunals have found a variety of factors or methods to be relevant, and no factors or methods are considered to have a privileged status in relation to others. This was clearly stated in the *North Sea Continental Shelf* cases (*ibid*., pp. 53–56, para. 101) and in the *Guinea/Guinea-Bissau* case, 1985 (*International Legal Materials*, Vol. XXV, No. 2,1986, p. 294, para. 102).

12. The factors which, in accordance with international judicial practice, have primarily to be taken into consideration are those related to the geographical features of the case, especially the relevant area and the relevant fronting coasts. The length of the relevant eastern coast (baseline) of Greenland is approximately 524 kilometres, the length of the fronting western coast of Jan Mayen is approximately 57.8 kilometres. Thus, the ratio of coastal lengths is more than 9 to 1 in favour of Greenland, so that this case is characterized by a very marked difference between the lengths of the two relevant opposite coasts. This is why the proportionality factor is crucial. In the context of a delimitation of the continental shelf, a reference to that factor is generally taken to imply that there should be a reasonable degree of proportionality between the area of the continental shelf of the States concerned and the length of their relative coastlines.

13. Proportionality has played an important role as a relevant factor in many judicial cases concerning delimitation of the continental shelf and other maritime areas (*North Sea Continental Shelf* cases, 1969; *United Kingdom/France*, 1977; *Tunisia/Libya*, 1982; Gulf of Maine, 1984; *Libya/Malta*, 1985; Guinea/Guinea-Bissau, 1985; *Canada/France*, 1992). The exact role in the delimitation process has differed in judicial practice and has been widely discussed by publicists of international law. Proportionality in the lengths of the relevant coasts has either been a factor which, together with other factors, has been taken into consideration in order to decide an equitable delimitation or it has — as in the present Judgment — been used *a posteriori* as a test of equity and appropriateness of a line which, as a starting point in the delimitation process, has been drawn on the basis of equidistance or in accordance with another method of delimitation.

When there are opposite coasts of comparable lengths, a median line delimitation would, in general, pass the tests of proportionality and equity. In the present case, however, where the two coastlines are of a proportion of more than 9 to 1, a median line cannot in my opinion be considered equitable, not even as a starting point in the delimitation process.

A median line delimitation would have allocated in total 96,000 square kilometres of the relevant area to Norway/Jan Mayen and 141,000 square kilometres to Denmark/Greenland, which corresponds to a ratio of some 1.5 to 1 in favour of Denmark/Greenland. Such a ratio differs greatly from the ratio of the difference of the lengths of the relevant coasts and would clearly have been inequitable.

This is also the case — although to a smaller degree — with the ratio, which follows from the Judgment.

The Court has in its decision, in my opinion, not — sufficiently — taken the difference between the lengths of the relevant coasts into consideration as it attributes, according to my estimate, some 43 per cent of the area of overlapping claims (zones 1,2 and 3) to Denmark/Greenland (approximately 28,000 square kilometres) and some 57 per cent to Norway/ Jan Mayen (approximately 37,000 square kilometres). This amounts to a total allocation of some 178,000 square kilometres of the relevant area to Denmark/Greenland and some 59,000 square kilometres to Norway/ Jan Mayen, which is a ratio of some 3 to 1 in favour of Denmark. I do not see how this partition can be equitable considering the ratio of the coastal lengths (9 to 1). A delimitation of 200 miles drawn from Eastern Greenland would have allocated an area of about 206,000 square kilometres to Denmark/Greenland and some 31,000 square kilometres to Norway/ Jan Mayen, which is a ratio of some 6.1 to 1 in favour of Denmark/Greenland. I therefore consider that considerations of general

proportionality — together with certain other considerations — lead to the conclusion that a delimitation of 200 miles drawn from Eastern Greenland would have been equitable.

14. The Court has taken no account at all of the considerable differences between Greenland and Jan Mayen as regards population and socio-economic factors, on the grounds that such factors undergo modifications over time and thus cannot serve as a basis for a maritime delimitation which is destined to be permanent. I disagree with the Court as all these factors have existed for a long period of time and any change in the foreseeable future is very unlikely. Due to geographical, climatic and other local conditions the major differences between Greenland and Jan Mayen will in all probability continue to exist and are, in my opinion, stable enough to be taken into consideration.

Besides, the position of the Court that socio-economic factors should not play a role in the delimitation process because they change has not prevented it from taking account of access to the fishery resources in the south of the disputed area.

As has been said, there are no general criteria of customary law that can serve to determine the weight to be attached to the factors considered relevant in a concrete case, as each case is "monotypic" *(Gulf of Maine)*.

Contrary to the standpoint of the Court, I consider that not only geographical but also population and socio-economic factors play a part when one is assessing the equitableness of a maritime delimitation (*Delimitation of the Maritime Boundary in the Gulf of Maine Area, I.C.J. Reports 1982*, p. 278, para. 59, and p. 340, para. 232). There is no question of assessing single factors individually as relevant, but of assessing and weighing them up collectively.

The present case is characterized not only by a very marked difference between the lengths of the two relevant coasts (and the size of the two landmasses), but also by a fundamental difference between Greenland and Jan Mayen with respect to their demographic, socio-economic and political structures. Greenland is a viable human society with a population of 55,000 and with political autonomy, whereas Jan Mayen has no population in the proper sense of the word, as only about 25 persons temporarily stay on the island manning meteorological, radio and LORAN stations.

15. The economic and other interests described by the Parties in this case are fundamentally different. The interests described by Denmark are interests directly connected with Greenland whereas the interests described by Norway are interests connected with the Norwegian mainland and its population, not with Jan Mayen. As the case concerns delimitation of the maritime area between Greenland and Jan Mayen it seems to me that only the population and socio-economic structures of these territories are in fact relevant and that, in this connection especially, the total dependence of Greenland on fisheries needs to be stressed.

It is generally recognized that a heavy dependence on fisheries may be a relevant factor in international law, as far as territories like Greenland are concerned. This appears from a resolution which was adopted in connection with the Convention of 29 April 1958 on Fishing and Conservation of the Living Resources of the High Seas. In connection with the adoption of the resolution, particular mention was made of Iceland, the Faroe Islands and Greenland, as countries whose people are overwhelmingly dependent upon coastal fisheries for their livelihood or economic development. That the needs of the coastal population of

Greenland justify special protective measures was also recognized in the Judgment of 30 November 1982 of the Court of Justice of the European Communities.

The Court has, as mentioned, taken account of the factor of access to what it considered to be the capelin zone as it has found that a division of the southern part of the area of overlapping claims into two equal parts would give both Parties equitable access to the fishing resources of the area. In other words, a new type of median line has been introduced. I disagree with the grounds of the Court as they disregard the abovementioned socio-economic factors.

16. The Court did not consider the maritime delimitation between Iceland and Jan Mayen, as effected by the treaties of 1980 and 1981, to be a precedent and the conduct of the Parties to constitute an element which could influence the operation of delimitation in the present case.

I agree that these treaties do not constitute a binding precedent in the strict sense of the term but they are in my opinion nevertheless relevant as an expression of the conduct of Norway and as such of great importance to the present case.

I consider the Iceland/Jan Mayen delimitation which involves the very same island which is the subject of the present case to be highly relevant as a strong indication of what would be an equitable delimitation of the maritime area between Greenland and Jan Mayen.

17. It is noteworthy that the operative part of the Agreement of 1980 does not contain any provisions concerning the delimitation of the economic zones but that one of the preambular clauses is the following:

> “Considering that Iceland has established an economic zone of 200 nautical miles and that Norway will in the near future establish a fishery zone around Jan Mayen”.

Thus the Icelandic 200-mile zone, vis-à-vis Jan Mayen, was not agreed upon by the Parties but existed by virtue of the Icelandic Law of 1 June 1979. The line, unilaterally drawn by Iceland, was then mentioned in the Preamble of the 1980 Agreement “recognizing Iceland's strong economic dependence on the fisheries, cf. Article 71 in the text of the Conference on the Law of the Sea”. The same point of view was expressed in the Recommendation of 30 May 1980, advanced by the Norwegian Parliamentary Committee with respect to the 1980 Agreement:

> “In that no reservation is made on Norway's part against the full 200-nautical-mile extent of Iceland's economic zone also in the area between Iceland and Jan Mayen, it also implies approval of that extent of the zone in the area mentioned.”

That view also found expression in the Committee's Report of 27 April 1982:

> “The Committee would also recall that, by virtue of the Agreement of 28 May 1980 between Norway and Iceland concerning fisheries and continental shelf questions, Norway indirectly approved an Icelandic economic zone of 200 nautical miles, comprising both fishing territory and the continental shelf, between Iceland and Jan Mayen. This approval at the same time marked acceptance on Norway's part of an Icelandic continental shelf of at least 200 miles towards Jan Mayen.”

The Agreement of 1981 between Norway and Iceland, following the recommendations of the Conciliation Commission set up by the 1980 Agreement, provided that the delimitation between the Parties' respective parts of the continental shelf in the area between Iceland and Jan Mayen was to coincide with the delimitation line between their respective economic zones. The Conciliation Commission had, according to the 1980 Agreement, to “take into account Iceland's strong economic interests in these sea areas, the existing geographical and geological factors and other special circumstances”.

18. The two Agreements by which Norway accepted that the maritime boundary between Iceland and Jan Mayen should be established to take account of the existing Icelandic 200-mile zone must, in the context of developments in the law of the sea, be considered as being in conformity with equitable principles and expressing a solution which Norway (and Iceland) considered to be equitable. A median line delimitation would not have been considered equitable.

19. The factual and legal situation in relation to the maritime delimitation in the area between Greenland and Jan Mayen is very similar to the context of the delimitation between Iceland and Jan Mayen. Greenland is, like Iceland, much larger than Jan Mayen and they both have, unlike Jan Mayen, permanent populations and their own economic and political structure. Iceland and Greenland have, with regard to their economies, been put on the same footing as, together with the Faroe Islands, they have, as has been said, been singled out in connection with the Convention of 29 April 1958 on Fishing and Conservation of the Living Resources of the High Seas, as countries or territories whose people are overwhelmingly dependent upon coastal fisheries for their livelihood or economic development.

The delimitation between Iceland and Jan Mayen must, as already stated, be considered to be equitable. As the factors which were relevant in that case are very similar to the relevant factors in the Greenland/ Jan Mayen case, it would have been just and equitable to draw the delimitation line in the present case in a manner similar to the way in which the lines were drawn in the Iceland/Jan Mayen case, that is to say, at a distance of 200 nautical miles from East Greenland.

20. As for the delimitation in the maritime area between Bear Island and mainland Norway, the Court has found that Norway is no more bound by that solution than is Denmark to apply, in the present dispute, the method of equidistance used to effect the delimitation between Norway and Denmark in the Skagerrak and the North Sea or off the Faroe Islands. I do not see any analogy between the delimitation situations concerning Bear Island and the delimitations in the North Sea mentioned by the Court as the situation concerning Bear Island is very special. I consider that the Bear Island delimitation, although it concerns delimitation between two Norwegian territories, has international aspects and that it is of a certain relevance as expressing the conduct of Norway concerning a maritime delimitation of an area located between an uninhabited small island and a mainland.

21. I do not agree with the method of delimitation of the area of overlapping claims (zones 1, 2 and 3) which is very ingeniously invented expressly for this case.

The two lines dividing the area into three zones are drawn between the points where the Greenland 200-mile line and the median line are changing direction.

The southernmost zone (zone 1) corresponds — by accident — essentially to the area which, according to the Court, is the principal area for capelin fishing. It follows from what I have already stated that I do not consider the division of this zone into two equal parts to be equitable as it disregards relevant socio-economic factors. Furthermore I do not think that

the Court is in a position to define the main fishing area of capelin with accuracy as that area might vary greatly.

The division of zones 2 and 3 is based on the sole consideration —which I strongly contest — that an equal division of all three zones would give too great a weight to the circumstance of the marked disparity in coastal length. The division of zones 2 and 3 is thus effected in a way that leads to the desired delimitation of all three zones. I consider that this whole method is artificial and that no rules of international law have been adduced to provide grounds for the method apart from a general reference to “the requirements of equity”.

22. The judge may — and should — exercise judicial discretion within certain limits and has to make difficult choices according to his convictions.

In the present case, where the decision is based mainly upon equitable considerations, the range of choices is wider than in cases involving treaty law only, and the decision of what should be the equitable solution correspondingly difficult. In many cases as in the present one it seems almost impossible with 100 per cent certainty to point to one single solution which could be characterized as equitable. The judge has to make a choice between several potentially equitable solutions.

For the reasons stated above and after having carefully weighed up all the relevant factors, I have reached the conclusion that the Judgment is not the most equitable solution but that a delimitation of the continental shelf and of the fisheries zone between Greenland and Jan Mayen at a distance of 200 nautical miles from Eastern Greenland would have been the most equitable solution and consequently should have been the outcome of the case.

(Signed) Paul Fischer.

Footnotes:

1 On the maps produced by the Parties, and referred to in argument, the points called C and D in the present Judgment were designated C_1 and D_1. *[Note by the Registry.]*

* Between points No. 1 and 2, 3 and 4, 12 and 13, and 19 and 20 the baseline follows the low water mark along the coastline. The protrusive points on the above-mentioned parts of the low water mark are presented in the sub-annex to Annex 58. Co-ordinates of all base points are given in WGS 84.

1 As has been pointed out, Norway is separated from the main part of the North Sea continental shelf by a deep trench, known as the Norwegian Trough. It was really remarkable that Norway, in spite of the existence of that trench, could participate in the division of the continental shelf of the North Sea by applying in general the rule of the median line or the equidistance line. The reason behind this solution can only be a matter of pure conjecture but it seems to me that there existed some general feeling among the countries of the North Sea region that Norway ought not to be isolated in this respect.

1 Mr. Manner, Chairman of Negotiating Group 7, reported in the course of the seventh session (28 March–19 May 1978):

> "No compromise on this point did materialize during the discussions held, although one may note, that there appears to be general agreement as regards two of the various elements of delimitation: first, consensus seems to prevail to the effect that any measure of delimitation should be effected by agreement, and second, all the proposals presented refer to relevant or special circumstances as factors to be taken into account in the process of delimitation." (UNCLOS III, Official Records, Vol. X, p. 124.)

He also reported at the resumed seventh session (21 August–15 September 1978):

> "During the discussions general understanding seemed to emerge to the effect that the final solution could contain the following four elements: (1) a reference to the effect that any measure of delimitation should be effected by agreement; (2) a reference to the effect that all relevant or special circumstances are to be taken into account in the process of delimitation; (3) in some form, a reference to equity or equitable principles; (4) in some form, a reference to the median or equidistance line." (*Ibid.*, p. 171.)

In his statement on 24 April 1979 to the Second Committee of the Conference at the eighth session, he stated that "[d]espite intensive negotiations, the Group had not succeeded in reaching agreement on any of the texts before it" (*ibid.*, Vol. XI, p. 59) but suggested as a possible basis for compromise the following text:

> "The delimitation of the exclusive economic zone (or of the continental shelf) between States with opposite or adjacent coasts shall be effected by agreement between the parties concerned, taking into account all relevant criteria and special circumstances in order to arrive at a solution in accordance with equitable

> principles, applying the equidistance rule or such other means as are appropriate in each specific case." *(Ibid.)*

Mr. Manner again in his Report on 22 August 1979, at the resumed eighth session, stated that

> "[a]s before, the discussions on delimitation criteria were characterized by the opposing positions of, on the one hand, delegations advocating the equidistance rule and, on the other hand, those specifically emphasizing delimitation in accordance with equitable principles" (*ibid*., Vol. XII, p. 107).

On 24 March 1980 at the ninth session he suggested his assessment of alternatives which might, in time, secure a consensus at the conference:

> "Article 74 [83]. 1. The delimitation of the exclusive economic zone [continental shelf] between States with opposite or adjacent coasts shall be effected by agreement in conformity with international law. Such an agreement shall be in accordance with equitable principles, employing the median or equidistance line, where appropriate, and taking account of all circumstances prevailing in the area concerned." (*Ibid*., Vol. XIII, p. 77.)

This draft was incorporated in the Informal Composite Negotiating Text/Revision 2 (11 April 1980) by a decision of the "collegium" but was not agreeable to both groups at the plenary meetings on 28 July 1980 at the resumed ninth session; Negotiating Group 7 had, by that time, been dissolved.

1 This text did not appear in the later (i.e., post-1953) text drawn up by the International Law Commission. After 1953, the International Law Commission prepared an independent article concerning dispute settlement, to cover not only delimitation but also other aspects of the continental shelf, which finally became the optional protocol for the settlement of disputes attached to the four Geneva Conventions on the law of the sea adopted at UNCLOS I.

1 *North Sea Continental Shelf, I.C.J. Reports 1969*, p. 3; *Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland and the French Republic*, 1977, *RIAA*, Vol. XVIII, p. 3; *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), I.C.J. Reports 1982*, p. 18; *Delimitation of the Maritime Boundary in the Gulf of Maine Area, I.C.J. Reports 1984*, p. 246; *Continental Shelf (Libyan Arab Jamahiriya/Malta), I.C.J. Reports 1985*, p. 13; and *Delimitation of the Maritime Areas between Canada and France*, Decision of 10 June 1992.

1 See, *inter alia*, M. K. Yasseen, "L'interprétation des traités d'aprés la convention de Vienne sur le droit des traités", 151 *Recueil des cours* (1976-III), pp. 64 ff.; G. E. do Nascimento e Silva, "Le facteur temps et les traités", 154 *Recueil des cours* (1977-I), at pp. 266 ff.; T. O. Elias, "The Doctrine of Intertemporal Law", 74 *American Journal of International Law* (1980), pp. 285 ff.; Sir Humphrey Waldock, "The Evolution of Human Rights Concepts and the Application of the European Convention on Human Rights", in *Mélanges offerts à Paul Reuter*, 1981, pp. 535, 536, 547; and Sir Ian Sinclair, *The Vienna Convention on the Law of Treaties*, 2nd ed., pp. 124–126, 139–140.

1 *Yearbook of the International Law Commission*, 1950, Vol. II, p. 368, para. 29; *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua* v. *United States of America*), *Jurisdiction and Admissibility, I.C.J. Reports 1984*, p. 424, para. 73, and *ibid*., *Merits, I.C.J. Reports 1986*, pp. 93–94, paras. 174–175.

1 T.J. Lawrence, *The Principles of International Law*, 7th ed., 1930, preface to the first edition, p. vii.

1 See, in English law, *Maxwell on the Interpretation of Statutes*, 12th ed., 1969, pp. 190-191; and *Craies on Statute Law*, 7th ed., 1971, pp. 218–220.

1 *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Second Phase, I.C.J. Reports 1950*, p. 229. And see *Acquisition of Polish Nationality, P.C.I.J., Series B, No. 7*, p. 20; *Serbian Loans, P.C.I.J., Series A, No. 20/21*, p. 32; and *Rights of Nationals of the United States of America in Morocco, I.C.J. Reports 1952*, p. 196.

1 *Official Records of the General Assembly, Eleventh Session, Plenary Meetings*, Vol. II, 658th meeting, 21 February 1957, pp. 1181 ff.

1 E. de Vattel, *Le droit des gens*, Vol. 2, Chap. 17, para. 263, cited by Mr. Basdevant in the S.S. *"Wimbledon", P.C.I.J., Series C, No. 3*, Vol. I, p. 197.

2 See *Interpretation of the Convention of 1919 concerning Employment of Women during the Night, P.C.I.J., Series A/B, No. 50*, p. 383, Judge Anzilotti, dissenting.

1 See, generally, *Anglo-French Arbitration, RIAA*, Vol. XVIII, pp. 57–58, paras. 98 ff. ; *Tunisia/Libya*, *I.C.J. Reports 1982*, p. 91, para. 131, pp. 92–93, para. 133, and pp. 152–153, paras. 17 ff., Judge Gros, dissenting; *Gulf of Maine, I.C.J. Reports 1984*, pp. 322–323, paras. 184–185, and pp. 334–335, para. 218; *Libya/Malta*, *I.C.J. Reports 1985*, pp. 44–46; and *Canada/France Arbitration*, Award, paras. 61–63.

1 *I.C.J. Reports 1984*, pp. 300–301, para. 115; pp.312–313, para. 157; p. 328, para. 197; pp. 329–330, para. 201 ; pp. 331–332, para. 209; p. 332, para. 210; pp. 332–333, para. 212; p. 333, para. 213; p. 334, para. 217.

1 Laura Nader and June Starr, "Is Equity Universal ?", in R. A. Newman (ed.), *Equity in the World's Legal Systems, A Comparative Study*, 1973, p. 125, at p. 133, cited in J. I. Charney, "Ocean Boundaries between Nations : A Theory for Progress", *American Journal of International Law*, 1984, Vol. 78, p. 582, at p. 595, note 69.

1 See *I.C.J. Pleadings, Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, Vol. V, p. 246, question IV(I) of Judge Oda's questions, and p. 503, para. IV(I) of Libya's reply; *I.C.J. Pleadings, Maritime Delimitation in the Gulf of Maine Area*,Vol. VI, p. 461, President Ago's question; *Gulf of Maine, I.C.J. Reports 1984*, p. 317, para. 168, p. 326, paras. 192–193 ; Paul Jean-Marie Reuter, "Une ligne unique de délimitation des espaces maritimes?", in *Mélanges Georges Perrin*, 1984, p. 251, at p. 256 ; D. W. Bowett, *The Legal Regime of Islands in International Law*, 1978, pp. 188–189 ; and R. R. Churchill, "Marine Delimitation in the Jan Mayen Area", in *Marine Policy*, 1985, Vol. 9, pp. 26–27. There is a well-known divergence between the boundary of the continental shelf and that of the economic zone in the case of the Australia/Papua New Guinea Maritime Boundaries Treaty of 1978.

1 See *Corpus Juris Secundum*, Vol. 16, pp. 563 ff., para. 176, concerning judicial attitudes to political questions in the United States. And see Justice Stone's dissent in *United States* v. *Butler* (1926), 297 US 1 (78),

> "while unconstitutional exercise of power by the executive and legislative branches of the government is subject to judicial restraint, the only check upon our own exercise of power is our own sense of self-restraint".

As to judicial activism and judicial self-restraint in England, see S. A. de Smith, *Judicial Review of Administrative Action*, 4th ed., pp. 31 ff.

1 R. Y. Jennings, "Equity and Equitable Principles", in *Annuaire suisse de droit international*, Vol. XLII (1986), p. 38. See, also, the same author in "The Principles Governing Marine Boundaries", in *Staat und Völkerrechtsordnung, Festschrift für Karl Doehring*, 1989, p. 408.

2 See Mark W. Janis, "Equity in International Law", *Encyclopedia of Public International Law*, Vol. 7, pp. 76–77:

> "The application of equitable principles in these maritime delimitation cases has evoked a debate regarding the role of equity which is rather similar to that which accompanied earlier manifestations of equity practice. Some observers — largely in the positivist tradition — have criticized the courts for going beyond their powers."

3 Judge Jennings refers, in connection with maritime delimitation, to "some deep problems — one might almost add a malaise — affecting that part of international law today" ("The Principles Governing Marine Boundaries", *op. cit.*, p. 398). See, also, the criticisms of the use of equity assembled by Judge Bedjaoui in "L''énigme' des 'principes équitables' dans le droit des délimitations maritimes", in *Revista Española de Derecho Internacional*, Vol. XLII (1990), p. 376.

1 "Opzet van een boek over het internationale recht" ("Outline of a Book on International Law") in *Verzamelde Geschriften* (Collected Papers), The Hague, 1948, p. 292, at p. 338.

2 Georges Ripert, "Les règles du droit civil applicables aux rapports internationaux", 44 *Recueil des cours de l'Académie de droit international* (1933-II), p. 575 — "L'équité est principe, mais principe de morale et non principe du droit."

1 As assembled by Judge Bedjaoui in "L''énigme' des principes équitables' dans le droit des délimitations maritimes", *op. cit.*, p. 376.

2 "Juridical Evolution and Equity", in *Essays in Jurisprudence in Honor of Roscoe Pound*, 1962, pp. 82,84.

3

> "les principes équitables se présentent en définitive comme un arsenal juridique dans lequel le juge puise les outils permettant d'identifier, d'évaluer, de comprendre et de satisfaire des circonstances reconnues juridiquement pertinentes dans une espèce déterminée." (Bedjaoui, *op. cit.*, p. 384.)

1 See, for example, R. Dworkin, *Taking Rights Seriously*, 1977, p. 46.

1 For example, the *audi alteram partem* rule has from ancient times been described even in popular literature:

> “Qui statuit aliquid parte inaudita altera,
>
> Aequum licet statuerit, haud aequus fuit.”

(Seneca, *Medea* 199–200, cited in a series of later common law cases such as *Re Hammersmith Rent-Charge*, 4 Ex 87, at 97; *Smith* v. *Rex*, 3 App. Cas. 614 at 624. See also Broom, *Legal Maxims*, 10th ed., 1939, p. 66.)

1 *I.C.J. Reports 1984*, p. 313, para. 159.

2 See, for example, the five separate tasks devolving on the Court, as analysed by J. I. Charney, of which the last three may be classified as methods:

> “(3) To the extent possible, each piece of information identified in the prior paragraph should be used to construct a line or range of lines that best suits the function to which it relates.
>
> (4) These alternative lines and previously identified factors should be studied and weighed according to their importance. In a process that might even approach vector analysis, a line that best reflects all the relevant factors in light of their importance to the zone should be sought.
>
> (5) A cartographical method should be selected to describe the line accurately and reliably.” (J. I. Charney, “Ocean Boundaries between Nations: A Theory for Progress”, 78 *American Journal of International Law* (1984), p. 597.)

3 One could, if so disposed, draw a distinction between a merely geometrical norm and a juridical norm as Judge Tanaka did in his dissenting opinion in the *North Sea Continental Shelf* cases (*I.C.J. Reports 1969*, p. 183). However, if the geometrical norm stems from equitable considerations, it is for the purposes of this discussion classed as an equitable method. Judge Tanaka was referring to the distinction between the rule of equidistance as a mere technique and as a norm of law.

1 *I.C.J. Reports 1984*, p. 336, paras. 221–222.

1 See T. L. McDorman, P. M. Saunders and D. L. VanderZwaag, “The Gulf of Maine Boundary: Dropping Anchor or Setting a Course?”, 9 *Marine Policy* (1985), p. 100.

2 *Ibid.*

1 *Reports of International Arbitral Awards (RIAA)*, Vol. I, 1922, p. 331.

1 “Adjuvandi, vel supplendi, vel corrigendi juris civilis” (D.I.1.7.1).

2 The equitable work of the jurists was fruitful, and important doctrines such as subrogation, estoppel and constructive notice resulted from their efforts. See W. W. Cook, in Encyclopedia of the Social Sciences, ed. Seligman, 1931, Vol. 5, p. 584. Equity can do no less in international law.

3 See *I.C.J. Reports 1974*, p. 33, para. 78, and p. 202, para. 69; *I.C.J. Reports 1982*, p. 60, para. 71, and p. 92, para. 133 A(I); *I.C.J. Reports 1984*, p. 278, para. 59, and p. 299, para. 112; *I.C.J. Reports 1985*, pp. 38–39, para. 45, and pp. 56–57.

1 R. Y. Jennings, "The Principles Governing Marine Boundaries", *op. cit.*, p. 401.

2 See *Encyclopedia of Public International Law*, *op. cit.*, p. 77.

3 The related expression *bonum et aequum* means "right and equitable, fair(ness) and just(ice)" (Adolf Berger, *Encyclopaedic Dictionary of Roman Law*, 1952, p. 377) and appears, in Celsus' celebrated definition of *jus* as "*ars aequi et boni*", cited at the very commencement of Justinian's *Digest* (D.l.l.pr.). It appears, also, in the formula of *actiones in aequum et bonum conceptae* (Berger, *ibid*.).

4 Draft Scheme for the Institution of the Permanent Court of International Justice Presented to the Council of the League of Nations by the Advisory Committee of Jurists, Art. 35 (corresponding to the later Article 38).

1 *Documents concerning the Action Taken by the Council of the League of Nations under Article 14 of the Covenant and the Adoption by the Assembly of the Statute of the Permanent Court*, Geneva, 1921, p. 41, Annex.

2 Seventh Meeting of the Sub-Committee of the Third Committee of the First Assembly Meeting held on 1 December 1920.

3 *Documents concerning Action Taken …, op. cit.*, p. 145.

1 *Documents concerning Action Taken …, op. cit.*, p. 157.

2 *Ibid*., p. 211.

3 "The notion *ex aequo et bono* had been little used before its addition to the PCIJ's Statute and was included there, with little debate, arguab'ly to give the Court somewhat greater flexibility." (Janis, *Encyclopedia of Public International Law*, Vol. 7, p. 75.)

1 Chaim Perelman, in his study of lacunae in the law, makes the point in the context of arbitrations and judicial decisions in public international law, that a request for a decision *ex aequo et bono* could be read "dans le sens *contra legem*" (*Le problème des lacunes en droit*, 1968, p. 327).

2 For similar expressions by other tribunals, see the statement of the Court of Arbitration in the Anglo-French Continental Shelf Arbitration Award (*RIAA*, Vol. XVIII, paras. 70 and 245; see, also, Guinea/Guinea-Bissau Arbitral Award (*Revue générale de droit international public* (1985), Vol. 89, paras. 88 and 90) referring to the Judgment of this Court in the *North Sea* cases, and holding that its own function, likewise, was not to decide *ex aequo et bono*.

1 See also Bin Cheng, "Justice and Equity in International Law", *Current Legal Problems*, 1955, p. 203.

2 1 Scott, *Hague Court Reports* (1916), p. 226.

3 Shabtai Rosenne, “The Position of the International Court of Justice on the Foundations of the Principle of Equity in International Law”, in A. Bloed and P. van Dijk (eds.), *Forty Years International Court of Justice: Jurisdiction, Equity and Equality*, 1988, p. 108.

4 See O. Schachter, “International Law in Theory and Practice”, 178 *Recueil des cours* (1982-V), Chap. IV, “General Principles and Equity”, p. 85.

5 The question whether there is a “gap” in the law or whether there is always a rule or principle of law which is capable of extension and application to the case in hand is a nice jurisprudential one which it is not necessary to examine here at length. For a fuller, and perceptive, discussion, see Vaughan Lowe, “The Role of Equity in International Law”, 12 *Australian Yearbook of International Law* (1988–1989), pp. 58–63.

1 See, also, the separate opinion of the same judge in *Barcelona Traction, Light and Power Company, Limited, Second Phase* (*I.C.J. Reports 1970*, pp. 332–333), in relation to equity *praeter legem* and the sense which Papinian, the author of that expression, gave toit.

1 The fact that the judge must function *infra legem*, while the arbitrator is free of those constraints, is mentioned by Aristotle in a passage quoted by Grotius: “‘For the arbitrator has regard to what is fair, but the judge follows the law’” (De Jure Belli ac Pacis, Bk. Ill, Chap. XX, sec. XLVII, Kelsey, trans., *Classics of International Law*).

2 Shabtai Rosenne, *The Law and Practice of the International Court*, 1965, Vol. II, p. 605.

3 Barbara Kwiatkowska, “The International Court of Justice Doctrine of Equitable Principles Applicable to Maritime Delimitation and Its Impact on the International Law of the Sea”, in A. Bloed and P. van Dijk (eds.), *Forty Years International Court of Justice: Jurisdiction, Equity and Equality*, p. 158.

1 Shabtai Rosenne, “The Position of the International Court of Justice on the Foundations of the Principle of Equity in International Law”, *op. cit.*, pp. 88–89.

1 See, further, Monique Chemillier-Gendreau, “Equity”, in Bedjaoui (ed.), *International Law: Achievements and Prospects*, 1991, pp. 274–275.

2 Cf. the Jay Treaty of 1794, which, by Article 7, provided that the Commissioners appointed under the Treaty to decide the matters in contention between Britain and the United States should decide the claims “according to the merits of the several cases and to Justice, Equity and the Law of Nations”. Judge Hudson has listed numerous bilateral treaties entered into during the intervening centuries which provide for the application of equity — such as the 1795 United States-Spain Treaty, the 1840 Great Britain-Portugal Treaty and the 1926 and 1930 Danish Treaties with Finland and Iceland, respectively. See M. O. Hudson, *The Permanent Court of International Justice, 1920-1942*, 1943 (1972 reprint), p. 616 (footnotes).

3 Friedmann, *The Changing Structure of International Law*, 1964, p. 197, citing Hersch Lauterpacht, *Private Law Sources and Analogies*, 1927, para. 28; Manley Hudson, *The Permanent Court of lnternational Justice*, 1972 ed., p. 617; Charles De Visscher, “Contribution à l'étude des sources du droit international”, 60 *Revue de droit internationalet de législation comparée* (1933), pp. 325,414 et seq.; Dahm, 1 *Volkerrechts* (1958), pp. 40 et seq.

1 *Loc. cit.*

2 *I.C.J. Reports 1969*, p. 84.

3 *I.C.J. Reports 1974*, p. 63, fn. 1.

4 *The Permanent Court of International Justice, 1920–1942*, 1972 ed., p. 617.

5 *I.C.J. Reports 1969*, p. 48, para. 88.

6 *I.C.J. Reports 1982*, p. 60, para. 71.

7 *I.C.J. Reports 1969*, pp. 49–50, para. 91.

8 *Ibid.*

9 The phrase is used in this form rather than in the now inappropriate phraseology referring to "civilized nations". Sir Humphrey Waldock preferred the expression "general principles of law recognized in national legal systems", and the shortened expression "the general principles of law" is perhaps adequate for present purposes (see *North Sea Continental Shelf, I.C.J. Reports 1969*, p. 136, Judge Ammoun, separate opinion).

10 *Venezuelan Arbitrations of 1903*, p. 720.

1 *General Principles of Law as Applied by International Courts and Tribunals*, 1987, pp. 377–378.

2 *Op. cit.*, p. 75.

3 *Ibid.*

4 *Ibid.*, p. 76.

5 See Wilfred Jenks, *Common Law of Mankind*, 1958, p. 106; Wolfgang Friedmann, *The Changing Structure of International Law*, 1964, pp. 188–210; and Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, 1987, p. 377.

1 Schachter, *op. cit.*, pp. 79–80.

2 As set out in his Foreword to Bin Cheng's *General Principles of Law as Applied by International Courts and Tribunals*, 1987, p. xi.

3 See, for example, *Barcelona Traction, Light and Power Company, Limited, Second Phase, I.C.J. Reports 1970*, p. 48, para. 94:

> "It must first of all be observed that it would be difficult on an equitable basis to make distinctions according to any quantitative test… The protector State may, of course, be disinclined to take up the case of the single small shareholder, but it could scarcely be denied the right to do so in the name of equitable considerations."

1 See S. Rosenne, *The Law and Practice of the International Court*, 1965, VoI. II, p. 605.

2 Grotius, *De Jure Belli ac Pacis* (1646), Bk. II, Chap. XVI, sec. XXVI; see, also, Bk. III, Chap. XX, sec. XLVII (Kelsey, trans., *Classics of International Law*, 1925, pp. 425, 824).

3 With specific reference to the law of the sea, a number of eminent modern publicists, some of whom have been referred to in this opinion, are keeping up this tradition and making a distinguished contribution to this fast-developing field.

1 E.g., Judge Koretsky in *North Sea Continental Shelf* cases (*Federal Republic of Germany/ Denmark*; *Federal Republic of Germany/Netherlands, I.C.J. Reports 1969*, p. 165.

2 Kelsen, *The Law of the United Nations*, 1950, p. 366.

1 See *Annuaire de l'AAA*, 1972/1973, Vol. 42/43, Editorial by Boutros Boutros-Ghali, p. 4, on the need for international lawyers of the future "à affronter les problèmes complexes d'un monde nouveau, où le droit international devrait établir une paix durable, juste et équitable".

2 *Documents of the United Nations Conference on International Organization*, Vol. VI, San Francisco, 1945, p. 454.

1 S. Rosenne, "The Position of the International Court of Justice on the Foundations of the Principle of Equity in International Law", *op. cit.*, pp. 88–89. Sohn's view was expressed in "The Role of Equity in the Jurisprudence of the International Court of Justice", in *Mélanges Georges Perrin* (1984), p. 303.

2 *Official Records of the Third United Nations Conference on the Law of the Sea*, Vol. I, p. 4, para. 16.

1 Prosper Weil, *The Law of Maritime Delimitation: Reflections*, 1989, p. 166.

2 Cf. Kelsen, *Was ist Gerechtigkeit?*, 2nd ed., Vienna, 1975, p. 43 — "Ich weiss nicht und kann nicht sagen was Gerechtigkeit ist…und kann nur sagen was Gerechtigkeit für mich ist" ("I do not know and cannot say what justice is…and can only say what justice is to me").

3 See Julius Stone, *Human Law and Human Justice*, 1965, p. 316.

1 *Nicomachean Ethics*, V.i.5. See, also, Aquinas' *Commentary on the Nicomachean Ethics*, 5.1. Cf. Plato's *Republic*, 440C-D.

2 See E. N. Cahn, *The Sense of Injustice*, 1949; Julius Stone, *op. cit.*, p. 316.

3 Cahn, *op. cit.*, p. 13.

4 I. Jenkins, "Justice as Ideal and Ideology", in *Nomos, Justice* 191, cited in Stone, *op. cit.*, p. 317.

5 Stone, *op. cit.*, p. 321.

6 P. van Dijk, *Nature and Function of Equity in International Economic Law*, Grotiana New Series, 1986, Vol. 7, p. 5.

1 Schachter, *op. cit.*, p. 82.

1 E. Jiménez de Aréchaga, "The Conception of Equity in Maritime Delimitation", in *International Law at the Time of Its Codification: Essays in Honour of Roberta Ago*, 1987, Vol. II, p. 232.

1 M. A. Rothblatt, “Satellite Communication and Spectrum Allocation”, 76 *American Journal of International Law* (1982), p. 56.

2 *International Law Reports*, 1957, pp. 139, 141.

3 Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, 1987, pp. 48–49, citing the *Pinson* case (1928) as contained in *Jurisprudence de la commission franco-mexicaine des réclamations* (1924–1932), p. 133.

1 A Treaty of Amity, Commerce and Navigation between the United States of America and Great Britain providing for the creation of three mixed commissions of American and British nationals to settle a number of outstanding questions between the two countries.

2 Moore's analysis, as cited by H. Lauterpacht in *The Function of Law in the International Community*, 1933, p. 121, fn. 4. See, also, p. 132.

3 Decision of 30 June 1977, *RIAA*, Vol. XVIII, pp. 87–95, paras. 180–202.

1 Schwarzenberger, “Equity in International Law”, *Yearbook of World Affairs*, 1972, p. 346, at p. 357.

2 Charles De Visscher, *Theory and Reality in Public International Law*, trans. P. E. Corbett, Princeton, 1957, p. 336.

1 Aristotle, *The Nicomachean Ethics*, H. Rackham (trans.), Loeb Classical Library, re vised ed., 1934, pp. 315 and 317.

2 *Ibid.*

3 See Julius Stone, *Legal System and Lawyers' Reasonings*, 1964, p. 305.

1 Julius Stone, *Legal System and Lawyers' Reasonings*, 1964, p. 304.

2 Ian Brownlie, *Principles of International Law*, 4th ed., 1990, p. 26.

3 Julius Stone, *Legal System and Lawyers' Reasonings*, 1964, p. 305; and O. W. Holmes, Jr., “Path of the Law”, 10 *Harvard Law Review* (1897), pp. 465–466.

4 This distinction between the modes of operation of a judge and arbitrator was noted by Aristotle in a passage picked up by Grotius (see p. 233, footnote 1, above).

1 There could of course be several others, especially in a municipal forum, where a judge may consciously or unconsciously lean towards, for example, a utilitarian, an analytical positivist, a realist, or other philosophical stance in making his decision. See C. G. Weeramantry, “The Importance of Philosophical Perspectives in the Judicial Process”, 6 *Connecticut Journal of International Law* (1991), p. 599.

2 On leeways of choice in judicial discretion, see, generally, Julius Stone, *Human Law and Human Justice*, 1965, pp. 304–312. See also Lon L. Fuller, *The Morality of Law*, revised ed., 1969, for a view of the choices available, ranging from what Fuller calls the morality of aspiration, high up on the scale, to the morality of duty lower down. The more idealistic judge would make his choice higher up the scale than the more pragmatic. The highest points of the scale would be unsuitable for practical use.

1 See, on this aspect, Michel Virally (“L'équité dans le droit. A propos des problèmes de délimitation maritime”, in *International Law at the Time of Its Codification: Essays in Honour of Roberta Ago*, 1987, Vol. II, pp. 526–530), which makes a three-fold division. For a more elaborate analysis into five stages, see J. Charney, “Ocean Boundaries between Nations: A Theory for Progress”, *op. cit.* See, also, for a four-fold classification into identification of area, identification of method, application of practical method and assessment of equitability, M. D. Evans, *Relevant Circumstances and Maritime Delimitation*, 1989, pp. 87–88.

1 Judge Manley Hudson points out:

> “The conceptions introduced into the law as principles of equity cannot be listed with definiteness; but they are not to be discarded because they are vague, for that is a quality attaching to international law itself…” (*The Permanent Court of International Justice, 1920–1942* (1972 reprint, intro. by L. B. Sohn), p. 617.)

2 On the belief in legal certainty even in law, as opposed to equity, see Julius Stone, *The Province and Function of Law*, 1946, pp. 204–205:

> “|T]he defence of legal ‘certainty’ insofar as it assumes that certainty can be attained by continuing to adhere closely to logical development of the ‘principles of law’, is defending what has never existed. The appearance of certainty and stability in legal rules and principles conceals existing uncertainty.”

3 O. Schachter, *op. cit.*, p. 82: “No concept of international law resists precise definition more than the notion of equity.”

1 Charles De Visscher, *De l'équité dans le règlement arbitral ou judiciaire des litiges de droit international public*, 1972, pp. 8–9:

> “envisagées du point de vue de la formation historique de leur contenu, les règles de droit ont de tout temps été largement tributaires de l'équié avant de se cristalliser dans l'ordre juridique positif.”

See, also, M. D. Blecher, “Equitable Delimitation of Continental Shelf”, 73 *American Journal of International Law* (1979), pp. 83–88.

2 *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), I.C.J. Reports 1982*, p. 92.

1 Schachter, *op. cit.*, p. 87.

2 See, generally, Schachter, *ibid*..

3 As perhaps best illustrated by J. L. Azcárraga's suggestions running to three pages of mathematical formulae titled “Nuestra Fórmula Matemática”, in *La Plataforma Submarina y el Derecho Internacional*, 1952, pp. 82ó84. The formulae allocate different areas of shelf according to three fixed factors — number of inhabitants, length of coast and area of territory.

1 *I.C.J. Reports 1951*, p. 142. See, also, S. Rosenne, *The International Court of Justice*, 1957, pp. 427–428.

1 *North Sea Continental Shelf* cases, *I.C.J. Reports 1969*, p. 3; *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* case, I.C.J. Reports 1982, p. 18; case concerning *Delimitation of the Maritime Boundary in the Gulf of Maine Area, I.C.J. Reports 1984*, p. 246; and *Continental Shelf (Libyan Arab Jamahiriya/Malta)* case, *I.C.J. Reports 1985*, p. 13.

2 See, in particular, the decisions of the Court of Arbitration in the *Delimitation of the Continental Shelf between the United Kingdom and France* case, *RIAA*, Vol. XVIII, pp. 3 ff.; and *Chile/Argentina Beagle Channel Arbitration*, *International Legal Materials*, 1978, pp. 36 ff.

3 H. W. Jayewardene, *Regime of Islands in International Law*, 1990, p. 316.

4 *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), I.C.J. Reports 1982*, p. 246, para. 144, dissenting opinion of Judge Oda.

1 *RIAA*, Vol. XVIII, p. 45, para. 70.

2 "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." (Doc. NG 7/2/Rev.2, 28 March 1980, cited by Brown, "Delimitations of Offshore Areas: Hard Labour and Bitter Fruits at UNCLOS III", *Marine Policy* (1981), p. 180.)

3 "The delimitation of the exclusive economic zone 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." (Doc. NG 7/10/Rev.2, 28 March 1980, cited by Brown, *op. cit.*)

1 H. W. Jayewardene, *The Regime of Islands in International Law*, 1990, p. 320.

2 See *Official Records of the Third United Nations Conference on the Law of the Sea*, Vol. XV, pp. 39–42, for the discussion on the compromise text formulated by the President, and for its acceptance by the two groups concerned.

3 It is not necessary for present purposes to enter into discussions of the question whether the provisions of the Convention have acquired the force of customary international law. That question is not free of controversy — see Jennings, "Law Making and Package Deal", in *Mélanges offerts à Paul Reuter*, Paris, 1981, pp. 347–355; L. A. Howard, "The Third UN Conference on the Law of the Sea and the Treaty/ Custom Dichotomy", 16 *Texas International Law Journal* (1981), pp. 321–345; H. Caminos and M. R. Molitor, "Progressive Development of International Law and the Package Deal", 79 *American Journal of International Law* (1985), pp. 871–890; and M. C. W. Pinto, "Maritime Security and the 1982 UN Conference on the Law of the Sea", *Maritime Security, The Building of Confidence*, UNIDIR, 1993, p. 9, at pp. 40–46.

4 *I.C.J. Reports 1969*, p. 50, para. 93.

1 *I.C.J. Reports 1984*, p. 290, para. 81.

2 *North Sea Continental Shelf* cases, *I.C.J. Reports 1969*, p. 50, para. 93.

3 See Shigeru Oda, "Delimitation of a Single Maritime Boundary", in *International Law at the Time of Its Codification: Essays in Honour of Roberta Ago*, 1987, Vol. II, p. 349.

4 See *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), I.C.J. Reports 1982*, p. 83, para. 117.

5 *Ibid.*, p. 84, para. 118. See, also, Jiménez de Aréchaga, "The Conception of Equity in Maritime Delimitation", in *International Law at the Time of Its Codification: Essays in Honour of Roberta Ago*, 1987, Vol. II, p. 232.

1 *RIAA*, Vol. XVIII, pp. 84–85, paras. 171–173.

2 *Ibid.*, p. 90, para. 188.

1 *I.C.J. Reports 1969*, pp. 45–46, para. 82.

2 See *Official Records of the Third United Nations Conference on the Law of the Sea*, Vol. V, pp. 164 and 165. Articles 74 and 83 were then numbered 62 and 71, respectively.

3 See *ibid.*, Vol. VIII, pp. 16 and 17.

4 See *ibid.*, Vol. XIII, pp. 77–78.

1 *RIAA*, Vol. XVIII, pp. 45–46, para. 70.

2 *Ibid.*, p. 57, para. 97.

3 *Revue générale de droit international public* (1985), Vol. 89, p. 525, para. 102.

1 *RIAA*, Vol. XVIII, p. 45, para. 70.

2 *Ibid.*, p. 57, para. 97.

1 *RIAA*, Vol. XVIII, p. 93, para. 197.

2 *Ibid.*, p. 93, para. 198.

1 *I.C.J. Reports 1984*, paras. 48 and 232 of Judgment.

1 See, generally on this aspect, D. W. Bowett, "The Economic Factor in Maritime Delimitation Cases", in *International Law at the Time of its Codification: Essays in Honour of Roberto Ago*, 1987, Vol. II, p. 45, esp. at pp. 58–63, pointing out, inter alia, that economic interests of States lay at the very heart of the 1982 Convention and that no part of the Convention is divorced from these economic interests.

2 Rejoinder of Norway, p. 178, para. 605.

1 *I.C.J. Reports 1982*, pp. 63–64, para. 79; p. 89, para. 129.

2 *I.C.J. Reports 1984*, pp. 336–337, para. 222.

3 *RIAA*, Vol. XVIII, p. 117, para. 251.

1 Cf. the conflict between conscience and the unjust law as highlighted in Sophocles' *Antigone*, fifth century B.C. — Sophocles, *Antigone*, Eliz. Wyckoff (trans.), in *Complete Greek Tragedies II*, ed. D. Grene and R. Lattimore, 1960, University of Chicago Press, p. 170.

2

> “If mankind is to master the greatest of all arts, the art of living together in neighbourliness — if law is to light the march of the human spirit toward a closer understanding among nations — we must recognize the truth which was revealed to the Prophets of Israel, that equity is an integral component of justice.” (Ralph A. Newman, “The Principles of Equity as a Source of World Law”, 4 *Israel Law Review* (1966), p. 631.)

3 The *Bhagavad Gita* gives righteousness a central place in world order (IV.7) and the very first word of this classic, described as the glory of Sanskrit literature, is the word “*dharma*” — see Juan Mascaró (trans.), Penguin Classics, 1962, p. 37; and the *Brihad Aranyaka Upanishada* characterizes *dharma* as the king of kings (1, 4–14). Kane's monumental treatise on the *dharmasastra* (P. V. Kane, *History of Dharmasastra*, 1946) sets out among the meanings of *dharma* the concepts of duty, right, justice and morality (Vol. 1, p. 1). Fritz Berolzheimer describes the philosophical positions regarding justice in ancient India as “the antecedents of later legal and ethical developments among the Greeks and Romans” (Berolzheimer, *The World's Legal Philosophies*, 1968, p. 37).

4 See, generally, K. N. Jayatilleke, “The Principles of International Law in Buddhist Doctrine”, 120 *Recueil des cours* (1967–1), pp. 443–567. World rulership is to be under a “kingless authority”. That “kingless authority” is to be the law (p. 539); and righteousness is extremely important to the Buddhist conception of law (p. 449). Two conceptions underlie the Buddhist attitude towards law: *(a)* the rule of righteousness; *(b)* the happiness and well-being of mankind (L. P. N. Perera, *Buddhism and Human Rights*, 1991, p. 41).

5 See Matthew 23:23. The expositions of conscience by mediaeval churchmen (such as the *Summae Confessorum* written to guide priests in assessing the moral conduct of penitents) were probably an influential source in shaping the thinking of the early English Chancellors (see A. W. B. Simpson, *A History of the Common Law of Contract*, 1975, p. 405. See, also, *ibid*., pp. 377–379 and pp. 397–405). Their primary concern centred so much on conscience that the rubric under which early Chancery cases are to be found is not Equity but Conscience (see *ibid*., p. 398), for in laying the foundations of equity jurisprudence, the Chancellor sat “as a judge of conscience, in a court of conscience, to apply the law of conscience…” *(ibid.)*.

1 Surah 5, Verse 45, Yusuf Ali's translation. In particular, the technique of legal reasoning called istihsan, referred to by Judge Ammoun, accords an important role to equity. See, also, John Makdisi, “Legal Logic and Equity in Islamic Law”, 33 *American Journal of Comparative Law* (1985), p. 63; H. Afchar, “The Muslim Conception of Law”, *International Encyclopedia of Comparative Law*, Vol. VII, pp. 90–96, and the same author on “Equity in Musulman Law”, in Ralph Newman (ed.), *Equity in the World's Legal Systems*, 1973, pp. 111–123.

2 Their techniques of legal reasoning included *qiyas* (reasoning by analogy), *istishab* (presumption of continuity), *istislah* (considerations of public interest) and *istihsan* (a concept of equity). See Makdisi, *op. cit.*, pp. 40–45. The relevance to equity of some of them — such as *istislah* and *istihsan* — need scarcely be stressed.

3 The individual's right of ownership of land is limited by the superior right of the social group to which he belongs — A. N. Allott, in Cotran and Rubin (eds.), *Readings in African Law*, 1970, p. 265. See also, T. O. Elias, *The Nature of African Customary Law*, 1956, p. 272 : “It is this motive of the judge to do equity that is the most persistent characteristic of the African judicial process.” See, also, M. Gluckman, *The Judicial Process among the Barotse of N. Rhodesia*, 1955, pp. 202–206; J. H. Driberg (“The African Conception of Law”, *Journal of Comparative Legislation and International Law*, November 1934, pp. 230–246) discusses African law as an organic growth keeping in tune with the changing needs of society. On the

felt standards of the community which are not themselves matters of law entering the process of judgment, see, M. Gluckman, *Order and Rebellion in Tribal Africa*, 1963, pp. 178–206.

4 See, generally, Peter Sack, *Land between Two Laws*, 1973; and P. Hambruch, *Nauru: Results of the South Seas Expedition*, 1914. For the trust concept in traditional Hawaiian land law, see M. K. MacKenzie (ed.), *Native Hawaiian Rights Handbook*, 1991, p. 26.

5 See K. N. Llewellyn and E. A. Hoebel, *The Cheyenne Way*, 1941; Charles F. Wilkinson, *American Indians, Time, and the Law*, 1987.

6 See H. McRae, G. Nettheim, L. Beacroft, *Aboriginal Legal Issues*, 1991, pp. 44–56; *Mabo* v. *Queensland* (1992), 7 *Australian Law Journal* 408 (High Court of Australia).

1 See, also, E. B. Weiss, *In Fairness to Future Generations: International Law, Common Patrimony and Intergenerational Equity*, 1989, for the recognition by diverse cultures that each generation is a trustee or steward of the natural environment for the benefit of generations yet unborn, and for the fact that intergenerational fairness can be addressed under principles of equity in accordance with a long tradition in international law of using equitable principles to achieve a just result.

2 See P. Sack, *op. cit.*, pp. 33 and 37.

3 See E. B. Weiss, *op. cit.*, p. 37,

> "The use of equity to provide equitable standards for allocating and sharing resources and benefits lays the foundation for developing principles of intergenerational equity. These principles can build upon the increasing use by the International Court of Justice of equitable principles to achieve a result that the Court views as fair and just."

1 Newman, *op. cit.*, p. 631.

1 See R. A. Newman, *op. cit.*, p. 621.