DISSENTING OPINION OF JUDGE GROS

[Translation]

1. Because of the importance of the Judgment from the standpoint of its consequences for the law applicable to the delimitation of maritime spaces, I believe it necessary that I should set forth the grounds of my dissent.

2. The Parties have submitted to the Chamber some 7,600 pages of pleadings and 2,000 pages of oral arguments together with 300 supporting maps, sketches or diagrams – more than 12 metres of shelving is taken up by the volumes deposited in the library by the Parties ; yet no clear position regarding the essential legal problems arising in this case emerges from this mass of material. Thus the problems of the single boundary, of the law applicable to the present case, of equity, of the exact role of geography, have been examined in great detail but with a certain lack of precision and some self-contradictions, accompanied frequently by the use of categorical formulae or assertions presented as rules or principles of law. One is reminded of Mr. Justice Holmes' warning about the relativity of words :

> "A word . . . is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." (245 U.S. 418, 425.)

In the course of the present proceedings, the Parties and the Chamber have each referred to judicial decisions in support of their legal reasoning, but frequently a judicial text has been quoted without anything to indicate that colour and content have in fact changed. The present must however be seen in its own true colours : the jurisprudence of the subject is no longer viewed as in 1969 and 1977, but has taken a sudden turn of which due note must be taken, and the Judgment of the Chamber takes its place within this change.

3. International law has been evolving since, in its Judgment of 18 December 1951, the Court first signalled the economic importance of certain situations in the determination of a maritime boundary, in the following five lines of a 26-page Judgment :

> "Finally, there is one consideration not to be overlooked, the scope of which extends beyond purely geographical factors : that of certain economic interests peculiar to a region, the reality and importance of which are clearly evidenced by a long usage." (*I.C.J. Reports 1951,* p. 133.)

The opposite viewpoint was stated in the dissenting opinion of Judge Sir Arnold McNair :

> "Norway has sought to justify the Decree of 1935 on a variety of grounds, of which the principal are the following (A, B, C and D) :
>
> (A) That a State has a right to delimit its territorial waters in the manner required to protect its economic and other social interests. This is a novelty to me. It reveals one of the fundamental issues which divide the Parties, namely, the difference between the subjective and the objective views of the delimitation of territorial waters.
>
> In my opinion the manipulation of the limits of territorial waters for the purpose of protecting economic and other social interests has no justification in law ; moreover, the approbation of such a practice would have a dangerous tendency in that it would encourage States to adopt a subjective appreciation of their rights instead of conforming to a common international standard." (*I.C.J. Reports 1951,* p. 169.)

During the Conferences of 1958 and 1960, the idea of a contiguous fishing zone lying close to the coastline of a State began to take shape, but in the years which followed it was the continental shelf which came to the fore. On this, the Court's Judgment of 20 February 1969 in the *North Sea Continental Shelf* cases (*I.C.J. Reports 1969*, pp. 4-56, hereinafter referred to as the 1969 Judgment), and the Decision of the Court of Arbitration between the United Kingdom and France dated 30 June 1977 (*Cmnd* 7438 ; hereinafter referred to as the 1977 Decision) constituted – the Decision supporting the Judgment – a body of case-law whose elements are well known. The Third United Nations Conference, after a decade of effort, produced the Convention of 10 December 1982 (hereinafter referred to as the 1982 Convention), which deals with the delimitation of maritime spaces in a manner which is not that of the above-mentioned case-law but, even before its adoption by the States members of the Conference, attracted the support of the Court in the Judgment of 24 February 1982 on the *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* (*I.C.J. Reports 1982*, pp. 18-94, hereinafter referred to as the 1982 Judgment). References will be made to other decisions but the essential texts are, on the one hand, the Conventions of 1958 and 1982 and, on the other, the decisions of 1969, 1977 and 1982. It is a fact that the 1982 Judgment, which was based on the draft of the 1982 Convention, constituted a sudden change in the case-law, and that the Convention substituted a new régime for the delimitation of both the continental shelf and the 200-mile zone for that which, in the case of the continental shelf, had emerged from the 1958 Convention, the 1969 Judgment and the 1977 Decision. Moreover, it is a fact that the present Judgment essentially chimes with the standpoint taken by the Court in 1982. The effects of this marked change of stance in conventional law and jurisprudence form the main reason for my disagreement with the majority of the Chamber regarding the solution to the

problems raised by the present case. I said at the time why I considered that the 1982 Judgment had taken a wrong turning (*I.C.J. Reports 1982*, dissenting opinion, pp. 143-156) ; the Court's deviation could have been mitigated by a decision of the present Chamber in a dispute which had all the elements needed to strengthen rather than erode the law on the delimitation of maritime expanses, but this opportunity has been missed.

4. I would like to make one initial comment on this case which has been presented by the Parties as an important precedent in international law. This is not so, since the Parties themselves have informed the Chamber of the precautions they have taken to ensure that, if necessary, they will be free to negotiate on the boundary laid down by the decision (reply by the United States to a judge's question : sitting of 9 May 1984) ; moreover, the Parties had made sure in advance that the future Judgment would relate solely to the Gulf of Maine dispute, held to be a case apart from three other maritime boundary disputes between the two States, as transpires from the minutes of bilateral talks issued by the State Department in 1975-1976 and communicated to the Chamber on 8 May 1984 (Ann. 3, September 1976, pp. 3-6). Finally, the part played in the oral arguments by the concept of special circumstances, together with the use made of the principles or methods relied on, would in themselves have been sufficient to ensure that the effects of the *Gulf of Maine* Judgment were confined to the actual object of the dispute, namely the delimitation of the maritime zones of that particular area.

5. In the Special Agreement the question is put quite simply : What is the course of the single maritime boundary that divides the continental shelf and fisheries zones of Canada and the United States of America in the Gulf of Maine area (preamble and Art. II, para. 1) ? It became apparent during the argument that this simplicity in fact overlay some serious problems, which I shall now consider.

I shall begin with the problem of the single boundary line, which the President of the Chamber raised in his question to the Parties in the following terms :

> "In the event that one particular method, or set of methods, should appear appropriate for the delimitation of the continental shelf, and another for that of the exclusive fishery zones, what do the Parties consider to be the legal grounds that might be invoked for preferring one or the other in seeking to determine a single line ?" (Sitting of 19 April 1984.)

The wording of this question shows that a point of law that was essential to the case had not at that time been resolved by the Parties, namely the question of the law applicable to the determination of a single boundary dividing a continental shelf and fishery zones, the fundamental question in the present dispute. To examine the question of the single boundary is to enquire into the applicable law, no less. As the Judgment states in paragraph 161, the replies of the Parties have done no more than refer the

problem back to the Chamber itself. At the sitting of 10 April 1984 the Agent of Canada treated the single boundary as a "legal concept", and the Parties appeared to think that the mere fact of their having asked for a single boundary in the Special Agreement sufficed to impose it on the Chamber. However, an agreement between parties to request only one line for the two areas in question does not, in itself, create a rule of law in the case to be decided, making it possible to ignore all the facts of the case, the legal elements and all the circumstances relevant to the situation in hand ; the Parties are agreed on point A, as being the point of departure of the line, and on the location of its other terminus within a broad triangle – two indications which, taken together, set a strict limit to the jurisdiction of the Chamber in determining the course of the boundary – but this does not turn either point A or the triangle into a legal concept. These elements of the Special Agreement are minor factual details provided by parties who, in 15 years of negotiations, had not been able to reach agreement on even one segment of continental shelf boundary or fishing limit. The Parties did not invoke any legal considerations when indicating their agreement on point A, the triangle and the single-line formula : quite the reverse. It was precisely such legalities that the President's question called upon them to explain. The Chamber's jurisdiction to decide, in law, what the requested maritime boundary should be was not limited by the Parties' indications. Its task was to see whether there existed in international law any rule prescribing or authorizing the use of a single line for the continental shelf and the fishery zone, whatever the factual circumstances and the rules of the applicable law, something that has not been done either by the Parties or by the Judgment.

6. The Judgment's reply is given in paragraphs 192-194 : the delimitation called for is "a delimitation of two distinct elements by means of a single line. This is an unprecedented aspect of the case which lends it its special character" – and the paragraphs referred to go on to draw conclusions for the criteria to be used to unite continental shelf and fisheries through the use of a single line. The essence of the matter lies here, and I shall come back to it ; discussion must be focused upon this reply, since it governs the reasoning of the Judgment regarding the law applicable to this case. The Chamber having been asked for a single line, this request in itself – "this fact", says the Chamber – suffices to create a sort of special circumstance which takes precedence over all the rest – principles, criteria and methods – and supersedes the problem of determining whether this single line is, or is not, established in accordance with law. It is clear to me that this reply is no reply : the words "special circumstances" are, indeed, avoided, but the idea is there for sure and, once again, a change of terminology does not suffice to avoid a problem. The "special aspect" of the single line is a fact, says the Judgment, and as a fact is only relevant if it has a justifiable influence upon the legal grounds for the boundary to be determined, the question remains. In the law of delimitation, heretofore, relevant facts used to be tangible, because they consisted solely of particular geographic circumstances. When the notion of "special aspect" is

extended to the fact that a single line has been requested, the question is put in another guise, but it remains the same : what are the legal grounds permitting this request to be applied to the facts of the case, namely a certain continental shelf and certain fishery zones ? – since, if there is no other answer than to transform a request of the Parties into a special circumstance from which legal deductions can be made, the applicable law is confined to an *a priori* assessment by the Parties. What is more, even the Parties themselves did not give an answer in this sense to the question put to them, and they had admitted that here was a real problem which the Chamber would have to solve. No answer, in fact, has yet been given to the preliminary question of law as to whether the Chamber may view the words "single maritime boundary" used in the Special Agreement as a circumstance of decisive effect on the delimitation in the Gulf of Maine area or whether, by virtue of any rules of law applicable to the facts, this request, which is one fact among others in the overall case, does not in itself suffice to determine that there shall be a single-line delimitation – this being a mere hypothesis for so long as it has not been verified on legal grounds. The International Court of Justice has said :

> "the seisin of the Court is one thing, the administration of justice is another. The latter is governed by the Statute, and by the Rules." (*Nottebohm, Preliminary Objection, Judgment, I.C.J. Reports 1953,* p. 122.)

7. International law has evolved since the codification conferences of 1930 and 1958, down to the Convention of 10 December 1982 which has been presented as a codification. It should be recalled that the Conferences of 1930 and 1958 had been prepared through studies and reports by the most eminent experts in international law, the authors of standard works on the law of the sea. In 1958, the régime of the continental shelf was codified in a convention, while the claims of the coastal State to a fishery zone in modest areas of the high seas were taken into consideration in a convention of more limited scope which was rapidly overtaken by the pretensions of certain coastal States. It was not for another 20 or so years later, though before the Third United Nations Conference on the Law of the Sea had yielded any result, that the concept of an exclusive economic zone extending to 200 miles and comprising exclusive fishing rights was to be put into practice – sometimes in regard only to fisheries – whether unilaterally or by agreement between certain States ; the right of a coastal State to such a zone is nowadays accepted. During the Third United Nations Conference, this practice was enshrined in texts which bear the stamp not of legal research but of compromises between interests. Judging by the accounts given in international law reviews by some of the participants, the method of work adopted by the Conference, doing away with the meetings of committees of jurists but convening groups so composed as to reflect the opposing interests, gave its proceedings (for which there are no official minutes) a cachet which sets them apart from those of codification conferences. Moreover, the 1982 Convention has not yet come into

force and, in addition, the Government of the United States, when replying to a question put by a judge, adopted a particular position with regard to the Convention which casts doubt upon its applicability to the present case (sitting of 9 May 1984). It remains to be ascertained whether the text of the Convention of December 1982 contains any rules of general international law which as such were already applicable to the delimitation of the boundary which the Chamber was asked to determine.

8. There is nothing on delimitation of continental shelf or fishery boundaries in conventional law, in customary law, or more particularly in the Convention of 1982, which gives any indication of any obligation to proceed by means of a single line. The objective sought by States as from the 1958 Conference, and carried to extremes over the past decade or so, is plain : the ever-increasing enlargement of the maritime domain of the coastal State ; first it was the contiguous zone, then the adjacent fishing zone, at the same time as the continental shelf, then the exclusive economic or fishery zone which, in certain declarations by States, has connoted an intention to widen the territorial sea. Whereas the 1958 Convention on the Continental Shelf contained a rule, the equidistance/special-circumstances rule, that rule – though upheld by the case-law from 1969 to February 1982 – has been eroded by the fact that the Third United Nations Conference was unable to reach a decision regarding the role of equidistance and equity other than in texts which do not contain any rule of delimitation, either for the continental shelf or for the economic zone : Articles 74 and 83 confine themselves to saying that an agreement based on international law within the meaning of Article 38 of the Statute of the Court should make it possible to arrive at an equitable solution. It is difficult to discern any rule in such a formula : to say that due application of international law should give rise to an equitable result is a truism. Necessity for an agreement between the States concerned, application of international law, equity – yes, but by what means ? It was the chairman of the negotiating group in which the Article 83 compromise formula on delimitation was reached who expressed doubt that "the Conference will ever be able to draw up a formula providing a clear and precise answer to the question of the criteria for delimitation", as President Sir Humphrey Waldock has recalled (*The International Court and the Law of the Sea,* 1979, p. 12 ; see also Judge Oda's opinion on the legal value of the 1982 Convention, *I.C.J. Reports 1982,* p. 246, para. 143). All the gains represented by the legal edifice of 1958, the 1969 Judgment and the 1977 Decision, have thus been destroyed by the effect of those two articles of the 1982 Convention, which take no account of that jurisprudence and efface it by the use of an empty formula. The Court had already, in February 1982, revised the 1969 Judgment so far as delimitation of the continental shelf was concerned, by interpreting customary law in accordance with the known provisions of the draft convention produced by the Third United Nations Conference.

9. The Parties in the present case were acquainted with the 1982 Convention and the change of course in the case-law ; they were unable to invoke any legal rule but could well have thought that a single line would be

a convenient formula and serve their interests at present. The position of the Chamber cannot be the same, so long as it has not been established that a single line is either prescribed by general international law or legally demanded by the relevant factors in the present case. The Court in its Judgment of 24 February 1982 decided to set aside any consideration of equidistance, because the Parties had not proposed it, but did not maintain that this would have prevented it from considering that method if it had thought fit. The Chamber was in no different situation when the time came to determine whether a delimitation by a single line was legally acceptable in the circumstances of the present case.

10. Prior to the 1982 Convention, delimitation under the 1958 Convention on the Continental Shelf took place according to the "equidistance/special-circumstances rule" (Art. 6 of the 1958 Convention on the Continental Shelf ; cf. Art. 12 of that on the Territorial Sea and the Contiguous Zone). At the time, this seemed to indicate that an identical principle could provide the basis for any boundary delimiting the various areas of maritime jurisdiction – then of modest extent. A new question arose with the introduction of the exclusive fishing or economic zone : where lie the natural identity between the continental shelf and the zone and the relationship of dependence between a State and waters stretching for 200 miles ? In 1973, Judge Sir Gerald Fitzmaurice observed in this connection that "there must come a point at which claims to territorial waters would verge on the absurd" as soon as those waters ceased to retain any sort of physical bond with the lands "to which they were supposed to be ... appurtenant" (*I.C.J. Reports 1973,* p. 72, para. 8). It is these pretensions, judged inordinate by most distant-water fishing States and the jurists of previous codifications before the Third United Nations Conference on the Law of the Sea, which now come to the fore : the ambition is to wrest from the sea the greatest possible expanse with a view to its immediate or eventual exploitation and, above all, the exclusion of others. It is the seizure of vast areas, the continental shelf and the 200-mile zone, which has become the aim, with repercussions on a law of delimitation which the 1958 and 1960 Conferences had dealt with at a time when the boundary problem applied to a territorial sea of 3 or 6 miles, or a fishing zone of up to 12 miles, with the ensuring of opposability to third States as the main concern. In the context of a 200-mile claim, the question of delimitation takes on a different complexion, since it is inseparable from the immensity of the maritime spaces involved, and States will no longer agree clear rules, because of their determination to appropriate as much as they possibly can by every conceivable means of delimitation. That is what lies enshrined in the two articles of the 1982 Convention (Arts. 73 and 84), which open the way to arbitrariness by defining nothing, and it is likewise the reasoning of the Chamber's Judgment, founded as it is, like the 1982 Judgment, on those same articles and, like the articles themselves, on an *a priori* denial of the equidistance method and on the concurrent use of various criteria, methods and arguments solely interconnected by the idea of arriving at an equitable result. The Chamber thus followed the Parties in adopting,

through the propounding of a "fundamental norm", the unusable formula of the 1982 Convention (paras. 7 and 8 above) and decided to apply it to the case. The terms in which the Chamber has formulated this rule in paragraph 112 of the Judgment are merely the veil for two words that sum it up just as well as two subparagraphs : agreement + equity.

11. The 1982 Convention replaced the continental shelf concept as codified by the 1958 Convention with the one notion of a distance of 200 miles, whether or not the coastal State has that natural prolongation of its land territory which the 1969 Judgment analysed (paras. 47-48 and 95 ; 1977 Decision, paras. 191 and 194 ; cf. 1982 Convention, Art. 76, para. 1). Hence certain States now are credited with a mythical, non-existent continental shelf, whereas others which do have such a natural physical prolongation see no account taken of it – that is, if one holds that the 1982 Convention which is not yet in force has indeed, on this point, modified the 1958 Convention, which the Judgment does not say. Not having to judge anything other than the subject of the present dispute, I would say that the question does not arise between the Parties, who are bound by the 1958 Convention on the Continental Shelf. The United States has not maintained that the 1958 Convention has lapsed, but that it is not "determinative" for the delimitation of a single line ; the Anglo-French Court of Arbitration had formally rejected the contention, put forward at that time by the French Government, that the 1958 Convention had lapsed. The Parties agree that the continental shelf of the Gulf of Maine area is one continuous, unbroken shelf. The present case therefore features both a recognized physical continental shelf and a continental shelf convention which is in force but is not being applied between the Parties.

12. As to the 200-mile fishery zone claimed by either Party, it must be pointed out that the arguments before the Chamber were often widened to cover the concept of an economic zone. This was not what was called for in the Special Agreement, which speaks only of fishery zones, and the United States decision to claim an exclusive economic zone, taken in 1983 while the case was pending, cannot have any effect on the boundary decision. Admittedly, Article III, paragraph 1, of the Special Agreement does provide that the maritime boundary decided by the Chamber shall apply to any claim or exercise of sovereign rights or jurisdiction over the waters or sea-bed and subsoil. But the Chamber is judging what has been submitted to it, i.e., a continental shelf and fisheries boundary (Special Agreement, Art. II, para. 1). The fishery zones of the two States connote exploitation of the fishing resources of the volume of water within the 200-mile limit. Whereas the continental shelf presents a problem of sea-bed and subsoil resources (1969 Judgment, para. 96 *in fine*), the delimitation of fisheries involves division of the water column. A single boundary will establish a unity between the sea-bed and the exploitation of the subsoil on the one hand, and the water column with its resources on the other ; it cannot be assumed that this unity is pre-existent. The two elements have always been treated separately. In 1958 there was one convention on the continental shelf and another on fishing, while back in 1945 the United States made

two proclamations on the same day, one on the continental shelf, the other on fishing in certain inshore areas of the high seas. Of the Parties, one, the United States, has argued that the continental shelf has as it were been incorporated into the 200-mile zone, and the other, Canada, that there is a rule of law requiring a single boundary. But neither of them has explained how the water column can have absorbed, or effaced, a real, continuous continental shelf, by some phenomenon whereby the specific identity of the subsoil and sea-bed is suppressed simply through the presence in the column of fisheries.

13. The Chamber has decided, in paragraphs 192, 193 and 194, the formal preclusion of any criterion "which can now be seen as inappropriate to the delimitation of one or other of the two objects" that it is requested to delimit ; this means "a delimitation of two distinct elements by means of a single line" (para. 192) ; the very fact that the delimitation has a twofold object constitutes a special aspect of the case. "It follows that . . . it is necessary . . . 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" (para. 193). Here paragraph 194 must be quoted :

> "In reality, a delimitation by a single line, such as that which has to be carried out in the present case, i.e., a delimitation which has to apply at one and the same time to the continental shelf and to 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. In that regard, moreover, it can be foreseen that with the gradual adoption by the majority of maritime States of an exclusive economic zone and, consequently, an increasingly general demand for single delimitation, so as to avoid as far as possible the disadvantages inherent in a plurality of separate delimitations, preference will henceforth inevitably be given to criteria that, because of their more neutral character, are best suited for use in a multi-purpose delimitation." (Emphasis added.)

14. It seems to me difficult to consider that the Chamber has thus replied to the question which its President had put to the Parties. One cannot simultaneously recognize the existence of two different realities and decide to ignore the difference in determining the boundary except on the supposition that words can be used to suppress a problem rather than deal with it. Even had it been possible, in the case of an unreal continental shelf area, but only given present possibilities of exploitation, to maintain that this false continental shelf was not to be distinguished from the water column, it is out of the question to do so after having recognized the existence in the Gulf of Maine of a real, continuous continental shelf, which has already been explored. In the second place, after having discarded the continental shelf, to strike an equal balance according to the

logic of the Judgment, one must also exclude the fisheries ; it is a sea deprived of all meaning, an empty sea, which is to be divided – which was not among the Parties' themes. Finally, I find it hard to grasp what a criterion can be that does not *give preferential treatment* to one object to the *detriment* of the other and at the same time is *suitable* to both ; these words call for explanations which are not provided by the Judgment and cannot be for others to provide. If they are to be taken in their proper sense, the criterion must do no harm either to one object (continental shelf) or to the other (water), so it must be a criterion devoid of effect : one which, to avoid giving preferential treatment, exerts no action. But, in that case, how is it *suitable* ? The only conclusion to be drawn is that the President's question remains unresolved, not only in regard to the dispute here decided but for any States contemplating a single boundary. It still remains to be explained how two States bound by Article 6 of the 1958 Convention on the Continental Shelf become released from it because it does not apply to a superjacent zone of water ; before any question of a single boundary arose, the continental shelf was already covered by the high seas, which were subject to a different régime. The result of refusing to balance up the equities of the two elements, the continental shelf and the water column, is that the water has obliterated all consideration of the other element without any opportunity being allowed of appreciating how the latter would have prejudiced the former. To say that the two elements are *a priori* in opposition is not found sufficient, and the maxim becomes : only the water counts. This is surprising, because no equitable criterion is revealed for dividing the water without first ensuring that no harm is done to the continental shelf, which means that the latter element will always be the loser. The obligation to apply the 1958 Convention in force between the Parties as regards the "object" continental shelf cannot be escaped on the pretext that it would be detrimental to the "object" water or not "be suitable" ; in the present case it is necessary to begin with the treaty applicable in regard to the continental shelf and to see which element is favoured or disfavoured.

15. By not carrying out an examination of the proper factors for determining the course of a boundary equitable for both elements, the continental shelf and the fisheries, the Chamber has failed to assess the equities in its treatment of the facts. Perhaps there is still time to challenge the unwarranted confusion of the elements to be delimited and to prevent the idea from taking root that, in contemporary positive law, only one delimitation rule still exists : up to 200 miles from each State, its jurisdiction over the waters of the sea and everything which they contain or cover is total, and one need only divide up the water between the States concerned for the rest to follow of its own accord. For such a ruling to be a rule, some better grounds must be found for it than what exists at present, which is confined to a bare assertion in the absence of such an examination as a court must normally carry out in order to apply the law to the facts. What weight do use of the subsoil and use of the water carry in the determination of the boundary : the same weight, different weights or no weight at all ? Even if

it were none at all, as the Chamber holds – subject to the small role conceded *in extremis* to checking that the line does not harm the balance of interests (paras. 238-239) –, it would be useful to know the reason for this total negation.

16. A single boundary not justified by legal reasoning can be neither the "reasonable" solution called for by the 1969 Judgment, paragraph 90 *in fine,* nor the equitable result in terms of the fundamental norm propounded by the Parties and taken up by the Chamber (Judgment, para. 112). The existence of some bilateral agreements that have fixed a single boundary for a continental shelf and for a 200-mile zone does not prove anything, the fact of States' signing agreements that fix a single boundary being in itself irrelevant in the absence of any indication how the line in question satisfies all the equitable considerations, in relation to the continental shelf, fishing, etc., when it was perhaps out of a sense of compromise, neglect of some factor, or merely for the sake of convenience that such agreements were concluded. Even if one were to cite an agreement providing for a single continental shelf/zone boundary and formally specifying in the text that the line had been modified in a particular segment for a reason connected either with the continental shelf or with the zone, one would still need to know by what reasoning the parties arrived at that solution ; sometimes an agreement includes concessions which are not motivated by reliance on international law. Two States may negotiate a single boundary which suits them without going into the question of whether the result is equitable ; a court must establish a line which is equitable for both parties, after having examined and solved the different problems to which the continental shelf and the zone give rise. In the early stages of the present dispute, between 1964 and January 1976, the two States only discussed a delimitation line for the continental shelf, as the Judgment recalls in paragraphs 64-68 ; the discussion was still centred on this topic in 1976. This was revealed by the State Department in a record of the negotiations issued in January 1976 which showed that at the time the United States Government was considering a continental shelf boundary only, while noting the danger of prejudicing the potential boundary of its economic zone in the Gulf of Maine, which therefore implied two distinct boundaries (Ann. 2, January 1976, p. 2, para. II, and pp. 5-6, paras. IV and V). It was perhaps the extension of the dispute to fishing that prompted the United States theory of a natural boundary along the Northeast Channel separating fishery zones, which constituted another admission of the special character of each of the two elements to be delimited. There accordingly existed – at least from 1964 to 1976 – grounds for differentiating between a continental shelf boundary and a fishery zones boundary, and the Parties' request for a single line in the Special Agreement, concluded after lengthy negotiations the content of which the Parties have not revealed, does not suffice to make the single line a determinative special aspect.

17. The finding that the single boundary is merely an indication of delimitation procedure, and accordingly does not bind the Chamber if the

law applicable to the relevant circumstances of the case does not allow the application of such procedure, has not been contradicted by the Judgment. The relevance of a circumstance or special aspect – the choice of words is optional – can be explained and demonstrated, and only by thorough enquiry concerning the continental shelf and the fishery zone in the Gulf of Maine area would it have been possible to gauge the truth of the matter. Either such analysis of the two categories of maritime domain concerned would have shown that their delimitation involves the same problems or that the content of each is – in accordance with the internal logic of the present Judgment – quite irrelevant, in both of which eventualities one may reasonably devise a single boundary, or else it would have brought to light the existence of some differences between the respective lines that would be reasonable on the one hand for the sea-bed and subsoil and, on the other, for the waters above them. Considering that the two States still have difficulty in delimiting their territorial waters and that they negotiated between 1964 and 1976 (cf. para. 16, above) with respect to a continental shelf boundary only, it is difficult to accept the theory which has been argued of the single boundary as a rule of contemporary international law in process of formation, if not already accomplished, or the thesis of the single line as a special circumstance. To bolster its decision on this point the Chamber, in paragraph 194 of the Judgment, anticipates the possibility of an exclusive economic zone, accepted by maritime States, covering all forms of jurisdiction, something which, it must be said, will closely resemble a 200-mile territorial sea. Here again, Judge Sir Arnold McNair had already declared that a claim to exclusive jurisdiction over extensive areas was equivalent in substance, even if that substance was functional and divisible, to the legal situation which obtains in the zone of sovereignty over territorial waters (*I.C.J. Reports 1951,* pp. 159-169). Having changed the law on such areas, States cannot retain those features which once gave point to the work done in studying the special fishery interest and economic dependence of certain sectors of a population. The entire bases of reasoning have been altered ; the coastal State wanted exclusive jurisdiction over the sea-bed and subsoil, then over the water column, and it has obtained what it wanted ; but the resources are not the legal cause of the exclusive zone, they have been removed outside the problem : the existence of mineral or living resources is not taken into account. A continental shelf without resources and an almost empty sea offer no obstacle to the appropriation of the continental shelf and of a fishery zone. The notion of economic dependence can no longer be invoked as a determining factor, in the meaning given by the Court to those two words in the 1951 Judgment quoted above. In paragraphs 237-240, the Chamber briefly examines the possible effects of the sharing of resources resulting from the line, which seems to contradict their exclusion from the examination of the principle of the single boundary. By obliterating any distinction between the continental shelf and the water, a step is taken towards unification of the rights enjoyed as well as that of the maritime spaces placed under the sovereignty of the coastal State.

18. The problem of the unity of the zones is not a new one ; it was broached in three opinions, appended to the Judgment of 24 February 1982, which I find it appropriate to recall :

(a) Judge Oda devoted a section of his dissenting opinion to the "Relation between the Continental Shelf and the Exclusive Economic Zone" (paras. 126-131) and Chapter VII (paras. 146-177) to the "Principles and Rules for the Delimitation of the Continental Shelf/Exclusive Economic Zone". I note that the question of the single boundary is raised in paragraph 126 and that Judge Oda seems to conclude that an "alignment" is possible of the régime of the zone on that of the continental shelf (para. 130, beginning and end). But his position is more reserved in paragraphs 143-145, which contain a detailed criticism of the negative aspects of the wording of the 1982 Convention on the law of delimitation (*I.C.J. Reports 1982,* pp. 246-247, para. 143 *in fine,* para. 144, para. 145, last sentence). Judge Oda's conclusions continue to be reserved in paragraph 146 (subparas. (4) and (5)) and, while his analysis of the two zones in question is thorough, he seems rather to indicate ways of approaching the problem than to come down firmly in favour of a single line.

(b) The dissenting opinion of Judge Evensen also deals with the exclusive economic zone, in particular in paragraphs 7, 8, 9 and 10, where he raises the problem of different delimitation lines and refers to the replies given by Tunisia and Libya ; he points out that, in the case in question, he has doubts as to whether "a practical method for the delimitation of the areas concerned should be based solely or mainly on continental shelf considerations" owing to the "practical impact of the concept of natural prolongation through the development of that of the 200 mile economic zone" (p. 10). In paragraph 15 and also in his "Conclusions" (p. 319) Judge Evensen reverts to the idea of a single line, on the grounds of the "obvious advisability" of this solution. (*I.C.J. Reports 1982,* pp. 269-288, 296-297 and 319-323.)

(c) Judge Jiménez de Aréchaga deals in one page with the question of the exclusive economic zone (paras. 54-56) and he considers that "at least in the large majority of normal cases, the delimitation of the exclusive economic zone and that of the continental shelf would have to coincide. The reason is that both of these delimitations are governed by the same rules" (para. 56, dealing with Articles 74 and 83 of the 1982 Convention). (*I.C.J. Reports 1982,* pp. 115-116.)

19. The foregoing observations were drafted in connection with a dispute on the continental shelf at a time when the question of the single line did not arise, but by three judges commenting on the work of the Third Conference on the Law of the Sea ; they are reflected in paragraph 194 of the Judgment, which predicts that in future the single line will be generally adopted (para. 17, above). This does not bring the problem concerned any

closer to solution, if only because, the 1982 Convention not being in force, one has to decide whether the merging of the continental shelf up to the 200-mile limit with the zone is already a rule of customary law. This point is not self-evident for, if that were the case, there would no longer be any possibility of drawing a boundary confined to the continental shelf, and whether that is so could be deduced from an examination of current practice (the reverse is suggested by the fact that several current disputes concern the continental shelf alone). The Chamber could not adopt a position involving the mutual neutralization of the relevant criteria of the continental shelf and of the water without examining them, unless it first settled this problem of the recognition in customary law of the merging of all jurisdictions over the maritime spaces in the 200-mile zone, quite aside from the texts of the 1982 Convention. A court applies established law and not a possible future law. The question is whether it may, at will, delimit a continental shelf and the superjacent waters taking them separately, in turn, or as fused with one another, and that question is one which it cannot decide in the abstract, with the sole explanation that a single boundary is the solution of the future and, furthermore, one advisable or convenient ; it still has to be one reasonable and reasoned. What had to be judged was whether a single boundary would in the present case be an equitable line and on what grounds. This is a question to which the Court referred in the 1982 Judgment, in a sentence at the end of paragraph 107 :

> "As to the presence of oil wells in an area to be delimited, it may, depending on the facts, be an element to be taken into account in the process of weighing all relevant factors to achieve an equitable result." (*I.C.J. Reports 1982,* pp. 77-78.)

It would seem, then, that the presence of resources in a continental shelf is a relevant factor.

20. If it were to become apparent from an examination of the respective problems of the continental shelf and the exclusive fishery zone in the Gulf of Maine area that, when law is applied to the facts, there are no factors complicating the drawing of a single boundary, this solution would certainly be "simpler" for the Chamber and the Parties, but that is not the point ; simplicity comes near to facility, and facility is no criterion for delimiting boundaries ; it is all too often a means of postponing difficulties to a later period. If it were apparent that the unification of two different lines which might be justified by the facts, one for the continental shelf and the other for the economic zone, was inequitable for one of them in relation to the other, it is hard to see what application of equity might justify a single line which would be partially inequitable because it would produce extraordinary, unnatural or unreasonable results, either on the continental shelf side or on the side of the zone. Everything therefore depended on analysis of the facts, especially as it had been submitted in connection with Georges Bank that any oil extraction might ruin its fisheries and cause

pollution throughout the Gulf, entailing heavy responsibilities, and as the Parties' positions seemed to rule out agreement on either joint management of the fisheries or joint exploitation of deposits divided by the delimitation. The judicial task is however not limited by the Parties' presentation of their opinions on all these points (cf. 1969 Judgment, para. 97, on the unity of any deposits, "a factual element which it is reasonable to take into consideration in the course of the negotiations for a delimitation", and the separate opinion of Judge Jessup (pp. 66 ff. and 81-84), who, going well beyond paragraph 240 of the present Judgment, hoped to contribute to "further understanding of the principles of equity which . . . are 'part of the international law which [the Court] must apply' " (p. 84)).

21. Although "continental shelf" has become a term which no longer applies to a physical content, Article 56 of the 1982 Convention, which defines the exclusive economic zone and the rights, jurisdiction and duties attributed to States, ends with the following words : "The rights set out in this article with respect to the sea-bed and subsoil shall be exercised in accordance with Part VI". This Part VI is headed *Continental Shelf* and contains ten articles including Article 76 on the "Definition of the Continental Shelf", Article 77 on the "Rights of the Coastal State over the Continental Shelf", Article 78 on the "Legal Status of the Superjacent Waters and Air Space . . .", not to mention Article 83 on the "Delimitation of the Continental Shelf . . .", identical with Article 74 on the Zone. What is left of the legal unity of maritime spaces and of the idea that the continental shelf should be merged with the zone, if the last paragraph of Article 56 defining the zone refers back to Part VI for another definition of the continental shelf element not contained in Article 77, and why should there be two articles on a delimitation defined in one and the same way ? The construction of the Treaty with a Part V *(Exclusive Economic Zone)* and a Part VI *(Continental Shelf)* only makes sense if the two areas differ in certain ways, to such an extent that it was necessary to devote to them two parts of a convention on the law of the sea. Exegetes who want to fuse the rules of delimitation have therefore to justify the radical uselessness of Part VI, in what purports to be a text of "codification". Comparison of Articles 55-62 and 73-74 (Zone) with Articles 76, 77, 78, 81 and 83 (Continental Shelf) seems to leave only this alternative : either two legal régimes, or chaos.

22. Prior to the 1982 Convention, international law, according to the 1969 Judgment and the 1977 Decision, had developed a few firm precepts : equidistance plus the special circumstances of the area to be delimited, with in the forefront the configuration of the coasts, their special aspects, and nature to be respected as the "given fact". The solution to the present dispute could have been deduced from the very terms of paragraph 99 of the 1969 Judgment :

"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 divison 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."

Although the Chamber's Judgment alludes to these indications, it in fact retains of them nothing more than the idea of equal division, and this it modifies completely by supplemeting it with criteria, methods and corrections which however viewed are extraneous to the 1969 text or the 1977 Decision. It is up to those who support the current legal vacuum to demonstrate that the 1958 Convention has in fact become obsolete and that the 1982 Convention, which the United States did not sign and which is not in force, has nonetheless uncovered a customary rule on this point which runs counter to both the 1958 Convention and the 1969-1977 case-law by assuming that a fusion has taken place between the continental shelf and the 200-mile zone and that a single boundary is called for, without further enquiry.

23. The argument that the continental shelf is now fused with the zone and that the 1958 Convention on the Continental Shelf is obsolete was put forward by the French Government in 1977 where the 1958 Convention was concerned, and was rejected by the Court of Arbitration (cf. Decision, paras. 45, 46, 47, 48 and 205) after its having indicated 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" (para. 48 *in fine*), which was no acquiescence but simply a polite way of setting on one side a draft codification. The International Court itself, in its Judgment on *Fisheries Jurisdiction,* had decided that, as a court of law, it could not render judgment *sub specie legis ferendae* (*I.C.J. Reports 1974,* para. 53). The task at present is to discover in the evolution of the law of the sea some precise element of at least equal relevance to the 1958 Convention, which the United States held applicable to the continental shelf between 1969 and 1976, if not longer, judging by the partial documentation furnished to the Chamber (para. 16 above) ; to grasp the causes of this treaty's dereliction, it would have been necessary to find other grounds than a mere statement that it is no longer determinative because it cannot apply to water. On 16 July 1970 the United States issued a declaration regarding Canada's having on 6 February of that year acceded to the 1958 Convention with a reservation that gave rise to an objection on the part of the United States (United Nations, *Multilateral Treaties* 1975, p. 455). No indication has been given of any legal grounds for the termination of the 1958 Convention since then. As for the legal position adopted by the Government of the United States regarding the 1982 Convention and its role, in its reply to a question put by a judge at

the sitting of 9 May 1984, it allows such a degree of freedom in the positions to be adopted in each specific case, at the discretion of that Government, that the problem of the application of the contents of that instrument by the United States will invariably remain a matter for its own exclusive appreciation. Finally it should be recalled that there is a uniform continental shelf in the Gulf of Maine and that it extends even beyond the 200-mile limit, the delimitation of its final part between the 200-mile line and the outer edge of the slope remaining to be undertaken by the two States at some subsequent stage (Special Agreement, Art. VII). It scarcely makes sense to eliminate the continental shelf within the Gulf by assimilating it to the water column, when the final part of it will remain to be delimited and will be treated as a specific area of shelf as from the 200-mile line where the water will cease to be a factor.

24. The position taken with regard to the single boundary by the last part of the Judgment, where, in verifying its conclusions, the Chamber considers as factors the whole range of economic resources abundantly invoked by the Parties, with a view to demonstrating that they ought to be satisfied with the result, calls for the same remarks as Judge Sir Robert Jennings made on another case in his dissenting opinion on Italy's application for permission to intervene :

> "[this] is to assume that the correct location of a continental shelf boundary is determined by a court of law by establishing some sort of compromise between different claims. Such an assumption is surely contrary to principle. Continental shelf boundaries are established by the applicable law, taking account of all the relevant circumstances. The actual extent of the claims of the parties is not a relevant circumstance. Continental shelf rights in fact belong whether they are claimed or not. Claims are, therefore, irrelevant except in so far as they can be justified before the Court by reference to the applicable law." (*Continental Shelf (Libyan Arab Jamahiriya/Malta), Application for Permission to Intervene, I.C.J. Reports 1984*, p. 155, para. 22.)

As the Chamber's reasoning is not justified by reference to the applicable law, the single line remains a method adopted by the Chamber in accordance with a line of reasoning that it has based, like the Court in 1982, upon judicial freedom of appraisal. Whether, in the present case, the single line provides an equitable result is a question still unresolved, and what paragraphs 238-241 express is merely the hope that the Parties will accept the considerations put forward by the Chamber in regard to its decision. This shows how far removed is a compromise solution from a judgment based on the legal prescriptions to which the Parties must bow.

25. Thus while the crucial question in the present case has been posed, it has not been answered. The Chamber has not discovered the legal grounds that could be relied upon to support a method of continental shelf delimitation, rather than one of delimiting waters, for the determination of its

single line. The explanation involving criteria of more neutral character cannot be the answer, since it cancels out the question ; it means claiming that the judge may eliminate any criterion peculiar to one zone or the other, which is to relegate each zone to total isolation, and the very possibility of a delimitation common to both is thus denied. This avoidance of a question central to the whole debate – indeed, the debate itself – was perhaps unnecessary within the internal logic of the present Judgment. Having followed the Court in the change of jurisprudence that occurred in 1982, as indicated at the beginning of this opinion, the Chamber has merely effected an equal division of water, and this fact in itself is sufficient admission that there are no legal grounds to be relied upon as regards either of the two zones whose fusion has thus been noted if not decided. The question put by the President of the Chamber will nevertheless continue to face treaty negotiators seeking to establish a single boundary, unless it discourages them from adopting this procedure whenever a real continental shelf is involved.

26. To my mind, the conclusion to be drawn from examination of the problem of the single boundary *qua* decisive factor in a new law of delimitation is that, in the present state of international law according to the Court's jurisprudence in the 1982 Judgment based on the convention text of that year, anything may henceforth be deemed relevant for the purpose of reaching an equitable result if the States concerned agree to hold it so or the judge is convinced of its relevance. I find this closer to subjectivism than to the application of law to the facts with a view to the delimitation of maritime areas. Over and above the question of the single boundary, therefore, it is the entire problem of the law applicable from now on to any maritime delimitation, be it of the continental shelf or the zone, which has to be faced. The key to the Chamber's legal reasoning lies in the approach it adopted in setting out to establish the single boundary, starting from the unprecedented and decisive nature of the fact of having been asked for one, and, as all of that reasoning is based on equitable considerations, it is necessary to enquire what kind of equity is involved.

* * *

27. In redefining the law of maritime delimitation on the basis of Articles 74 and 83 of the 1982 Convention the Chamber has exposed the disservice rendered international law by the Third United Nations Conference ; I have summed up this formulation in two words : agreement + equity. As the concept of agreement has nothing to do with the work of judges, only equity remains. But if there is any legal concept to which each attaches his own meaning, it is equity. There is, I feel, no need for me to say more than what is essential to the present case in a surely never-ending debate. What is the equity referred to in any remnant of the law of maritime delimitation that may survive in 1984 ?

28. The Chamber's Judgment follows the line of thought of the Court's, thus confirming that there has been a break in the case-law in relation to the 1969 Judgment and the 1977 Decision. In a dissenting opinion appended to the Judgment of 1982 I have already expressed my reaction as to the nub of the problem raised by this new view of equity, and it seems to me useless to repeat it here ; I wish to incorporate into the present opinion the full text of paragraphs 9, 10, 11, 12 (first 11 lines), 13, 14 (first 25 lines), 16, 17 and 18 of the 1982 opinion ; it is thus unnecessary to introduce many quotations here, and I shall just give one, which is important :

> "While the Court is entitled to change its conception of equity in comparison with the 1969 Judgment, the use of a few quotations from that Judgment does not suffice to prove that no such change has taken place." (*I.C.J. Reports 1982,* p. 151, para. 16.)

29. The decisive reason for my not having accepted the conception of today's Judgment, in which the Chamber enlarges upon that of the Court in 1982, continues to reside in the fact that equity does not consist in a successive search for equality, proportionality, result ; each of these considerations is a way of applying equity, it is a choice made in the manner of applying the law, and not an accumulation of equities which there is nothing to forbid supplementing with such others as one may glimpse in that frame of mind. One must not narrow down the law of delimitation to two words, agreement plus equity, only to equate that equity with judicial discretion.

30. The Chamber has applied the second subparagraph of the version of a "fundamental norm" which it gives in paragraph 112 : the equitable character of the criteria, the capability of the methods to ensure an equitable result. Faced with a geographical situation as simple as nature can produce, i.e., one devoid of any particular geographical features leading to distortions, within the precise meaning of all those words in the 1977 Decision (paras. 238-245 and 248-252), the Chamber has decided to take no account of the resources of the continental shelf and fishery zones concerned, save in a brief examination of the equity of its line at the very end of its reasoning (paras. 237-238), and has divided a volume of water the content of which is indifferent from the viewpoint of the result. To that end it has performed a highly developed legal analysis based (paras. 95-114, 155-163 and 190-230) on the quest for an equitable result, in the 1982 version enshrined by the Judgment and Convention of that year, and, with the aid of criteria which it declares equitable and various methods deemed apt for the purpose, has gone in search of a line equitable in itself.

31. To follow the internal logic of the Chamber's reasoning, one must take into consideration paragraphs 79-96, which expound the doctrine on which it bases the Judgment, and paragraphs 191-206 concerning the methods, with paragraphs 235-241 offering a verification of the application of those two elements of the reasoning from the viewpoint of the equitable result. Paragraph 191 defines the fundamental rule according to the Chamber in a new version of the articles on delimitation in the 1982

Convention, while paragraph 241 gives an assurance that the *overall result* is indeed equitable. The chain is thus complete, and it is worth drawing attention to the new construction in its essential elements because, if it is taken together with the previous Judgment, that of 1982, the jurisprudence of the Court appears fixed for the time being. Thus there can be no appraisal of the *Gulf of Maine* Judgment in relation to the attainments of 1969 and 1977, which have been categorically repudiated, and it would be no use seeking to counter the decisions of the Court in 1982, and the Chamber in 1984, by arguments with which they have deliberately parted company. The study carried out in paragraphs 79-96 concludes with the finding that, if Article 6 of the 1958 Convention is taken together with customary law, the law on delimitation can be summarized as follows : any delimitation must be effected by consent between States, a principle which, "going a little far in interpreting" the 1958 Convention, can conceivably be supplemented, according to the Chamber, by an implicit rule that any agreement or other, equivalent solution must involve the application of equitable principles (Judgment, para. 89). These principles are not, we are told, principles of law like the principle of agreement and the aforesaid implicit rule (para. 90). The Judgment concludes these passages on the law of delimitation by recalling certain dicta from the 1982 Judgment and describing the relevant provisions of the 1982 Convention. To my mind this new doctrine is no advance upon paragraph 71 of the 1982 Judgment (last eight lines), which has been answered by paragraph 19 of a dissenting opinion (*I.C.J. Reports 1982,* p. 153). That much is apparent, when the Judgment applies its doctrine to the case in hand, in the use of criteria, methods and corrections each and every one of which is based on a notion of equity reached by the successive and always subjective reactions of the judge.

32. Admittedly, the application of the combined methods, with successive corrections, is accompanied by references to the justifications for each adjustment made to a theoretical line arrived at via the method, that of equal division, which is the first to be employed yet is presumed to be inequitable, since it is constantly corrected. The end having first been established, the means follow. This is apparent even at the beginning of the Judgment in the description of the facts, which in any delimitation decision is a textbook exercise generally restricted to the geographical description of the situation ; not so in the present instance, where the Chamber already interprets the geographical facts so as to prepare the treatment it will be giving them in its use of methods and in its corrections of a line which is justified not by its own merits resulting from the employment of factors of equity defined and balanced within an overall examination of the relevant circumstances, but at the whim of the successive evaluations of a judge unfettered either by law or by the geographical facts of the case. The idea that the Gulf is a rectangle has no other utility than to prepare the discovery that an angle in the north of the Gulf will enable a bisector to be drawn ; the choice of some imaginary lines to compose certain sides of the mythical rectangle ending in an area outside the Chamber's competence is

presented as a striking likeness of nature. The Gulf is not a rectangle in any exact description of the facts in this case, since, like any gulf, it has only three sides, but it is made out to be one simply because that enables it to be given a fourth side at its entrance which will prove an indispensable line for justifying the direction of the final segment of the boundary, in that a perpendicular can be drawn between this unreal closing line of the Gulf and the coast of the United States, this being as foreign to the geographical situation as the description of a rectangular gulf, and the whole being reminiscent of the smoothing-out technique proposed by the French Government in 1977 and unequivocally rejected by the Decision (paras. 230 and 246). By such means is a gulf of somewhat oval shape pressed into the service of a series of deductions based on a rectangle whose imaginary character is conceded by the Chamber itself. The Judgment of 1982 availed itself of a similar procedure (cf. dissenting opinion, *I.C.J. Reports 1982,* pp. 154 and 155, paras. 18, 19 and 21 ; cf. Judge Sir Gerald Fitzmaurice's warning against the arbitrary drawing of lines in maritime delimitation, *Fisheries Jurisdiction, I.C.J. Reports 1973,* p. 29, separate opinion, n. 11). This succession of deductions stimulated by lines made up with a definite end in view is a factor in the reasoning pursued by the Chamber in its search for an equitable result.

33. One general observation is called for on the subject of geographical facts and the uses to which they are put. When it is said, as it sometimes is, that geography is neutral, this implies that things are what they are, and the formula confirms the dictum that "There can never be any question of completely refashioning nature" (1969 Judgment, para. 91). Geography is impartial rather than neutral, in the sense that it is decisive in a delimitation and, in itself, gives no preference to one State rather than another. A judge may not, therefore, modify the geographical situation by any representation, be it a line, rectangle or angle, which is his own vision of the facts and alters those facts. When such technical procedures are utilized, they may serve to prepare the application of a method but they are not an interpretation of the geographical situation as nature fashioned it. In the case of a continuous continental shelf between two States, as in the present instance, the delimitation may be effected in the disputed area by equal division, as the Court said in 1969 in a passage of its Judgment (para. 99) cited by the present decision ; but if one adds to the continental shelf the waters above it after having declared that, since neither element yields any criterion equally applicable to the other, neither provides the key to the delimitation, any new interpretation of the geographical facts which upsets the equality accepted as governing the delimitation becomes unjustifiable. But this is precisely what is visible in the successive approaches to the problem in the present Judgment, whether it be the rectangular Gulf, the coasts represented by other lines than those of the national limits of the territorial waters, the artificial closing line of the Gulf and its direction, the distortion attributed to Sable Island but not Nantucket, the refusal to take the Parties' coasts into consideration for the segment of the boundary outside the Gulf, or interpretations of the geography of the Gulf which

distort that search for the equal division of disputed maritime areas which the Chamber holds to be the basic equitable criterion for the purposes of its task.

34. Since the Chamber's basic criterion is the equal division recommended as long ago as 1969, it must be pointed out that the Judgment of that year did not refer in this connection to the whole of the continental shelf but only to the areas of overlap between the Parties' zones in certain sectors (para. 99) ; the Decision of 1977 was no less precise in limiting the result of the division to those marginal areas where the Parties' continental shelves converged (para. 78). This aspect of the matter is ignored by the Chamber's Judgment, though it has repercussions on the use of proportionality applied to all the coasts of the Parties in relation to the whole of the continental shelf areas and fishery zones, as well as on the actual manner of determining the boundary. In a territorial dispute, it is only the land actually disputed that is measured up, and everything recognized as incontestably belonging to one party is left out of the operation ; nobody thinks to object against one party that it already has more land than the other. During the oral proceedings, the methodology of hydrographic surveys was invoked in relation to areas the greater part of which were not in dispute, instead of merely areas of overlapping "in certain localities" (1969 Judgment, para. 99), and the Chamber has followed suit.

35. Overlapping is not a phenomenon exclusive to the continental shelf and the 200-mile zone ; once two States have adjacent coasts, the salients thereon may begin to produce difficulty in the territorial waters and contiguous zone, giving rise to mutual encroachments. The present dispute concerns a specific overlap as apparent in the facts, and the precondition for employing the method of equal division envisaged in the Judgment is that this area of overlapping be defined by the Chamber, not in accordance with the Parties' claims but on objective bases. This has not been done. The fact is that, in what may be called the area of the real dispute, i.e., solely the area where overlappings occur between the effects of the relevant coasts of the two States, the geographical situation presents an equality between those States which does not call for any correction based on arguments from equity ; it is a situation of equality in the same plane, within the meaning of the Court's 1969 Judgment, if nice calculations (an expression used by the 1977 Decision, in particular at paras. 27 and 250) based on all the coasts and sea areas of the Parties within and without the Gulf be eschewed and attention focused on this zone of actual overlaps, which does not extend beyond an initial segment of line as from point A, in the part where the two States have adjacent coasts. When the facts of geography indicate and permit of a division producing equality, there can be no question of elaborating an equity to improve upon equality, and the line drawn has simply to ensure that equality. Admittedly, to enunciate the principle of dividing overlaps is simply to pose the true problem, not to solve it. But it is through narrowing the disputed area down to what it really is that the solution becomes visible.

36. The application of equal division in the case is sufficient to rule out the argument based on the idea of total proportionality held to be an indispensable condition for an equitable maritime delimitation. In the present instance, this pretension to improve upon equality involves the importation of geographical circumstances that are extraneous to or remote from the precise object of the dispute. The present case is one in which a limited overlap, due to coasts adjacent to the point of departure of the line requested of the Chamber, could be resolved simply by dividing it equally with the aid of any appropriate method, and equidistance in the first place. A dispute limited in space and size, magnified by the Parties for their own reasons, could have been given the right solution by the Chamber once it had adopted the principle of equal division. Instead, the Chamber has needlessly elaborated supplementary arguments from equity which traverse the whole Judgment in a series of doctrinal considerations, criteria, methods and corrections ; this edifice is, to my mind, contrary to the applicable international law. Once the Chamber decided to apply equal division, that decision was final ; unless deviations come to light, in the shape of previously unnoticed inequities, there is nothing else left to decide (cf. dissenting opinion, *I.C.J. Reports 1982,* para. 13), and there is no visible evidence of particular geographic circumstances producing any such effects.

37. When States claimed and obtained exclusive jurisdiction over an expanse of water up to the 200-mile limit, they were able to assume that this aquatic zone had effaced the continental shelves where they exist physically, or at least that the water takes priority over the sea-bed and subsoil ; they chose the vague notion of the equity of the result with the wording of the 1982 Convention, a new equity conducive to compromise solutions for negotiators and *ex aequo et bono* decisions for judges. So long as equity was conceived as the application of a rule of law prescribing recourse to equitable principles, it was distinguishable from arbitrariness and *ex aequo et bono.* As each contentious case has its own characteristics, the judge's work was performed within the bounds of the application of legal rules to the facts ; even if Article 6 of the 1958 Convention left room for an assessment of the effect of special circumstances, that assessment remained under control. By introducing disorder into the conception of equitable principles, and freedom for the judge to pick and choose relevant circumstances and criteria, the Court, in the Judgment of February 1982, and the States participating in the Third United Nations Conference, by the Convention of December 1982, have given equity in maritime delimitation this doubtful content of indeterminate criteria, methods and corrections which are now wholly result-oriented. 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.

38. Admittedly, the Judgment of the Chamber has criticized the Parties' attempt to catalogue equitable principles and present them as settled, generally applicable principles of positive international law. But the argu-

ment in paragraphs 192 ff. of the Judgment on principles, criteria and methods merely recapitulates the Parties' contention as to freedom of choice in identifying what is equitable, only changing the terminology, and we know from Mr. Justice Holmes what to think of the veil which words cannot supply (para. 2, above). The history of the case-law between December 1969 and February 1982 shows that the Court has changed its opinion. For the time being let us note that, for the Court and for this Chamber, equity within the meaning of the decisions of 1969 and 1977 is rejected and that what is today called equitable, as in the 1982 Judgment, is no longer a decision based on law but an appraisal of the expediency of a result, which is the very definition of the arbitrary, if no element of control is conceivable. The way in which it has been maintained and accepted that anything could be presented as a relevant factor to be thrown into the balance of equities is an abuse of the word "relevant", and renders the judge's mission impossible, except as a conciliator, which is a role he has not been asked to fill. The contradiction between the law as set forth in the 1969 Judgment and confirmed by the 1977 Decision, and the legal vacuum resulting from the 1982 Convention as to the delimitation of a 200-mile zone comprising the continental shelf, is flagrant, but that is precisely what goes to make a reversal of precedent, so one must examine the Judgment of the Chamber on the merits and the logic of its own reasoning. And it is this bundling together of all notions of equity in the Judgment of the Chamber which is the central point of the reasoning used to justify the result obtained.

39. The Chamber has taken a position on the way in which equity is to play a part in its judgment on the delimitation of the maritime areas at issue, but without defining a concept of equity. As a result of the freedom of choice of criteria – another word which can mean very different things – methods and corrections, which it is sought to justify by the notions of equality, proportionality and an equitable result, the Chamber at each point in its reasoning advances ground after ground in order to establish, and then substantiate, an equitable result ; but all the words used lack the content with which circumstances and the law provide a judge as a necessary basis for his judgment. It is no more conclusive to say that a result is equitable than to say that it is just, if the judge does not refer to an order of equity or of justice. In 1969 the Court decided on the application of the "rule of equity" in the particular case of delimitation of the continental shelf (1969 Judgment, para. 88) ; equity cannot be considered as a means of securing equality, proportionality and an end-purpose, all at the same time. When a judge wishes to ensure equality or equivalence, equality being achievable only within the same plane, he can draw inspiration from the frequently quoted formula in the Judgment of 15 December 1949 in the *Corfu Channel* case : "what the Court, in the circumstances, has described as a *true measure* of compensation and the *reasonable figure* of such compensation" (quoted in the 1969 Judgment, also in para. 88 ; emphasis added) ; he has to weigh up the points of fact and the legal consequences which he can deduce from them so that his decision can ensure an equi-

valence between claims reduced to their true value. Such research implies recourse to points of reference, sometimes called parameters, without which the judge would exceed his role. By accepting that the continental shelf is no longer a real area of the sea-bed and subsoil, but that to a distance of 200 miles it is deprived of its natural specificity, the Chamber has been solely dividing water. The destruction of the concept of natural prolongation means that there is no longer anything left to measure, and the link between the land and the subsoil and even the water column has lost all significance. Equity by equivalence between two maritime elements can, in the new legal vacuum, be effected by equal division, but that is as far as the search for an elusive equity can be taken. The 1969 Judgment confined equality exclusively to the division of overlaps of limited extent – nothing more than that ; whereas, from the outset of its reasoning right up to its conclusion, the present Judgment adds to this the continual deployment of a concept of equity in proportionality and a concept of equity in the result. Proportionality and the equitable result are set up as general principles, and therefore as rules for any delimitation, and one cannot see why that should not be extended to the domain of international responsibility, where the notion of a true measure of compensation has always existed. It is a decision which has serious consequences and it is all the more regrettable in that, in this case, it is unjustified.

40. The Permanent Court of International Justice and the International Court of Justice never directly decided a case on the basis of equity up to the Judgment of 1969, and it would seem that this was due to prudence on the part of judges who were well aware of the difficulties in this connection. It was only by brief allusions that the two Courts showed their awareness of the existence of the problem, and their wisdom becomes all the more apparent today when one contemplates the pass to which we have come. The Court in 1969 evinced the same caution but, called upon as it was to give fairly precise indications so that a negotiation which had failed should, following its judgment, succeed, it had, to accomplish the task defined by the Special Agreement, to develop a concept of equity, which it set forth in 12 paragraphs ; this was unusual, as the Court normally determines the law without elaborating the theory, but this was what had been asked of it. The following year, in the *Barcelona Traction, Light and Power Company, Limited* case (*I.C.J. Reports 1970,* paras. 92-102), the Court again took the traditional prudent approach and, following several considerations relating to the case, ruled out the application of equity, though saying that, "as in all other fields of international law, it is necessary that the law be applied reasonably" (para. 93), which does not go very far, and more or less amounts to the assimilation of the equitable to the reasonable, the word used in the 1969 Judgment. The 1974 Judgment on *Fisheries Jurisdiction* had to examine the problem of the distribution of resources between States concerned and mentioned the problem of equity when the Court repeated after the 1969 Judgment :

"It is not a matter of finding simply an equitable solution, but an

equitable solution derived from the applicable law" (*I.C.J. Reports 1974*, p. 33, para. 78, and p. 202, para. 69).

The Court then considered an equitable distribution of fishery resources (para. 78) on the basis of quotas, but it finally declined to balance up the interests of the States concerned, in the absence of sufficient information and usable parameters (pp. 32 and 201). The Court's refusal in 1974 to engage in a distribution of fishing quotas already showed that this role is not an easy one for a court of law to assume. The Court also ruled out the notion of the exceptional dependence of a State on economic resources, as it was also to do in its 1982 Judgment. It will be recalled that in 1977 the Court of Arbitration summed up the role of proportionality in unequivocal terms :

"It is rather a factor to be taken into account in appreciating the effects of geographical features on the equitable or inequitable character of a delimitation, and in particular of a delimitation by application of the equidistance method" (paras. 99 and 100-101).

The Chamber, on the contrary, has considered it essential to correct its median line at the exit from the Gulf, established from basepoints on opposite coasts, using a calculation of proportionality based on all the coasts of the Gulf and then recalculated to attenuate it, without reference to any particular geographical feature the influence of which might create a distortion which would be considered inequitable, the operation being carried out at the judge's own discretion and from a view of equity, known only to himself at present, which is cloaked in the word "correction".

41. The danger which the two Courts had throughout their history managed to avoid is confronting us today. Their prudence was necessary, because it was clear that an inordinate use of equity would lead to government by judges, which no State would easily accept (cf. *I.C.J. Reports 1974*, p. 149, dissenting opinion, para. 34). The advice on the application of equity given to the Parties by the 1969 Judgment has been replaced in the 1982 Judgment and the Chamber's Judgment by a system of equity erected into a doctrine separate from law, one which is no longer an application of law. It is, in short, a law unto itself, where each case is exposed to the application of any imaginable criteria, methods and corrections conducive to a result which the disappearance of rules leaves to the discretion of each tribunal. But, while it is true that many rules of international law are drafted as principles of conduct rather than norms, to interpret them in accordance with the law is one thing, whereas it is a very different matter to replace them by an equity which lacks all general doctrine and varies from case to case not only in accordance with the circumstances – for that is always so – but in accordance with whatever the judge may choose to dub an equitable result. In 1977, Professor H. Briggs, in a declaration appended to the Decision, foresaw the

"threat that the rule of positive law expressed in Article 6 will be

> eroded by its identification with subjective equitable principles, permitting attempts by the Court to redress the inequities of geography" (*Cmnd.* 7438, p. 126).

Controlled equity as a procedure for applying the law would contribute to the proper functioning of international justice ; equity left, without any objective elements of control, to the wisdom of the judge reminds us that equity was once measured by "the Chancellor's foot" ; I doubt that international justice can long survive an equity measured by the judge's eye. When equity is simply a reflection of the judge's perception, the courts which judge in this way part company from those which apply the law.

42. The foregoing observations show how far I am from the Chamber's reasoning on all points in this case. The same is true, accordingly, as regards the result of that reasoning, i.e., the delimitation line, and I have not voted for the operative paragraph, any more than for the reasoning behind it. A distinction must however be drawn : since equity is now a matter of each judge's opinion, I do not maintain that the Chamber's line, or any of the lines presented during this case, is less equitable than the one presented by myself on the map attached to this opinion. I voted against the Chamber's line because, unless coincidence or some miraculous chance has made of it the one and only equitable line – which is presuming a great deal –, the means employed in its production are in any case incompatible with what survives of the law applicable to such a delimitation, in particular the equal division of overlaps and equidistance as a method of achieving that equality. It is this that prompts me to append a map (see p. 390) illustrating the line I considered to effect an equal division, in the geographic circumstances, of the areas in issue between the Parties, with the sobriety appropriate to a proposal the aim of which is to show how the much-reviled equidistance method provided a reasonable solution to the Parties' request for the separation of their respective continental shelf and fishery zones (cf. 1977 Decision as regards the Atlantic sector, where equidistance was applied subject, after lengthy reflection, to a correction : paras. 237-252).

43. To speak briefly of the role of equidistance, it is necessary to go back to the 1958 Convention which is in force between the Parties so far as the continental shelf is concerned and, in that connection, indicate that the construction of its Article 6 presented by the Judgment is not well-founded. President Sir Humphrey Waldock, in his above-quoted lecture, said :

> "Article 6 of the Geneva Convention on the Continental Shelf of 1958 had provided that, in the absence of agreement, the continental shelf boundary in the case both of 'opposite' and of 'adjacent' States should be determined by *the equidistance principle,* unless another boundary is justified by special circumstances." (P. 11, emphasis added.)

This is the formula already found in the 1977 Decision, and these two references should in my view suffice : as between opposite States and adjacent States the difference is one solely of a geographical nature, and in either case the "principle" of equidistance, said Article 6, is applicable, i.e., is the way to establish the delimitation. In 1969 the Court recognized that equidistance was a sound method, but not the only one, and that others could be utilized "in the application of equitable principles", but it is to be noted that this paragraph 85, which is never quoted *in toto* but only by the selection of this or that convenient passage, is entirely devoted to the way in which the States actually concerned should, in the eyes of the Court, set about negotiating an agreement.

44. An equidistance line "every point of which is equidistant from the nearest points on the baselines" is a unique line that depends only upon the positions of the basepoints. So long as those positions are known there can be no dispute as to the course of the line, and all technical treatises are agreed on the principles of its construction. Furthermore, because the two sets of basepoints of the two coasts continually interact on the line, the determination of relevant basepoints on one coast is to some extent dependent on the configuration of the other coast, so that where the coasts are opposite, and provided that there are no incidental features like islands a significant distance offshore, the equidistance line usually effects a reasonably even division between them.

45. This line on page 390, below, is essentially an equidistance line constructed from mainland basepoints. Such a line cannot be made to pass through Point A, and consequently the line starting at Point A follows a neutral course perpendicular to the coastal front of Maine until it intersects the equidistance line. For the construction of the equidistance line the Canadian Brier, Tuscet and Cape Sable Islands and the United States Great Wass, Mount Desert and Vinalhaven Islands are all treated as part of the mainland. No account is to be taken of Nantucket or the other islands and islets south of Cape Cod, or of Seal Island off Nova Scotia. This equidistance line turns to the south-east at a point a few miles south-east of a line between Cape Cod Elbow and Cape Sable. It crosses Georges Bank about 14½ miles west of the Chamber's line, and intersects the Canadian 200-mile limit about 29 miles from the terminus of the Chamber's line.

46. 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. The 1969 Judgment and the 1977 Decision were based on that rule and interpreted it in the desire to seat international law firmly on a concept of rigour in the application of an equity dependent on that existing law. When the Judgment of 1982 decided, in paragraphs 109 and 110, to summarize the development of customary law on continental shelf delimitation, it took

sides in the combat against the idea of equidistance by "as a first step" depriving it of any "preferential status" as a method, thus creating for negotiators and, subsequently, judges something like a thought prohibition. This ban is now renewed by the Judgment of 1984. The difference between the international law on the continental shelf of 1958 and the swerve to a new direction in 1982 is therefore fundamental. It would seem that the idea of conducting a preliminary examination in terms of the equidistance method is so feared that it has to be proscribed. It is difficult to grasp the necessity of such an *a priori* opposition to the very notion of equidistance having any useful role to play in searching for an equitable solution.

47. So far as its doctrine is concerned, the present Judgment can be summed up in four words : the result is equitable. This is tantamount to expecting States that come to the Court to accept this new basis of the function of the judge as one freed from the positive law he is charged to apply. The 1969 Judgment and the 1977 Decision had erected guardrails to the use of the concept of equity ; these the 1982 Judgment and the present one have thrown down. The Court, in its *Fisheries* Judgment of 1951, had carefully limited its ruling to the particular character of the situation. The Chamber has sought to make a contribution to bringing the conventional law on delimitation up to date, but this, I feel, runs counter to the Court's judicial task, as Charles De Visscher pointed out in 1963 :

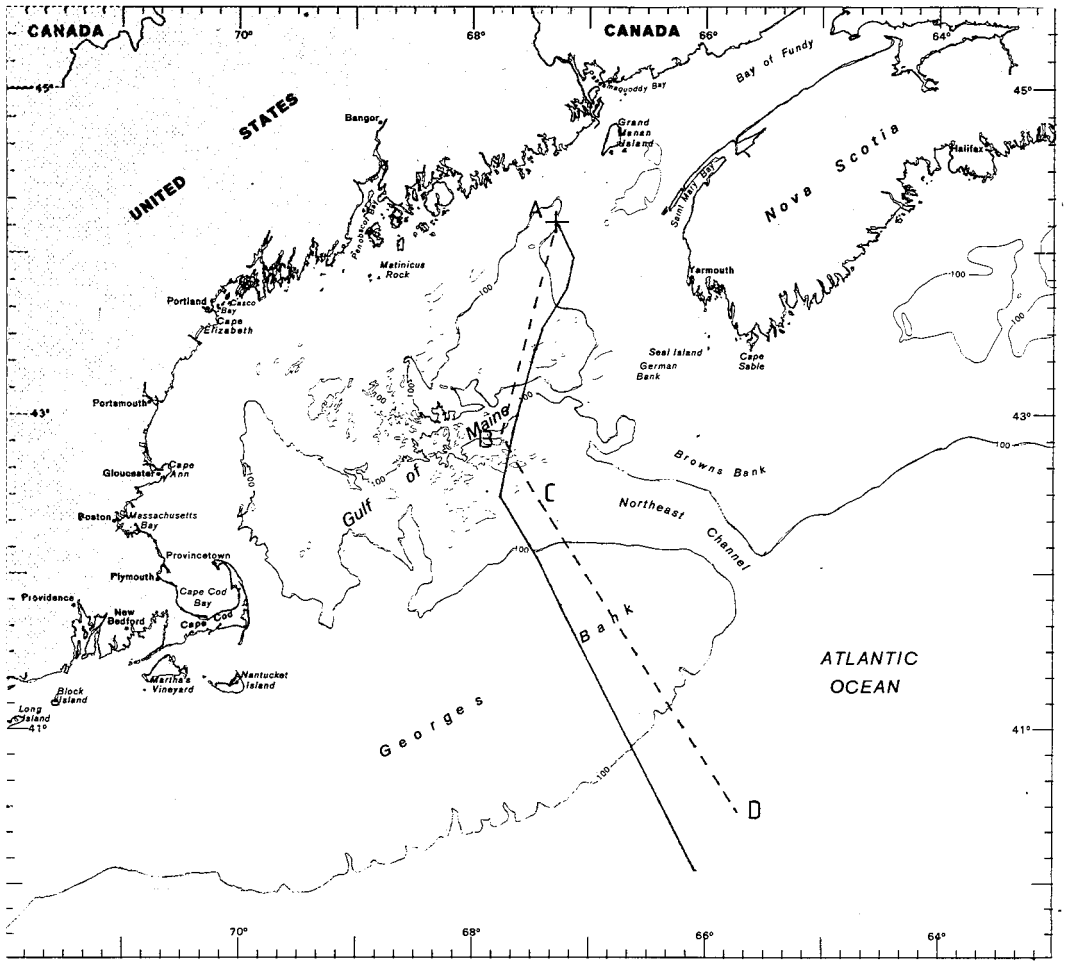
> "The function of interpretation is not to perfect a legal instrument so as to adapt it more or less exactly to what one may be tempted to envisage as the full attainment of a logically postulated objective, but to shed light on what the parties actually intended."

The course taken since February 1982 has been to indulge in an equity beyond the law, detached from any established rules, based solely on whatever each group of judges seised of a case declares itself able and free to appreciate in accordance with its political or economic views of the moment. This is to transform the International Court of Justice into a court of equity, as Judges Sir Arnold McNair and Sir Gerald Fitzmaurice had warned in their time. Since 1982 we have been witnessing not merely a new trend in jurisprudence but a different manner of settling inter-State disputes.

48. Like that of the Court in 1982, the Judgment of the Chamber has attempted to construct, in support of an unsuccessful codification of maritime delimitation, a doctrine of the equitable result, demonstrated by the progression of the reasoning through the contradictions it seeks to efface. The decision's apparent refusal to take account of the natural resources of the areas to be delimited gives way in the closing paragraphs 238, 239 and 240 to recognition by the Chamber that the use of those resources is a major concern and the expression of its hope that the Parties will find the compromise solution offered them satisfactory to their interests. By thus assimilating a procedure which continues to bear the stamp of

the 1982 Convention, the Chamber adds to the Court's case-law one more consensus decision of the type whose regrettable effects I recently exposed ("La recherche du consensus dans les décisions de la Cour internationale de Justice", *Festschrift für Hermann Mosler,* 1983, p. 351 ; esp. pp. 357-358). Again, consensus here is just another word for a compromise, the very type of transaction in which the Parties had formally requested the Chamber not to engage, calling upon it to decide "in accordance with the principles and rules of international law applicable in the matter as between the Parties" (Special Agreement, Art. II, para. 1). This is not, in my opinion, a judicial method of work enabling those problems to be dealt with that are directed to a court of law and not to an amicable conciliator.

(Signed) André GROS.



MAP

REFERRED TO IN THE DISSENTING OPINION OF JUDGE GROS

Chamber's line – – – – – – – –

Judge Gros' line ————————