DISSENTING OPINION OF JUDGE ODA

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OPENING REMARKS

1. To my profound regret, I was not able to vote for the present Judgment, as on some important points I differed from the view of the Court. In my view, the Court has not fully grappled with the recent developments in the law of the sea and is in danger, in its application of equity, of taking the principle of equity for what it subjectively feels to be equitable in a particular case. In this respect, this Judgment follows – in my own view – a mistaken approach which first appeared in the Court's Judgment in the *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* case in 1982 and then in the Chamber Judgment in the *Delimitation of the Maritime Boundary in the Gulf of Maine Area* case in 1984. As the Judgment properly states, the application of justice "should display consistency and a degree of predictability" (para. 45) ; yet those qualities are somewhat lacking in these successive decisions. Apart from references to "equitable principles", the "equitable result" or "relevant circumstances", the Court does not respond to the Parties' request with any principles or rules on which they can depend for the delimitation of the continental shelf, but simply translates "equity" as a subjective appreciation of the circumstances. It has not made an attempt to understand how the "equidistance/special-circumstances" rule, employed since the Geneva Convention on the Continental Shelf in 1958, has always been interpreted in connection with the principle of equity. The delimitation line suggested by the Court resembles more the result of a transaction than an application of judicial principles. I cannot but feel as I did in the 1982 case, when I stated :

> "the Court suggests as the positive principles and rules of international law to apply in this case only equitable principles and the taking into account of all relevant circumstances. This merely amounts to an uninformative rearrangement of the terms of the main question put to it. It appears simply to suggest the principle of non-principle." (*I.C.J. Reports 1982*, p. 157, para. 1.)

CHAPTER I. MISCONCEPTIONS IN THE PRESENT JUDGMENT

1. Development of the Law of the Sea

2. The present Judgment does not deny that "the 1982 Convention is of major importance" (para. 27), and finds it the Court's duty "to consider in what degree any of its relevant provisions are binding upon the Parties as a rule of customary international law" *(ibid.)*. It acknowledges the impact of

the new institution of the exclusive economic zone upon the régime of the continental shelf, by recognizing that :

> "It is in the Court's view incontestable that . . . the institution of the exclusive economic zone, with its rule on entitlement by reason of distance, is shown by the practice of States to have become a part of customary law." (Para. 34.)

On the other hand, the Judgment hesitates to acknowledge that "the concept of the continental shelf has been absorbed by that of the exclusive economic zone" (para. 33). While acknowledging that the distance criterion applies to the continental shelf as well as to the exclusive economic zone, the Judgment refuses to admit that "the idea of natural prolongation is now superseded by that of distance" (para. 34). Instead, it suggests that

> "where the continental margin does not extend as far as 200 miles from the shore, natural prolongation, which in spite of its physical origins has throughout its history become more and more a complex and juridical concept, is in part defined by distance from the shore, irrespective of the physical nature of the intervening sea-bed and subsoil. The concepts of natural prolongation and distance are therefore not opposed but complementary ; and both remain essential elements in the juridical concept of the continental shelf." *(Ibid.)*

3. While admitting, on the one hand, that –

> "title depends solely on the distance from the coasts of the claimant States of any areas of sea-bed claimed by way of continental shelf, and the geological or geomorphological characteristics of those areas are completely immaterial" (para. 39),

the Court is unable, on the other hand, to accept the conclusion that –

> "the new importance of the idea of distance from the coast has, at any rate for delimitation between opposite coasts, in turn conferred a primacy on the method of equidistance" (para. 42),

or that –

> "even as a preliminary and provisional step toward the drawing of a delimitation line, the equidistance method is one which *must* be used, or that the Court is 'required, as a first step, to examine the effects of a delimitation by application of the equidistance method' " (para. 43).

The present Judgment states that –

> "[s]uch a rule would come near to an espousal of the idea of 'absolute proximity', which was rejected by the Court in 1969 . . . and which has

> since, moreover, failed of acceptance at the Third United Nations Conference on the Law of the Sea" *(ibid.)*.

The Judgment continues :

> "That a coastal State may be entitled to continental shelf rights by reason of distance from the coast . . . does not entail that equidistance is the only appropriate method of delimitation . . . nor even the only permissible point of departure." *(Ibid.)*

4. The Judgment expresses the view that "[State] practice, *however interpreted,* falls short of proving the existence of a rule prescribing the use of equidistance . . . as obligatory" (para. 44 ; emphasis added). The Judgment nevertheless acknowledges "impressive evidence that the equidistance method can in many different situations yield an equitable result" (para. 44). Then the Judgment goes on to the following dictum :

> "Judicial decisions are at one . . . in holding that the delimitation of a continental shelf boundary must be effected by the application of equitable principles in all the relevant circumstances in order to achieve an equitable result." (Para. 45.)

The present Judgment apparently espouses the conclusion of the 1982 Judgment that, even though the reference to "equitable principles" had been eliminated from the final draft of the 1982 Convention, the Court "was 'bound to decide the case on the basis of equitable principles' as well as that 'The result of the application of equitable principles must be equitable' (*I.C.J. Reports 1982,* p. 59, para. 70)" (para. 28).

The Judgment states :

> "The normative character of equitable principles applied as a part of general international law is important because these principles govern not only delimitation by adjudication or arbitration, but also, and indeed primarily, the duty of Parties to seek first a delimitation by agreement, which is also to seek an equitable result." (Para. 46.)

On the other hand, the Court shows inconsistent severity towards the similarly absent "equidistance/special-circumstances" rule on the ground that this rule was not mentioned in Article 83 of the 1982 Convention. This Judgment appears to offer "equity" as the approved antithesis to "equidistance".

*

5. As suggested above, the present Judgment does show some understanding of the impact of the exclusive economic zone on the continental shelf and the criterion of distance for the régime of the continental shelf. This is an improvement of the position taken by the Court in 1982. I recall

that in my dissenting opinion then I expressed my critical view as follows :

> "It will be surprising to any student of the law of the sea to find that the words 'Exclusive Economic Zone' appear only once in this lengthy Judgment, and then only in connection with historic sedentary-fishing rights." (*I.C.J. Reports 1982,* p. 157, para. 1.)

In the present case, in contrast, the Judgment pays some heed to the concept (para. 33). The second improvement in the present Judgment is related to the attention, if not approval, it gives to the method of equidistance, for in 1982 I had felt bound to state :

> "The Judgment does not even attempt to prove how the equidistance method, which has often been maintained to embody a rule of law for delimitation of the continental shelf, would lead to an inequitable result. Indeed, it gives that method rather short shrift." (*I.C.J. Reports 1982,* p. 157, para. 1.)

6. Even so, with regard to the principles and rules applicable to the delimitation of the continental shelf, I cannot but say that my understanding of the development of the law of the sea over the past decades is different from that of the Court. First, the Judgment undermines its own acknowledgment of the criterion of distance in the régime of the continental shelf by the statement that the notions of natural prolongation and distance are complementary. At this point I return briefly to the point made by the Judgment in paragraph 34, which for ease of reference I quote again in part below :

> "natural prolongation, which in spite of its physical origins has throughout its history become more and more a complex and juridical concept, is in part defined by distance from the shore, irrespective of the physical nature of the intervening sea-bed and subsoil. The concepts of natural prolongation and distance are therefore not opposed but complementary ; and both remain essential elements in the juridical concept of the continental shelf."

I find it difficult to appreciate the meaning of "in part" within this quotation, because it suggests that, "in part", natural prolongation may be established by factors other than "distance", and what can those be if not the physical aspects swept aside by "irrespective" ? The passage thus would seem to make better sense without the qualification "in part" – a qualification which might have been necessary had the Court wished to analyse Article 76 of the 1982 Convention (see para. 61 below), but in fact the Court has at this point virtually acknowledged that the sense of that Article must be understood as compatible with the criteria for the limits of the exclusive economic zone. In those circumstances, to say that "the concepts of natural prolongation and distance ... are complementary"

and that both remain "essential elements" is surely, at least within the 200-mile context, no more than a method of keeping "natural prolongation" alive by artificial respiration. This seems to be borne out in paragraph 39 of the Judgment (further discussed in para. 62 below), which is quite happy to consecrate the distance criterion and to describe the traditional physical criterion of "natural prolongation" – including the presence of a rift zone – as "completely immaterial". In any case, how can a criterion be "complementary" to what it establishes ? It is difficult for me to understand how the concepts of natural prolongation and distance can be considered as being complementary to each other. The present Judgment, to the extent that it relies on the notion of natural prolongation employed in the Judgment of 1969, fails to allow full weight to the simple facts that that Judgment was delivered before the commencement of UNCLOS III, when both the distance criterion in the concept of the continental shelf and the new institution of the exclusive economic zone were unknown, and that the new era of the law of the sea was merely dawning around the turn of the decade, i.e., from the 1960s to the 1970s.

7. Secondly, the Judgment applies equitable principles without recognizing that the method of equidistance has never been proposed as a counter-concept to the rule of equity and that this method has been considered by adjudicators to lie well within the framework of the rule of equity. The way in which the "equidistance/special-circumstances" rule has played, or is playing, an important role in the delimitation of the continental shelf in the recent developments in the law of the sea, still giving satisfaction to the concept of equity in the contemporary law of the sea, will be seen in Chapter II.

2. *Misconstruction of the "Relevant Area" for the Operation of the Judgment*

8. It is in some cases a difficult and dubious task to define the "disputed areas", "relevant areas" or "areas of delimitation" for the purpose of delimiting the continental shelf of two or more States, and the difficulty and dubiety are all the greater when the sea area washing the shores of the parties is also surrounded by other States which have not become parties to the dispute. The present case was not one in which the "area", being simply an aggregate of the "area-to-be" appertaining to Libya and the "area-to-be" appertaining to Malta, did not affect any third State and so only concerned these two Parties in dispute. In this respect it was quite different from the *Delimitation of the Maritime Boundary in the Gulf of Maine Area* case (where only a division between Canada and the United States was at issue) and even from the *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* case (where the Court could plausibly confine itself to a certain limited area without affecting the interests and claims of any third States).

The region in which the line of delimitation between Libya and Malta was to be drawn might include some zones where a third party might also be interested.

9. In describing "the area in which the continental shelf delimitation, which is the subject of the proceedings, has to be effected", the Judgment is very careful not to define, "in geographical terms", "the area in dispute between the Parties" (para. 14). However, in explaining the task of the Court, the Judgment takes a positive line in so defining the "area" :

> "[T]he decision must be limited to a geographical area in which no . . . claims [of a third State] exist. It is true that the Parties have in effect invited the Court . . . not to limit its judgment to the area in which theirs are the sole competing claims ; but the Court does not regard itself as free to do so, in view of the interest of Italy in the proceedings." (Para. 21.)
>
> "The present decision must . . . be limited in geographical scope so as to leave the claims of Italy unaffected, that is to say that the decision of the Court must be confined to the area in which, as the Court has been informed by Italy, that State has no claims to continental shelf rights." *(Ibid.)*
>
> "A decision limited in this way does not signify either that the principles and rules applicable to the delimitation within this area are not applicable outside it, or that the claims of either Party to expanses of continental shelf outside that area have been found to be unjustified." *(Ibid.)*
>
> "The limits within which the Court, in order to preserve the rights of third States, will confine its decision in the present case, may thus be defined in terms of the claims of Italy." (Para. 22.)
>
> "[T]he Court . . . will confine itself to areas where no claims by a third State exist." *(Ibid.)*

Accordingly, the limits of the "area" are defined by the meridian 15° 10′ E, "which has been found by the Court to define the limits of the area in which the Judgment can operate" (para. 68), simply corresponding to the western limit of the Italian claim in the Ionian Sea.

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10. In stating the task of the Court in paragraphs 20-23, the present Judgment makes use of such expressions as "claims by Italy", "interest of Italy" or the like at least 11 times and the expression "claims of a third State", or the like, about 10 times. For the simple reason that "it has not been suggested by either of the Parties that [the Italian claims] are obviously unreasonable" (para. 23), the Court confines its task to a very

narrowly limited "area". It is astonishing that the Judgment, speaking of the claims of Italy in the region outside the "area", does not make a single reference to the corresponding Maltese claim in the same region. For that and other reasons I regret that the Court rejected Italy's application for permission to intervene. In the Court's view, as stated by the Judgment of 21 March 1984, the rights claimed by a third State would be safeguarded by Article 59 of the Statute (*I.C.J. Reports 1984,* p. 26, para. 42), whereas I expressed my view that

> "Article 59 of the Statute may not be accepted as guaranteeing that a decision of the Court in a case regarding the title *erga omnes* will not affect a claim by a third State to the same title." (*Ibid.,* p. 109, para. 37.)

The Judgment thus proceeds as it might have done had the intervention of Italy been admitted and its claim approved, i.e., by defining the area of decision in terms of the claims of Italy.

11. I hold the view that, with reference to the "area", the Judgment is mistaken in confining its overview of its task to a narrow area, merely in order not to risk interfering with a third State's claim. By so doing, the Court loses sight of the scope of the dispute between the two original Parties, thus falling short of that full exercise of jurisdiction which they are entitled to expect. I have repeatedly pointed out that I disagree with the previous Judgments rendered by the Court in which the whole argument hinged on the definability of the "relevant areas" : I refer to my separate opinion in the Judgment on the application by Malta for Permission to Intervene in the *Tunisia/Libya* case (*I.C.J. Reports 1981,* pp. 33-34, paras. 21-23), and my dissenting opinions appended to the 1982 Judgment in that same case (*I.C.J. Reports 1982,* pp. 249-251, paras. 147-148) and the proceedings on the Application by Italy for Permission to Intervene in the present case (*I.C.J. Reports 1984,* pp. 109-110, paras. 38-39). May I be allowed to quote my concluding words in my dissenting opinion in the *Tunisia/Libya* case :

> "I would like before concluding to stress one very important advantage of the equidistance method . . . It lies in the fact that its inherent property of equity remains constant whatever the 'area relevant to the delimitation', so that the imperious necessity of defining that area is removed – and with it the need to resort to the arbitrary and artificial use of parallels and meridians." (*I.C.J. Reports 1982,* p. 273, para. 188.)

12. The concept of the "area" is also pressed into service in a different context, namely that of calculating proportionality between the lengths of coastline and the area to be divided. This problem will be dealt with in the next section.

3. *Misapplication of the Proportionality Test*

13. The proportionality test plays a significant role concerning the suggested delimitation line. According to the Judgment, the role of proportionality "is to be employed solely as a verification of the equitableness of the result arrived at by other means" (para. 66). The Court is of the view that –

> "[s]uch a test [of proportionality] would be meaningless in the absence of a precise definition of the 'relevant coasts' and the 'relevant area' " (para. 67).

The Judgment also states :

> "[T]here is no reason of principle why the test of proportionality, more or less in the form . . . [of] the identification of 'relevant coasts', the identification of 'relevant areas' of continental shelf, the calculation of the mathematical ratios of the lengths of the coasts and the areas of shelf attributed, and finally the comparison of such ratios, should not be employed to verify the equity of a delimitation." (Para. 74.)

14. However, if the Court abandons in this case the exercise of determining "relevant areas" and "relevant coasts" for the test of proportionality, this is due to two alleged practical difficulties : first, because of "the geographical context . . . [being] such that the identification of the relevant coasts and the relevant areas is so much at large that virtually any variant could be chosen" ; secondly, because of "the existence of claims of third States" by which "the area to which the Judgment will in fact apply is limited" *(ibid.)*. In connection with the latter point, the Court is aware of "the dangers of reliance upon a calculation in which a principal component has already been determined at the outset of the decision" *(ibid.)* because "[t]o apply the proportionality test simply to the areas within [the] limits [determined by claims of third States] would be unrealistic" *(ibid.)*. Yet on the other hand the Judgment further notes two serious difficulties which would be involved by the application of "proportionality calculations to any wider area". Thus it appears totally to abandon the making, for the sake of proportionality, of any calculation on the basis of relevant areas and relevant coastlines, in spite of its previous contention, as quoted above, that "[s]uch a test [of proportionality] would be meaningless in the absence of a precise definition of the 'relevant coast' and the 'relevant area' " (para. 67). What the Judgment finally states, at the most, in connection with the test of proportionality, is –

> "[I]f the Court turns its attention to the extent of the areas of shelf lying on each side of the line, it is possible for it to make a broad assessment of the equitableness of the result, without seeking to define the equities in arithmetical terms. The conclusion to which the Court comes in this respect is that there is certainly no evident disproportion in the areas of shelf attributed to each of the Parties respectively such

that it could be said that the requirements of the test of proportionality as an aspect of equity were not satisfied." (Para. 75.)

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15. I can hardly believe that, without defining the relevant area and the relevant coasts, and thus without indicating any basic figures for comparison of proportionality, the Court can – on its own terms – successfully verify the equitable result to be derived from the suggested delimitation line. The impression is given that the Court, becoming aware of its difficulty in defining the relevant area and the relevant coast, abandoned all reference to the figures which were to be a basis for the proportionality test. Is it not a paradox for the Judgment to suggest the necessity of defining the relevant area and relevant coastlines for the verification of equity as a result of the division of the area, and then to abandon this task on the ground that such an exercise would be impossible ? In applying the test of proportionality between the expanse of the allotted sea-bed areas and the length of coastlines, it is certainly essential to define in advance all the areas to be delimited and coastlines to be measured. Yet for this purpose both – areas and coastlines – ought to be exhaustive for both Parties as well as exclusive of the interests of any third party. A definition of that area which excludes any of the expanses to which one or other Party may potentially lay reasonable claim will involve a failure to exercise jurisdiction and result in distortion. Indeed this is particularly so where the calculations of proportions are involved, for who is to say what the ratio might have been if all such areas were taken into account ? Such a definition thus becomes arbitrary and meaningless. The simple mathematical fact should not be overlooked that the outcome of a *partial* test of proportionality, i.e., one leaving out of account some areas to which the States concerned may be entitled in the immediate vicinity, cannot give any sound indication of the eventual equity of the resultant situation : a fact which the Judgment, in effect, acknowledges (para. 74). But the Judgment should in my view have gone on to recognize that, however equitable a solution may look in the present, deliberately restricted context, there is no guarantee that it will continue to look equitable once the further delimitations are effected, eventually establishing the total shelf areas of both the Parties to the present case. Meanwhile, the Court may have failed to help set the scene in the best way possible. After all, what will matter in the long run, from the viewpoint of international justice, is whether all States in the area receive their entitlement in terms of applicable law.

16. The Judgment took the figures of 24 miles' length and 192 miles' length, representing respectively "the coast of Malta from Ras il-Wardija to Delimara Point, following straight baselines but excluding the islet of Filfla", and "[t]he coast of Libya from Ras Ajdir to Ras Zarruq, measured following its general direction", as a basis in order "to justify the adjustment of the median line so as to attribute a larger shelf area to Libya"

(para. 68). As proportionality cannot be spoken of without figures for the area and the coastlines, I should mention that the relationship between the areas on each side – Maltese and Libyan – of the delimitation line which the Judgment now suggests, appertaining respectively to Malta and Libya within the area delimited by two side-lines connecting the points on each coast as referred to above, is, I am told, 1 to 3.8 if account is taken of the coastline the Judgment mentions as a basis for calculating "a considerable disparity between their lengths". With my reservations concerning the area as indicated above, however, I would suggest a hypothetical trapezium in which the ratio of the upperside to the base is 1 to 8, with the length of each lateral side being the same as the length of the base and the upperside facing the centre of the base (this is analogous to the presumption in the Judgment). Here the genuine equidistance line (which will be curved and not a straight parallel to the base) will produce an area divided in the ratio of 1 to 2.3 or slightly higher. If the base of this trapezium is further extended to one side so that the total length of the base is 24 times greater than the upperside (this is analogous to the situation in which the coastline of Libya from Ras Ajdir to Ras el-Hilal is counted), the genuine equidistance line will produce a division of the area in the ratio of 1 to approximately 4. In addition, turning from a hypothetical trapezium to the actual case, if the huge pocket hidden behind the notional straight line as a base for the Libyan coast is counted, that is, the Gulf of Sirt, the difference in ratio will be enormous.

17. Whether or not any one of these ratios – 1 to 3.8 (as a result of the division of the area by the delimitation line proposed by the Court) or 1 to 2.3 or 1 to 4 (as a consequence of the equidistance line in my hypothetical trapezium) – appears more or less equitable is a moot point. The Judgment, however, did not attempt to prove how the application of the equidistance method leading to such ratios would give an inequitable result. In this respect I must point out that the very concept of the median line in the case of opposite States implies a proportional ratio for the division of the area, instead of necessarily guaranteeing equality. It is for those who find this fact inconvenient to indicate what degree of coast-length disparity should trigger an adjustment, and why.

18. In final analysis, the Judgment seems to make a grave error in applying the concept of proportionality used in the 1969 Judgment of the Court to this present case. This concept was used by that Judgment for the verification of geographical equity in areas where the surrounding States faced an established median line and a central point in the oval of the North Sea. In other words, what the Court intended to say in 1969 was that in such specific circumstances, in which the States concerned were located as adjacent States in similar situations, but where the existence of a marked concave or convex coastline produced a somewhat distorting effect, the proportion of the length of the coast as rectified by its general direction – or, if I may call it, as I did in my argument in 1968, its "coastal façade" –

was in principle useful in the verification of geographical equity (see para. 69 below). The 1969 Judgment nowhere implied the possibility of generally applying the concept of proportionality in other cases, particularly in cases of delimitation between opposite States. The area in the Central Mediterranean Sea falling within the 200-mile distance from the coast, not only of the two Parties but also of some other countries, is so extensive that Libya and Malta both face wide areas in which the interests of those third States may also be involved. This is certainly not a case like the *North Sea Continental Shelf* cases, in which a predetermined area has to be divided between or among the Parties to the exclusion of others and without relevance to those parts outside the area in question. Misapplication of the test of proportionality is also to be seen in the 1982 and 1984 Judgments, as I shall explain in Chapter III.

4. Maladjustment of "Equidistance" Line

19. The Court attempts first to "make a provisional delimitation by using a criterion and a method both of which are clearly destined to play an important role in producing the final result" (para. 60),

> "[and] then examine[s] this provisional solution in the light of the requirements derived from other criteria, which may call for a correction of this initial result" *(ibid.).*

A median line between Libya and Malta is first drawn which is "only provisional" (para. 63). The Judgment states that :

> "to achieve [an equitable result] the result to which the distance criteria leads must be examined in the context of applying equitable principles to the relevant circumstances" *(ibid.).*

After excluding the island of Filfla in the calculation of the provisional median line between Malta and Libya, the Judgment considers "whether other considerations, including the factor of proportionality, should lead to an adjustment of that line being made" (para. 64). To take another expression from the Judgment, the Court, after "establishing ... the median line as the provisional delimitation line" (para. 65), "reflect[ed] [a weight in the assessment of the equities of the case] in an adjustment of the equidistance line" *(ibid.)*, or took "a median line (ignoring Filfla as a basepoint), as the first step of the delimitation" and then "transpos[ed] the median line northwards" (para. 73). Again quoting the Judgment, "[h]aving drawn the initial median line, the Court has found that that line requires to be adjusted" (para. 78).

20. The initial equidistance line is adjusted, according to the Judgment, to achieve "an equitable result" (para. 63), or to reflect "a weight in the assessment of the equities of the case" (para. 65). For this purpose the Judgment attempts to examine *all* the relevant circumstances,

namely – "the very marked difference in the lengths of the relevant coasts of the Parties, and the element of the considerable distance between those coasts" (para. 66). In the course of the delimitation process "the existence of a very marked difference in coastal lengths" is taken note of and "the appropriate significance [is attributed] to that coastal relationship", although the Judgment does not seek to define the existence of that difference "in quantitative terms which are only suited to the *ex post* assessment of relationships of coast and area" *(ibid.)*. Yet the Judgment, after thus measuring the Maltese coast as 24 miles long and the relevant Libyan coast as 192 miles long, finds that "this difference is so great as to justify the adjustment of the median line so as to attribute a larger shelf area to Libya" (para. 68). Apparently for this reason the Court –

> "finds it necessary, in order to ensure the achievement of an equitable solution, that the delimitation line . . . be adjusted so as to lie closer to the coast of Malta" (para. 71).

21. The Court finds it appropriate first "to establish what might be the extreme limit of such a shift" (para. 72). The Judgment, which had previously been much too restrictive in its view of the area the Court was entitled to consider, saw fit to identify the delimitation of the continental shelf between Libya and the island State of Malta, seen in the "general geographical context" (para. 69), as "a delimitation between a portion of the southern littoral and a portion of the northern littoral of the Central Mediterranean" *(ibid.)*. It treated the Maltese islands "as a minor feature of the northern seaboard of the region in question, located substantially to the south of the general direction of that seaboard" *(ibid.)*. Thus the Judgment took "a notional median line between Libya and Sicily" (para. 72) as the extreme limit of such a shift.

22. The Judgment argues :

> "Within the area with which the Court is concerned, the coasts of the Parties are opposite to each other, and the equidistance line between them lies *broadly* west to east, *so that* its adjustment can be satisfactorily and simply achieved by transposing it in an *exactly* northward direction." (Para. 71 ; emphasis added.)

The Judgment suggests, as a reference line, the 15° 10′ E meridian which, corresponding as it does to the Italian claim, is reputed to constitute the eastern limit of the "relevant area", and then undertakes to shift the delimitation line in terms of its intersection with this reference line. The median line between Malta and Libya intersects the 15° 10′ E meridian at about 34° 12′ N, and the notional median line between Libya and Sicily intersects it at about 34° 36′ N, so the Court suggests that "[a] transposition northwards through 24′ of latitude of the Malta-Libya median line would therefore be the extreme limit of such northward adjustment" (para. 72). Within this margin of 24′ on the 15° 10′ meridian, account is taken of the following relevant circumstances :

> "these are first, the general geographical context in which the islands

> of Malta appear as a relatively small feature in a semi-enclosed sea ; and secondly, the great disparity in the length of the relevant coasts of the two Parties" (para. 73).

These circumstances are alleged to "indicate that some northward shift of the boundary line is needed in order to produce an equitable result" *(ibid.)*.

23. Despite recognizing that the process it applies is not one "that can infallibly be reduced to a formula expressed in actual figures" *(ibid.)*, the Court concludes that "a boundary line that represents a shift of around three-quarters of the distance . . . achieves an equitable result in all the circumstances" *(ibid.)*. Thus a northward shift of 18′ on the 15° 10′ E meridian as a reference line is suggested, resulting in a delimitation line intersecting the reference line at 34° 30′ N. By a mere coincidence – a fact which the Judgment does not mention – this point is the same as the southwestern corner of the Italian claim in the Ionian Sea.

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24. The mere coincidence that the intersection point of the delimitation line and the reference line happens to have the same location as the southwestern limit of the Italian claim in the Ionian Sea is a surprising geographical fact. But, this apart, shifting the intersection point of the delimitation line on the meridian 15° 10′ E is geographically mistaken. If the delimitation line is shifted along the reference line on the meridian 15° 10′ E, it will make no sense in terms of either equidistance or proportional distance from Malta and Libya. Certainly the particular point, 34° 12′ N, on the reference line is an equidistant point between Libya and Malta, but it is equidistant only in relation to Delimara Point on the Maltese side and Cape of Homs on the Libyan coast. If the equidistance line is to be shifted to change the ratio, this shifting should properly be carried out on the line directly connecting two salient points on each coast, but not on the chosen reference line, which is essentially irrelevant to the geographical situation between the two coasts. In the margin on the reference line between 34° 12′ N, as a pure and simple equidistance between Libya and Malta, and 34° 36′ N, as a point of notional equidistance between Italy and Libya, there is a difference of 24′, that is, 24 miles on the reference line – but on this line only ; consequently, it is erroneous to suppose that the choice of the reference line was a matter of indifference. The Court suggests a point of 34° 30′ N, thus shifting the delimitation line by 18′, that is, 18 miles, on the reference line. It will certainly be possible to move the delimitation by 18′, or 18 miles, on all meridians. Yet this does not mean that the line has been shifted by three-quarters the width of the margin (that is, 18′ in 24), since the distance between the intercontinental median line and the pure and simple median line between Malta and Libya varies according to each meridian, so that the distance at each meridian is not always 24 miles. Moreover, the true distance contained within the

margin, i.e., the shortest distance, which except on the reference line itself is not to be found in a north-south direction, will also vary from place to place.

25. At any rate, there is no convincing ground whatsoever for shifting the delimitation line along a meridian which in essence bears no geographical relation to Libya and Malta, because the reference line has nothing to do with the distance between the Maltese and Libyan coasts and is dictated merely by a third party claim. In my view, the Judgment shows little grasp of the geography, and the conventional lattice of north-south/east-west cartography is not relevant to the division of the area between border States. Latitude and longitude, though important for *locating* a fixed point on the atlas, cannot be the determining factor in dividing the area between two States. The suggestion made by the Judgment for the delimitation line is based simply on the illusion created by the traditional north-south/east-west view of the atlas, and thus ultimately on the plane of the earth's rotation, a factor which has yet to receive conscious recognition in international law. A similar situation was also created by the Judgment in the *Tunisia/Libya* case (see para. 72 below).

26. The Judgment states that the suggested line "that represents a shift of around three-quarters of the distance between the two outer parameters . . . achieves an equitable result in all the circumstances" (para. 73) and that the location of a line is determined "which would ensure an equitable result between [the Parties]" (para. 78). Very little is revealed about the reasoning on the basis of which the Court finds the line "equitable". The Judgment admittedly states that the initial median line is adjusted "in view of the relevant circumstances of the area" *(ibid.)*. Yet "the considerable disparity between the lengths of the coasts of the Parties" and "the distance between those coasts" are hardly relevant to the point of being circumstances justifying an "adjustment". It must be concluded that the Judgment in fact employs "proportionality" not for the purpose of verification of the equitable result, but as a criterion for drawing the delimitation line. The Judgment itself states :

> "If the coast of Malta and the coast of Libya from Ras Ajdir to Ras Zarruq are compared, it is evident that there is a considerable disparity between their lengths, to a degree which, in the view of the Court, constitutes a relevant circumstance which should be reflected in the drawing of the delimitation line." (Para. 68.)

27. Let me now turn to an even more important point in connection with the northward adjustment of the initial median line. The Judgment suggests that this line should be "adjusted" or "transposed". In drawing the line between Malta and Libya, the Court did not give full effect to the existence of *Malta itself* ; thus the line drawn cannot in *any* sense be a median line or equidistance line between the Parties. The technique of the

present Judgment involves taking the entire territory of one Party as a special circumstance affecting a delimitation which the Court has no call to make and which excludes that very Party ! Indeed, if Malta is to be given partial effect, there is theoretically no need to consider the Malta/Libya median line at all : it becomes a mere convenience enabling the notional intercontinental Sicily/Libya median line to be more easily adjusted. The Judgment cannot be regarded as *adjusting* or *transposing* the Malta/Libya equidistance line, but simply as giving it short shrift. It must be pointed out that this line, once *adjusted/transposed,* is deprived of all the properties inherent in the concept of equidistance. The suggested line is simply a substitute for or a replacement of the median line, but cannot be an "adjustment" of the median line between Malta and Libya. If there is any median line to which the "adjusted" line bears some resemblance, it is – possibly – a median line between Sicily and Libya, but certainly not one between Libya and Malta.

28. The present Judgment appears to me to misunderstand the implications of the "half-effect" theory used in the 1977 Decision of the Anglo-French Arbitration. In that Decision partial effect was allowed to a *tiny part* of one party's territory, viewed as a special circumstance relevant to both parties for the purpose of drawing an equidistance line. Obviously, in that Arbitration, after a genuine equidistance line had been drawn, a suggestion was made for a correction of the United Kingdom baseline lest the somewhat isolated location of the small dependent islands of Scilly should greatly and unreasonably affect the delimitation of the whole area. This was quite different from the present case, where partial effect is given to the country itself for which a delimitation was to be drawn (see para. 45 below).

5. Regarding Geography

29. The Judgment appears to lack a proper understanding of geography, particularly in connection with the concept of the oppositeness of coasts and the method of equidistance. In my understanding, the opposite coast means, as a concept of geography, the coast which is directly facing. In the Central Mediterranean, in relation to Malta and Libya, the opposite coast means the entire southeast coast of the islands of Malta, and Ras Ajdir to Ras el-Hilal in Libya. There is no ground for the Judgment to take the point of 15° 10′ E or Ras Zarruq for the eastern limit of the coast of Libya as the opposite coast of Malta from the geographical point of view. This does *not* mean that the coast of Libya as far as Ras el-Hilal is opposite *only* to Malta, for it is certainly opposite also to Italy and other States. The error of the Judgment exists in regarding the relation of opposite coasts only in terms of the two Parties to the exclusion of all other States.

30. Secondly, the Court seems to misunderstand from the outset the

practical application of the method of equidistance. A median line is not simply a compromise between opposing configurations, nor the average of the lines that can be drawn parallel to the opposing coasts or to the straight baselines. Determinant in drawing an equidistance line are salient points or convexities on the coastline, which are *geometrically determined,* not artificially picked up, as the drawing of the delimitation line progresses. If geography is respected, the ascertainment of objective "equidistance" by means of the geographical or geometrical method of plotting equidistance will be quite independent of the subjectively defined "relevant coasts". Reference should have been made to Shalowitz's *Shore and Sea Boundaries,* Volume I (1962), particularly at pages 232-235, and to Hodgson and Cooper, "The Technical Delimitation of a Modern Equidistance Boundary", *Ocean Development and International Law,* Volume 3, No. 4, 1976, pages 361 ff.

CHAPTER II. REAPPRAISAL OF THE "EQUIDISTANCE/SPECIAL-CIRCUMSTANCES" RULE

1. Introduction : Failure of UNCLOS III in 1982 to Indicate Positive Rules for the Delimitation of the Continental Shelf

31. The 1982 United Nations Convention on the Law of the Sea is not yet a binding instrument, since 46 more ratifications have to be secured before it comes into force. Yet, in seeking to ascertain the principles and rules of the law of the sea today, it is unthinkable to overlook all the efforts deployed in the great workshop of UNCLOS III, involving an unprecedented number of personnel from all nations of the world over a uniquely protracted period of gestation (since 1967, when the *ad hoc* United Nations Sea-bed Committee was first set up), and culminating in a most comprehensive text of 320 articles. I am second to none in appreciating the magnificent achievements of the Conference. However, I cannot persuade myself that the Convention, in its relevant provision, is so drafted as to suggest any positive rule specific to the delimitation of the continental shelf. The Convention reads as follows :

"Article 83

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

32. This text may be analysed in the following ways. First, the Convention provides that "[t]he delimitation of the continental shelf . . . shall be effected by agreement". This simply represents the procedural aspect of the problem and implies that any unilateral claim to delimit the continental shelf would not be regarded as valid under international law. Its effect is thus merely to confirm that a general rule for the conduct of inter-State relations is applicable to the subject of delimitation. It in no way indicates a specific course of action. The ostensible solution that, since there is no obligatory rule applicable in all cases, the delimitation is to be effected by agreement is no solution at all. The rule calling for delimitation by agreement thus remains simply a rule concerning procedure and cannot constitute a rule indicating a method of delimitation.

33. This procedural rule is *however* qualified by the addition of two parameters, namely, "on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice" and the teleological rider : "in order to achieve an equitable solution". However, the simple invocation of "the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice" does not furnish any practical assistance towards a solution, in the absence of any more specific designation of which rules from the entire panoply of customary, general, positive and conventional law are of particular significance. Similarly, the prescription of an equitable solution as the goal offers not the slightest clue as to what constitutes an equitable solution in the case of shelf delimitation, and no method for reaching such an equitable solution is specified. What is more, given the contractual freedom of States, each party to an agreement must be deemed to regard it as equitable, or at the very least to have waived the right to seek to undo it on grounds of inequity. Hence the reference to equity in Article 83, paragraph 1, while seeming to convey a norm of a legal nature, is, as a legal prescription, otiose : at most it can be held to prescribe the frame of mind in which the negotiators should approach their task.

2. The "Equidistance/Special-Circumstances" Rule for the Delimitation of a Single Continental Shelf Homogeneous in Terms of the 200-Metre Depth Criterion

(i) *The Rule in the Geneva Convention on the Continental Shelf*

34. The failure of UNCLOS III to suggest any rules concerning the delimitation of the continental shelf does not mean that such rules had not existed thitherto. On the contrary, delimitation of the continental shelf had already been provided for, nearly a quarter of a century before, through an article in the Geneva Convention on the Continental Shelf. The relevant provisions of the 1958 Convention read :

"*Article 6*

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

2. Where the same continental shelf is adjacent to the territories of two adjacent States, the boundary of the continental shelf shall be determined by agreement between them. In the absence of agreement, and *unless another boundary line is justified by special circumstances, the boundary shall be determined by application of the principle of equidistance* from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured." (Emphasis added.)

35. The year of 1958 was too early to ascertain the principles and rules of customary international law on certain aspects of the continental shelf, the régime of which had only emerged during the post-war period. Yet the equidistance rule for the delimitation of the continental shelf had already been suggested in the 1953 draft of the International Law Commission and was taken over in the Commission's final draft in 1956. During UNCLOS I in 1958 the Netherlands-United Kingdom joint proposal, which was practically identical to the Commission's draft – with certain additional provisions which are irrelevant in the present context – was put to a vote. The United Kingdom, as a sponsoring country, explained the reasoning behind the proposal, as follows :

"[T]he median line would always provide the basis for delimitation. If both the States involved were satisfied with the boundary provided by the median line, no further negotiation would be necessary ; if a divergence from the median line appeared to be indicated by special circumstances, another boundary could be established by negotiation, but the median line would still serve as the starting point." (UNCLOS I, *Official Records,* Vol. VI, p. 92.) (*I.C.J. Reports 1982,* pp. 187-188, para. 52.)

The proposal was adopted by 36 votes to none with 19 abstentions, in the Fourth Committee, and then finally approved by 63 votes to none, with only two abstentions, in the plenary. The facts that in 1958 UNCLOS I (attended by most of the then-existing independent States) adopted this text, based upon the draft which the International Law Commission had been preparing ever since 1951, that the provision has continued in being

as a conventional rule since 1964 (when the 1958 Convention came into force), and is valid for 53 nations today, should not have been ignored in our considerations.

36. In providing that "the boundary of the continental shelf . . . shall be determined by agreement" the 1958 Convention, of course, already laid emphasis on the importance of agreement between the States concerned. Yet, unlike the 1982 Convention, the 1958 Convention did indicate the positive rules for the delimitation of the continental shelf. In my view, this point has generally been misunderstood. The implicit intention of Article 6 was, I believe, most probably to the following effect : whether in the case of agreement or impartial third-party determination, the principles and rules of international law to be applied should be that, unless another boundary line is justified by special circumstances, the boundary in the case of opposite States should be the median line and in the case of adjacent States should be determined by application of the equidistance principle. In other words, the Convention may be interpreted to mean that it suggested the "equidistance/special-circumstances" method as a normal basis of agreement as well as of third-party determination.

(ii) *The 1969 Judgment of the Court in the* North Sea Continental Shelf *cases*

37. In the *North Sea Continental Shelf* cases the Court did admit the value of the "equidistance/special-circumstances" rule not, it is true, as a rule of customary international law but only as a conventional rule. It stated that –

> "the [1958] Convention did not embody or crystallize any pre-existing or emergent rule of customary law, according to which the delimitation of continental shelf areas between adjacent States must, unless the Parties otherwise agree, be carried out on an equidistance/special circumstances basis. A rule was of course embodied in Article 6 of the Convention, but as a purely conventional rule." (*I.C.J. Reports 1969*, p. 41, para. 69.)

I find it very important to realize (as the Anglo-French Court of Arbitration did in 1977) that the Court in 1969 did not deny this rule but, on the contrary, appreciated its great value. It would seem that there are certain misunderstandings in this respect regarding the 1969 Judgment of the Court. In the course of the proceedings in that case, even the Federal Republic of Germany, which was strongly opposed to the strict application of equidistance in those cases, had taken the view that if the rigid application of equidistance were to be avoided, and the basis of measuring equidistance in certain cases were to be modified, such a rule was not objectionable. And in the outcome, the Court itself acknowledged that

there were some advantages in the equidistance method. Thus the intrinsic merit of an equidistance line was not as such rejected in the 1969 Judgment.

38. If the equidistance method was not accepted by the 1969 Judgment, this was apparently not because the equidistance method was *per se* inapplicable, but for the reasons implied in the Judgment (para. 89) : namely, that there existed convergent claims of several States and certain irregularities such as a concave or convex coastline in the North Sea area, and that the Court thought that simply employing the equidistance method would produce an unreasonable result. If the baselines had been adjusted to rectify the irregularity of the coastlines, the Court would surely have hesitated to refuse merit to the equidistance method. In spite of the voting of 11 to 6 in the Judgment, there did not seem to be a wide difference between the Court's Judgment and the dissenting opinions of several judges in their estimation of equidistance. What was important was the Court's evaluation of the special circumstances which would allow departure from the *strict* application of equidistance. It is true that the Court failed to specify equidistance as a rule, but in reality the factors to be taken into account in the course of negotiations, suggested in the operative part of the Judgment, constituted nothing but the factors which would make an exception from the equidistance rule possible. In particular, the factors mentioned under (1), "the general configuration of the coasts of the Parties as well as the presence of any special or unusual features", and (3), "the element of a reasonable degree of proportionality . . . between the extent of the continental shelf areas appertaining to the coastal State and the length of its coast measured in the general direction of the coastline", were exactly what the Federal Republic of Germany was suggesting in arguing that the *macrogeography* of the coast should be taken into account in applying the equidistance method (*I.C.J. Pleadings, North Sea Continental Shelf,* Vol. II, p. 195).

(iii) *The 1977 Decision in the Anglo-French Arbitration*

39. A dispute between the United Kingdom and France on the delimitation of the continental shelf between them in the English Channel and the area stretching towards the Atlantic Ocean was presented to an *ad hoc* Court of Arbitration, which delivered a unanimous decision on 30 June 1977. The Decision in this case is an example of how the "equidistance/special-circumstances" rule can be properly interpreted and applied. Both the United Kingdom and France being parties to the 1958 Convention, the significance of the reservation made by France at the time of its adhesion to the Convention and the objections to it by the United Kingdom were issues upon which the Court gave judgment. The Court of Arbitration was of the view that –

> "the effect of applying or not applying the provisions of the Convention, and in particular of Article 6, will make not much practical

difference, if any, to the actual course of the boundary in the arbitration area (Cmnd. 7438, para. 65)",

and that –

"the provisions of Article 6 do not define the condition for the application of the equidistance-special circumstances rule ; moreover, the equidistance-special circumstances rule and the rules of customary law have the same object – the delimitation of the boundary in accordance with equitable principles. In the view of this Court, therefore, the rules of customary law are a relevant and even essential means both for interpreting and completing the provisions of Article 6." (*Ibid.*, para. 75.)

While these issues are not directly relevant to the present consideration, it may suffice here to look at how the "equidistance/special-circumstances" rule was interpreted in this 1977 Decision.

40. The Decision properly interpreted the rule suggested in the 1958 Convention as follows :

"Article 6 . . . does not formulate the equidistance principle and 'special circumstances' as two separate rules. The rule there stated in each of the two cases is a single one, a combined equidistance-special circumstances rule" (*ibid.*, para. 68)

and that –

"[T]he combined character of the equidistance-special circumstances rule means that the obligation to apply the equidistance principle is always one qualified by the condition 'unless another boundary line is justified by special circumstances' . . . In short, the rôle of the 'special circumstances' condition in Article 6 is to ensure an equitable delimitation ; and the combined 'equidistance-special circumstances rule', in effect, gives particular expression to a general norm that, failing agreement, the boundary between States abutting on the same continental shelf is to be determined on equitable principles . . . [E]ven under Article 6 the question whether the use of the equidistance principle or some other method is appropriate for achieving an equitable delimitation is very much a matter of appreciation in the light of the geographical and other circumstances. In other words, even under Article 6 it is the geographical and other circumstances of any given case which indicate and justify the use of the equidistance method as the means of achieving an equitable solution rather than the inherent quality of the method as a legal norm or delimitation." (*Ibid.*, para. 70.)

41. The Decision also gave a proper evaluation of the Court's Judgment of 1969 in the *North Sea Continental Shelf* cases :

> "[The International Court of Justice] there made certain observations, which were of an entirely general character, regarding the differing validity of the equidistance principle as a means of achieving an equitable delimitation in different geographical situations. These observations, to which the present Court of Arbitration in general subscribes, indicate that the validity of the equidistance method, or of any other method, as a means of achieving an equitable delimitation of the continental shelf is always relative to the particular geographical situation. In short, whether under customary law or Article 6, it is never a question either of complete or of no freedom of choice as to method ; for the appropriateness – the equitable character – of the method is always a function of the particular geographical situation. (*Ibid.,* para. 84.)
>
> "As to the Court's observations on the rôle of the equidistance principle, it was far from discounting the value of the equidistance method of delimitation, while declining to regard it as obligatory under customary law. 'It has never been doubted', the Court commented, 'that the equidistance method is a very convenient one, the use of which is indicated in a considerable number of cases' (*I.C.J. Reports 1969,* para. 22) ; and again it commented 'it would probably be true to say that no other method of delimitation has the same combination of practical convenience and certainty of application' (*ibid.,* para. 23)." (*Ibid.,* para. 85.)

42. In drawing the line of delimitation between the United Kingdom and France throughout the English Channel where the coasts of the parties are opposite each other, both parties had agreed that the boundary should *in principle* be the median line and the Court of Arbitration saw –

> "no reason to differ from the conclusion of the Parties that, in principle, the method applicable in the English Channel is to draw a median line equidistant from their respective coasts, a conclusion which is in accordance both with Article 6 of the Convention and with the appreciation by the International Court of Justice of the position in customary law" (*ibid.,* para. 87).

43. In fact, east of the Channel Islands the parties had agreed on a "simplified" line based on the median line, as indicated by the line from Point A to Point D on the map attached to the Decision. West of the Channel Islands a similar agreement had been reached on a "simplified" line based on the median line, except that, in the portion between Points F and G, the use of the Eddystone Rock as a basis for measuring the distance remained an issue ; the Court of Arbitration eventually took account of that rock in drawing the median line. Even in the region where the Channel

Islands might have some effect, in other words in the segment between Points D and E, both parties remained –

> "agreed that the geographical and legal framework for determining the boundary is one of States the coasts of which are opposite each other ; and that, in consequence, the boundary should, in principle, be the median line. They are, however, in sharp disagreement as to the rôle which should be allowed to the coasts of the Channel Islands as coasts of the United Kingdom 'opposite' to those of France." (Cmnd. 7438, para. 146.)

The Court of Arbitration considered that the situation demanded a two-fold solution. First, the Court decided that the primary boundary between them should be a median line, linking Point D of the agreed eastern segment to Point E of the western agreed segment. The second part of the solution suggested by the Court of Arbitration was to leave the 12-mile distance area to the Channel Islands, except where the territorial seas of the two parties were to be delimited. In short, throughout the region of the English Channel the equidistance line was in principle maintained except where the Eddystone Rock was taken into account, and the Channel Islands were disregarded in measuring the equidistance.

44. In the Atlantic region, on the other hand, where the parties were in radical disagreement, the line was to be drawn not in the area between the two parties but in areas of the open sea where their coasts were no longer opposite. In this respect, the Court of Arbitration properly interpreted the comprehensive character of Article 6 of the 1958 Convention and stated :

> "The general character of the provisions of Article 6, and the absence of any contrary indications in the *travaux préparatoires* of the Article or in State practice, appear to the Court to support the view that the Article is to be understood as dealing comprehensively with the delimitation of the continental shelf, and that all situations, in principle, fall under either paragraph 1 or paragraph 2 of the Article." (*Ibid.,* para. 94.)
>
> "The rules of delimitation prescribed in paragraph 1 and paragraph 2 are the same, and it is the actual geographical relation of the coasts of the two States which determine their application. What is important is that, in appreciating the appropriateness of the equidistance method as a means of effecting a 'just' or 'equitable' delimitation in the Atlantic region, the Court must have regard both to the lateral relation of the two coasts as they abut upon the continental shelf of the region and to the great distance seawards that this shelf extends from those coasts." (*Ibid.,* para. 242.)

The Court of Arbitration then properly indicated the case of the lateral boundary referred to, as follows :

> "Whereas in the case of 'opposite' States a median line will normally effect a broadly equitable delimitation, a lateral equidistance line extending outwards from the coasts of adjacent States for long distances may not infrequently result in an inequitable delimitation by reason of the distorting effect of individual geographical features. In short, it is the combined effect of the side-by-side relationship of the two States and the prolongation of the lateral boundary for great distances to seawards which may be productive of inequity and is the essence of the distinction between 'adjacent' and 'opposite' coasts situations." (Cmnd. 7438, para. 95.)

45. Thus in the Atlantic region the Court of Arbitration suggested the median line from Point J to Point L, the latter of which is still equidistant from Ushant (French island) and the Scilly Isles (English islands). From Point L westwards the Court of Arbitration was of the view that –

> "account has to be taken of the distorting influence exercised by the Scilly Isles on the course of the boundary in the Atlantic region if those islands are given full effect in applying the equidistance method. In principle, as the Court had decided, the boundary in the remainder of the Atlantic region is to be determined by the equidistance method but giving only half-effect to the Scillies. Accordingly, the line running from Point K to Point L, at which latter point the Scilly Isles exercise their full effect, is prolonged for no more than a brief distance westwards until at Point M it meets the equidistance line which allows only half-effect to the Scilly Isles. From Point M, . . . the boundary follows the line which bisects the area formed by, on its south side, the equidistance line delimited from Ushant and the Scilly Isles and, on its north side, the equidistance line delimited from Ushant and Land's End, that is, without the Scilly Isles." (*Ibid.*, paras. 253-254.)

In short, therefore, even in the Atlantic region where the lateral boundary was to be drawn, equidistance played a decisive role, any departure from which was justified by the geographical location of both the English islands and the French islands. The issue was simply the geographical circumstances under which the equidistance was to be measured and the rule of equidistance itself was never abandoned.

3. The "Equidistance/Special-Circumstances" Rule in UNCLOS III

46. The process leading to the failure of UNCLOS III to suggest, except for one empty provision, any positive set of rules concerning the delimitation of the continental shelf, should not require any detailed explanation here. It must however be noted that while UNCLOS III failed to suggest

the "equidistance/special-circumstances" rule without producing any alternative rule at its final stage, the possibility of such a rule had been far from neglected. At the Third Session in 1975, the President of UNCLOS III suggested that the Chairmen of the three main committees should each prepare a single negotiating text covering the subjects entrusted to his Committee to take account of all the formal and informal discussions held thus far, though on the understanding that the texts would not prejudice the position of any delegation and would not represent any negotiating text of accepted compromise, and that there would be a basis for negotiation. On the final day of the session the Chairman of the Second Committee (which dealt with the law of the sea in general) prepared the first text in the form of the Informal Single Negotiating Text (ISNT). The relevant provision in this text was not much different from that of the 1958 Convention in the sense that the "equidistance/special-circumstances" rule was retained in a somewhat different form. The text of the ISNT read as follows :

> "The delimitation of the continental shelf between adjacent or opposite States shall be effected by agreement in accordance with equitable principles, employing, where appropriate, the median or equidistance line, and taking account of all the relevant circumstances." (UNCLOS III, *Official Records,* Vol. IV, pp. 162 f.)

The text of the ISNT was taken for inclusion in the Revised Single Negotiating Text (RSNT) in 1976, and eventually became Article 83, paragraph 1, of the Informal Composite Negotiating Text (ICNT) in 1977. It was agreed by the Conference that the ICNT would be informal in character and would have the same status as the ISNT and the RSNT and would therefore serve purely as a procedural device and only provide a basis for negotiation without affecting the right of any delegation to suggest revisions in the search for a consensus.

47. There was a deadlock in UNCLOS III around 1978 on this particular point. As from that time every effort was made to obtain a compromise between the two opposing groups which were divided over the pros and cons of the equidistance line. The compromise text suggested in 1980 by the Chairman of the Seventh Negotiating Group was included in the ICNT/Revision 2, and remained unchanged in the draft convention (Informal Text), that is, the ICNT/Revision 3 of 1980. The text reads :

> "The delimitation of the . . . continental shelf between States with opposite or adjacent coasts shall be effected by agreement in conformity with international law. Such an agreement shall be in accordance

> with equitable principles, employing the median or equidistance line, where appropriate, and taking account of all circumstances prevailing in the areas concerned." (UNCLOS III, *Official Records,* Vol. XIII, pp. 77 f.)

This provision remained part of the text until August 1981. The President of the Conference introduced – just one day before the close of the resumed Tenth Session, which was practically the last substantive session of the Conference – a document entitled "Proposal on Delimitation", in which he suggested a text which later became Article 83 of the 1982 Convention. This previously unknown text had not been discussed at all, but on the next day, 28 August 1981, the very last day of the session, the Chairmen of the two opposing groups expressed their general support of the text and the Collegium decided to incorporate it into the draft of the Convention. In the above-mentioned document the President stated that during his consultations he had :

> "gained the impression that the proposal enjoyed widespread and substantial support in the two most interested groups of delegations, and in the Conference as a whole" (A/CONF.62/SR.154, p. 2).

48. What is clear from a survey of the drafting history of this specific provision is that Article 83 of the 1982 Convention contains a catchall provision that ought to satisfy two schools of thought, and that is indeed its merit. Given, however, the difficulty of deriving any positive meaning from these provisions, it would seem that the satisfaction must be essentially of a negative kind, i.e., pleasure that the opposing school has not been expressly vindicated. Yet, while it is impossible not to admit the very limited nature of the negotiating texts, it cannot be overlooked that the "equidistance/special-circumstances" rule had throughout UNCLOS III been considered as a major premise of the discussions.

4. The "Equidistance/Special-Circumstances" Rule for the Delimitation of a Single Continental Shelf Homogeneous in Terms of the 200-Mile Distance Criterion

49. Thus eventually the "equidistance/special-circumstances" rule, which had been adopted – though as *lex ferenda* – without any objection at UNCLOS I, and which had remained as a basis for negotiation throughout UNCLOS III, was not specifically mentioned as a valid rule in the 1982 Convention. One might say that this was due to a change in the very concept of the continental shelf. It may therefore be pertinent to look into the development of the concept of the continental shelf since 1958.

(i) *New parallelism between the inner continental shelf and the outer continental shelf*

50. (Text of the 1958 Convention and the 1982 Convention.) The suggested outer limit of the continental shelf has greatly fluctuated in the intervening period. The 1958 Convention provides for the definition of the continental shelf as follows :

> "*Article 1.* ... the term 'continental shelf' is used as referring *(a)* to the seabed and subsoil of the submarine areas adjacent to the coast... to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas."

This definition was revised in the ISNT in 1975, the very first draft produced by UNCLOS III, which reads :

> "*Article 62. Definition of the Continental Shelf*
>
> The continental shelf of a coastal State comprises the sea-bed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance."

The provision in the ISNT remained, without any change, as Article 64 in the RSNT in 1976 and Article 76 in the ICNT in 1977. It became Article 76, paragraph 1, of the 1982 Convention without any change. Article 76 of the 1982 Convention, with additional provisions, provides, in part, the following definition :

> "1. The continental shelf of a coastal State comprises the sea-bed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance . . .
>
> . . . .
>
> 3. The continental margin comprises the submerged prolongation of the land mass of the coastal State, and consists of the sea-bed and subsoil of the shelf, the slope and the rise."

51. (Background.) The new definition of the continental shelf, which had not been thought of in 1958, appeared towards the end of the 1960s and the beginning of the 1970s. What then happened in the intervening period ? This was the age when the extraction of petroleum, not only from the continental shelf but also from the continental margin, had become a realistic possibility. Towards the end of the 1960s the major oil companies were in favour of the United States expanding its sea-bed areas far beyond the 200-metre depth of the superjacent waters to the edge of the continental margin, where the possibility of the exploitation – either technical or commercial – of the reservoir of petroleum resources had become realistic. On the other hand, they were also keen to prevent the developing nations from nationalizing or confiscating their invested interests in such expanded areas off the latter's coasts, in which they might once have been granted concessions. The United States introduced in 1970 in the United Nations Sea-bed Committee a draft convention (A/AC.138/25) proposing an *international sea-bed area* which would lie beyond the continental shelf as defined in terms of the 200-metre isobath, in which it suggested the institution of an *international trusteeship area* to comprise the continental margin beyond the continental shelf where each coastal State would be responsible for licensing, supervision and exercise of jurisdiction and where it would also be entitled to a portion of the royalties or profits derived from the exploitation of the resources. The real intention of the United States seems to have been for the continental margin, though given the status of an international sea-bed area, to be placed under the control of the coastal State, while nevertheless featuring international protection of the relevant investments from any arbitrary nationalization or confiscation by such State. In 1973 the United States revised its position and suggested the concept of a *coastal sea-bed economic area* covering the expanse to the lower edge of the continental slope where certain restrictions on the nationalization or confiscation of once-granted concessions would be imposed upon the coastal State (A/AC.138/SC.II/L.35). Although this new draft ostensibly makes a striking contrast to the United States draft of 1970, the aims of both proposals were in fact not so different. A general feeling was emerging that, no matter how the exploitability test in Article 6 of the 1958 Convention might be interpreted, the basic criterion of the 200-metre isobath as the limit of the continental shelf could no longer be retained, in the sense that the whole area as a reservoir of petroleum resources should be incorporated into the national domain.

52. (Emergence of distance criterion.) Yet the geology and geomorphology of the coastal areas in the world vary greatly according to each region. In some areas the continental shelf (and the continental margin) extend far beyond the coast, and in other places the coastal sea-bed drops sharply to the deep ocean floor. In view of this, as a compensation for geomorphological and geological disadvantages, the idea of the criterion of distance to define the continental shelf (in the legal sense), which in fact is not relevant

to the geology or geomorphology of the sea-bed areas, occurred to those States with a narrower continental shelf which were keen to obtain wider areas and ensure in terms of distance from the coast a minimum expanse of the reserved sea-bed areas even beyond their geologically limited continental shelf, no matter whether or not a deposit of petroleum actually existed there. This trend happened to coincide with the emergence of the new concept of the exclusive economic zone, which made a great impact on the régime of the continental shelf. In the concept of the exclusive economic zone, which was about to be accepted in the realm of international law, no limit other than 200 miles had ever been suggested and this limit was taken for granted from the outset, though the figure of 200 did not have any real necessity except for the fact that it had been suggested by some Latin American countries towards the end of the 1940s as the limit of their maritime sovereignty. Yet it was understandable for that figure to be applied as a criterion of distance in the concept of the continental shelf.

53. (Incorporation of continental margin in terms of natural prolongation of the land territory.) While the 200-mile distance was gaining worldwide support as a criterion for the continental shelf, this criterion of distance did not, however, work to halt the wider claim extending as far as the foot of the continental margin as a potential reservoir of petroleum resources. States which had even broader continental shelves in the geological sense contended that that 200-mile zone would not be sufficient and accordingly claimed sea-bed areas farther than 200 miles from the coast as being still part of their continental shelf. Since petroleum resources exist not only in the continental shelf itself but also in the continental margin beyond, the continental shelf in legal terms needed to be interpreted in its widest sense in order to incorporate the outermost fringe of the continental margin. The concept of natural prolongation of the land territory, which appeared for the first time in the Court's Judgment of 1969 and since then has been constantly referred to as designating the concept of the continental shelf, was employed to develop this kind of thought.

54. ("Natural prolongation" in the 1969 Judgment.) In fact, the use of the concept in the 1969 Judgment seems to have been widely misinterpreted, as too much emphasis was laid upon the concept, contrary to the real intention of the Judgment, which was simply to help interpret the law on the delimitation of the continental shelf. The Court in 1969 stated that "the continental shelf . . . constitutes a natural prolongation of its land territory into and under the sea" and repeated that the "shelf area is the natural prolongation [of the land domain] into and under the sea" (*I.C.J. Reports 1969,* para. 39). It also talked of "the more fundamental concept of the continental shelf as being the natural prolongation of the land domain" (*ibid.,* para. 40), and of the "natural prolongation or continuation of the land territory or domain, or land sovereignty of the coastal State, into and under the high seas, via the bed . . ." (*ibid.,* para. 43). In the context of the 1969 Judgment the outer limit of the continental shelf was not at issue, the North Sea being a shallow sea with the exception of the (irrelevant)

Norwegian Trough, and thus the area beyond the 200-metre depth of water was not dealt with at that time. Just as the 1958 Convention on the Continental Shelf did not reveal any precise idea as to the outer limit of the continental shelf, so the 1969 Judgment did not attempt to define the outer limit, or the full expanse of the continental shelf, by use of the concept of "natural prolongation". No, that concept was used simply to justify the appurtenance to the coastal State of the continental shelf geographically adjacent to it.

55. ("Natural prolongation" in UNCLOS III.) If the concept of natural prolongation had any sense in the 1982 Convention, it was quite different from what the 1969 Judgment had in mind. The concept was employed to give support, on the one hand, to the trend to expansion of the national sea-bed areas since the late 1960s and to halt this expansion, on the other hand, at the foot of the continental margin, so as to leave the area of scattered manganese nodules on the deep ocean floor under international authority in terms of the common heritage of mankind, the idea which had been emerging repeatedly in the late 1960s. In other words, the concept of natural prolongation for the continental shelf was suggested with a view to defining the international sea-bed area.

56. (Two distinct proposals at UNCLOS III.) Two proposals presented at UNCLOS III at its Caracas session in 1974 played a great role for the future. A nine-State proposal (Canada, Chile, Iceland, India, Indonesia, Mauritius, Mexico, New Zealand and Norway) read in part :

> "The continental shelf of a coastal State extends beyond its territorial sea to a distance of 200 miles from the applicable baselines and throughout the natural prolongation of its land territory where such natural prolongation extends beyond 200 miles." (A/CONF.62/L.4, Art. 19.)

In parallel, the United States abandoned its basic philosophy concerning the international character of the off-shore sea-bed area behind its 1970 and 1973 proposals, as mentioned above, and switched back to the simple subject of the outer limit of the continental shelf :

> "The continental shelf is the sea-bed and subsoil of the submarine areas adjacent to and beyond the territorial sea to the limit of the economic zone or, beyond that limit, throughout the submerged natural prolongation of the land territory of the coastal State to the outer limit of its continental margin, as precisely defined and delimited in accordance with Article 23 [on limits]." (A/CONF.62/C.2/L.47, Art. 22-2).

It may not be necessary to repeat that, behind such a development of an idea for the expansion of the sea-bed areas to be reserved to the coastal State towards the foot of the natural prolongation of the land territory, there was an increasing demand from such States that the whole coastal area as far as petroleum could be extracted should be attributed to the coastal State. Apparently basing himself on two proposals, one by the nine countries (Canada and others) and the other by the United States, both of which are quoted above, the Chairman of the Second Committee drafted in 1975 a provision for the ISNT, which was referred to in paragraph 50 above.

57. (Emergence of a new régime for the *outer continental shelf.*) There was a further trend early in the 1970s which cannot be overlooked. A group of nations which could not themselves be entitled to broadly expanded sea-bed areas, because of their location in an enclosed or semi-enclosed sea not facing the vast ocean, found the formation of the continental shelf extremely inequitable. If the legal continental shelf was to incorporate the outer edge of the continental margin – which could lie even beyond the 200-mile distance – thus embodying the sea-bed areas where petroleum deposits can be found or even beyond, the geographical inequality of States would be further exaggerated. The geographically disadvantaged – landlocked or shelf-locked – States not having any continental shelf would not allow the excessive claims made by a handful of States to go unchallenged. The provision containing the concept of payments and contributions with respect to the exploitation of the continental shelf beyond 200 miles, which has now become Article 82 of the 1982 Convention, was drafted by some geographically advantaged States simply to appease the dissatisfied States. The provision was to the effect that, unlike the proceeds of the coastal State's exclusive interests within its 200-mile distance, the revenues derived from exploitation beyond that limit (= the *outer continental shelf,* if I may so call it) would be dedicated to the international community through the authority to be established for the purpose of exploitation of the deep ocean floor, which would in turn distribute them, taking into account the interests and needs of developing States, particularly the least developed and the landlocked among them.

58. (Division of the inner continental shelf and the outer continental shelf.) The suggested provision which emerged as a political compromise at the later stage of UNCLOS III can hardly be regarded as reflecting customary international law. Yet noteworthy as of great importance is the change in the definition of the continental shelf arising out of the universal introduction of the 200-mile distance which certainly overrode the traditional concept of "continuity" or "contiguity", on the one hand, and of the interpretation of the concept of "natural prolongation" used in the 1969 Judgment, allowing much wider areas, on the other. Thus the continental shelf would be divided into two areas, the first being the area within 200 miles of the coast where the coastal State's exclusive interest in the mineral resources would be established, and the other the area beyond that,

extending "throughout the natural prolongation of its land to the outer edge of the continental margin", where a suggestion had been made that a portion of the profits should be dedicated to the international community. It cannot be over-emphasized that at least this parallelism between the *inner continental shelf* and the *outer continental shelf,* which never formed part of the traditional concept of the continental shelf, has now been suggested in the 1982 Convention.

(ii) *Unchanged legal basis of the continental shelf*

59. (Identity of the provisions concerning the right of a coastal State both in the 1958 Convention and in the 1982 Convention.) Despite the radical change as to the definition of the continental shelf, one cannot overlook the fact that Article 77 of the 1982 Convention with regard to the right of the coastal State over the continental shelf is exactly identical to Article 2 of the 1958 Convention. Thus the legal basis of the continental shelf, which was confirmed by the 1958 Convention and further endorsed by the 1969 Judgment of the Court as being established under customary international law, had been inherited without any change in the 1982 Convention. The fact that Article 77 of the 1982 Convention is identical to Article 2 of the 1958 Convention indicates that the legal basis of the continental shelf has not changed at all, although there remain some doubts whether this would apply to the *outer continental shelf* in which a totally new régime is suggested.

(iii) *Impact of the new régime of the exclusive economic zone upon the continental shelf*

60. (Emergence of the exclusive economic zone.) Whether or not the Court is asked to suggest principles and rules for the delimitation of the continental shelf or maritime boundaries, it cannot ignore the impact made by the new concept of the exclusive economic zone on the régime of the continental shelf. There is no need for me to make a thorough analysis of the emergence of the exclusive economic zone in the early 1970s, as I have already done this in my dissenting opinion in the 1982 Judgment (*I.C.J. Reports 1982,* pp. 222-234, paras. 108-130). Yet, in view of the fact that the concept of the exclusive economic zone has been rapidly accepted in the realm of international law, the question cannot be avoided whether the sea-bed – within 200 miles of the coast – has been incorporated in the régime of the exclusive economic zone, or whether it should still come under the separate régime of the continental shelf in parallel with the exclusive economic zone. This question was far more essential than initially thought in seeking to come to any judgment on the issues that had been presented for the Court's consideration in the present case. I am only too pleased to note and appreciate that the Court is now becoming aware of the importance of this problem.

5. *Rule for the Division of a Single Homogeneous Maritime Area*

61. (Article 76 of the 1982 Convention.) Let us now look again at the gist of the provision of Article 76 of the 1982 Convention :

> "The continental shelf of a coastal State comprises the sea-bed and subsoil of the submarine areas that extend . . . to the outer edge of the continental margin, or to a distance of 200 nautical miles . . . where the outer edge of the continental margin does not extend up to that distance."

A logical analysis of these words will show that what Article 76 thus offers is *not,* as the Judgment seems to suggest, two *complementary* definitions of the (legal) continental shelf – hence two *complementary* criteria for determining its appurtenance – but two radically *alternative* definitions. However, the Court has decided that the sea-bed between the Parties' coasts is a single, homogeneous area for the purposes of the delimitation and, in paragraph 39 of the Judgment, comes near to implying that, *whenever* dealing with claims in regard to combined distances between coasts of less than 400 miles, "there is no longer any reason to ascribe any role to geological or geophysical factors". While I agree that, for practical purposes – and, as I suggest elsewhere, for reasons connected with the régime of the exclusive economic zone –, the distance criterion has replaced that of geomorphology in all respects save in regard to the *outer continental shelf* between the 200-mile and 350-mile limits, I am not sure the Court has realized that, by stating that international law has already developed to that stage, it has added weight to the second of the alternative definitions in Article 76 and, in effect, replaced with the minor premise (distance) what some jurists may still regard as the major premise (physical prolongation). From the viewpoint of that Article, this would have been open to challenge, had the sea-bed in the present case featured, not a rift zone, but the outer edge of a continental margin. The Court would then almost certainly have had to weigh the merits of two convincing claims invoking the sense of Article 76, the one based on geomorphology, the other relying on distance. As it happens, the only real problem before the Court was actually that of discerning the rule for the division of a single maritime area homogeneous in terms of the 200-mile distance criterion.

62. (Divison of a single, homogeneous area.) Let us put aside, for the sake of convenience, the exploitability test prescribed in sea-bed areas beyond the 200-metre isobath in the 1958 Convention and the new concept of the *outer continental shelf* beyond the 200-mile distance in the 1982 Convention, neither of which had any direct relevance to the present case. Under the 1958 Convention, delimitation of the continental shelf could only be effected in a sea-bed area of a homogeneous nature (in terms of the

depth criterion of the 200-metre isobath) between States whose titles happened to overlap. The 1958 depth criterion has now been replaced in such areas by the distance criterion of 1982, but the present situation is similar in essence in that one homogeneous sea-bed area (now within a radius of 200 miles from either of the coasts concerned) may be divided among the bordering States. And I can see no reason to apply different principles and rules to the 1958 and 1982 hypotheses where an overlapping portion in a homogeneous sea-bed area is to be divided, since the law applicable to that situation has not undergone any change.

63. (Difference from territorial disputes.) A dispute concerning the delimitation of the continental shelf is different in substance from most disputes concerning land boundaries, or the sovereignty over an island, in which what is required of the organ entrusted with deciding the matter is to ascertain whether this or that claim to a particular boundary or island is historically justified or not. In such cases, the decision to be made by that organ is oriented towards finding and ascertaining, but *not* determining *de novo,* the sovereignty of one party in specific areas of land or on a specific island. In contrast, in the case of the delimitation of the continental shelf, the boundaries between the sea-bed areas appertaining to the coastal States are not restricted *a priori,* so that any State concerned has, in principle, been entitled to claim any specifically defined area. The area within a 200-mile radius of the coast, where given the proximity or adjacency of the States their claims overlap, should be delimited or divided between the States concerned. To make a delimitation of the continental shelf is to draw a line in a single homogeneous sea-bed area.

64. (Dividing an area.) In this respect a mention should be made of the concept of apportioning "just and equitable shares", which the Court did not accept in 1969. The Court's rejection of this concept in 1969 seems to have been very heavily dependent on its development of the doctrine that "the rights of the coastal State in respect of the area of the continental shelf ... *ipso facto* and *ab initio*". The Court seems to have found it an implicit consequence of this doctrine that the areas of continental shelf falling under the jurisdiction of each party were predetermined *ab initio,* each being mutually exclusive of the other, so that the function of the delimitation of the continental shelf consisted "merely" in discerning and bringing to light a line already in potential existence. The test of natural prolongation, and certain other features of the Judgment, were developed precisely as an aid to the performance of that very special and difficult task. Now, whatever the necessity of the Court's logic in the 1969 context, I am fully persuaded that it has since been overtaken by events. There is no reason for the present Court, in 1985, to be inhibited from realizing that the present delimitation is simply a question of justifiably and equitably dividing, apportioning or even "sharing" between the Parties a part of a

homogeneous sea-bed area which either can potentially claim. Thus the problem in the present case, in which the situation was not different from that in 1958, was to see what principles and rules, if any, other than the "equidistance/special-circumstances" rule could reasonably be proposed for the purpose of equitably dividing a single homogeneous sea-bed area among neighbouring States.

6. *Equity within the "Equidistance/Special-Circumstances" Rule*

65. (Equity.) The concept of "equity" is applicable to any case of dividing, apportioning or even sharing, and the case of dividing the area of overlapping claims in a single homogenous sea-bed area is no exception. The Truman Proclamation of 1945, the first official document in this field, suggested, for the boundary of the continental shelf between neighbouring States, determination with the States concerned in accordance with equitable principles, and the eleventh-hour provision of the 1982 Convention provides in similar terms that "delimitation . . . shall be effected . . . in order to achieve an equitable solution". "Equity" remains the prevailing principle in delimiting the continental shelf, yet simple insistence on an equitable solution is not so much helpful as merely the statement of a truism, since "equity" is a blanket concept susceptible of divers interpretations. How should it have been applied in the circumstances of the present case ?

66. (Irrelevance of world social justice.) Certainly various political, social and economic factors could have been suggested for this purpose : the size of the territories and their population, the natural features of "hinterland", the distribution of natural resources, the degree of development of the economy and industry, security considerations, etc., of the respective Parties. However, these factors could not lead to a solution for the Parties, because ideas of the way in which they should be taken into account are bound to vary widely. It could be asked, for instance, if the advanced industry or economy of one State should justify its being given wider areas of the continental shelf than the other State, or whether the latter should be given much wider areas to compensate for its poverty. It could also be asked whether the ratio between the two States' areas of land territory or even *lengths of coastline* should in equity ensure the same ratio between their sea-bed areas or whether, on the contrary, an *inverse* ratio of sea-bed areas would be more equitable. Such questions involve global resource policies, or basic problems of world politics, which not only could not be solved by the judicial organ of the world community but stray well beyond equity as a norm of law into the realm of social organization. This is a matter of future policy of world social justice which does not fall within the purview of a judiciary which has to employ solely the principles and rules of international law unless requested to decide a case *ex aequo et bono.* I agree with the Judgment in suggesting that the Court has no competence

to guess at or initiate any future policy of world social justice going beyond the existing principles and rules of international law.

67. (Geographical circumstances, normal or exceptional.) In the drawing of maritime boundaries, geography has always played a very important role ever since the International Law Commission first started dealing with the law of the sea, and rarely has any other element been considered as a factor affecting it. This the Judgment rightly acknowledges. Where I part company with it is in its belief that geography can be respected by exaggerating the mathematical consequences of a longer coastline. The 1958 Convention offered the formula of equidistance from the coast "unless another boundary line is justified". The equidistance method, a geographical method which leaves no room for equivocal interpretation, has ever since been suggested for the delimitation of the continental shelf. As the Court acknowledged in its 1969 Judgment, no other method of delimitation has the same combination of practical convenience and certainty of application. Is there any other method which may possibly represent equity ? As suggested in the present Judgment, equidistance may not be the invariable method for delimitation purposes, and no doubt has existed that in principle it would be strictly followed only in certain normal situations where it produces an equitable solution to the problem of the division of sea-bed areas. But if this method is one which, in principle, should apply in normal situations, as suggested in the 1958 Convention as well as the 1969 Judgment of the Court and the 1977 Decision of the Anglo-French Arbitration, how can anyone maintain that its application cannot be a rule of delimitation ? This does not, of course, mean that it is a compulsory rule in abnormal circumstances. In 1953 the Committee of Experts on Certain Technical Questions concerning the Territorial Sea was already well aware of the necessity of allowing exceptions to the equidistance rule. In 1956 the International Law Commission pointed out, in its final draft, that "provision must be made for departures [from the equidistance rule]" and that "this case may arise fairly often so that the rule adopted is fairly elastic". The 1958 Convention accordingly provided that a boundary other than the equidistance line might be justified by special circumstances. The 1958 Convention was not meant simply to suggest a substitute for or a replacement of equidistance in case of special circumstances. On the contrary, a certain flexibility was given so that, in the application of equidistance, geographical anomalies could be rectified in order to avoid results of a distorting character. In my view the "equidistance/special-circumstances" rule as suggested in the 1958 Convention still remains a basic rule for the delimitation of the continental shelf.

68. (Coastline irregularities as special circumstances.) Considering geography as the sole factor to be employed for the division of the continental shelf, the equidistance formula may well be rectified by certain relevant geographical circumstances. Since UNCLOS I efforts have been made to reconcile equity with the geography surrounding the sea-bed areas concerned. Perhaps the true solution to the problem relating to the method of equidistance is that account should always be taken of various elements and factors when determining the baselines containing the points from which the equidistance line is to be plotted. Should the real configuration of the coast of each State provide the sole basepoints for measuring equidistance ? This is basically the procedure applicable for determining the outer limit of the territorial sea. However, the inherent logic of the 1958 Convention might be so construed : while the sole use of the equidistance method can be expected to lead to an equitable result, this is on the understanding that the baseline to be employed for the purpose of the geometrical construction will vary, from case to case, from the strict version used in measuring the limit of the territorial sea to certain modified baselines employed because of special circumstances in the geography of the region. Certainly, not just any existing geographical condition may be regarded as an anomaly, and it will not be easy to define what irregularities should be rectified in determining the baseline for application of the equidistance method. Generally speaking, however, an irregular overall shape of the coastline, and significant configuration irregularities in a lateral case, and the existence of narrow promontories of peninsulae or even of islands in a case of opposite States, might reasonably be agreed upon as constituting irregularities the effect of which is to be mitigated in settling the basepoints on coastlines. It is important to note in this respect that the degree of irregularity to be considered significant in each case may vary according to the overall expanse of the area concerned. If the area is comparatively large, the existence of some irregularity may well be ignored, but if it is small even some minor irregularity would probably have to be taken into account for the purpose of rectifying the baseline for delimitation of the continental shelf.

69. (Coastal façade and macrogeographical aspect.) In the *North Sea Continental Shelf* cases in which the Federal Republic of Germany had to argue for "coastal façade" or "macro-geographical aspect" in order to rectify the points for measuring equidistance because of the irregularities in coastlines, i.e., a deep concave in that case. At that time I argued on behalf of that Party as follows :

> "I suggest . . . that if we wish to draw lines of demarcation to apportion areas of the continental shelf far removed from the coastal belt, we shall have to take a modified approach if a sensible outcome is

> to be achieved. In this specific case such modification might well entail the drawing of geographically delimited lines of demarcation not based upon the angled inward-curving North Sea coast of the Federal Republic of Germany. Rather, I propose that the lines of demarcation be drawn from a basis represented by the coastal 'façade', if I may so call it." (*I.C.J. Pleadings, North Sea Continental Shelf,* Vol. II, p. 62.)

> "The coastal façade, as I envisage it, represents a view taken of a State's coastal front with the intent of placing it in the proper perspective in relation to the coastal front of its neighbouring States. Such a perspective would lead to a division granting each State a just and equitable share. In order to visualize such a façade, one should be guided by the general direction of the coast ; in some particular cases, the most useful course would be to take the whole coastline of a country as constituting an entity." (*Ibid.,* p. 193.)

> "It may be suggested that [the] entire concept [of straight baselines] and its subsequent development may serve as a bridge towards my concept of a coastal façade. This façade line is a macrogeographical viewpoint which is a further abstraction from the microgeographical viewpoint. The latter consists in the drawing of the linear coastline as, for example, is envisaged in the concept of the straight baseline, whereas the façade theory involves a further abstraction from the actual coastal configuration and, therefore, should be characterized as a macrogeographical viewpoint." (*Ibid.,* p. 195.)

My arguments of "façade", "coastal front" and "macrogeographical perspective" were strongly opposed by the late Sir Humphrey Waldock, who was counsel for Denmark and the Netherlands, who said :

> "Another sign, Mr. President, that our opponents may have been becoming uneasy about your receptiveness to the 'unprecedented and not-to-be-a-precedent' criterion of their 'coastal fronts', was the appearance in their final speeches of the 'macrogeographical perspective'. At any rate, it was really quite remarkable how, in the dying moments of their speeches on the tenth day, this tongue troubling phrase suddenly appeared and ran riot through their argument. Learned counsel [the present writer], it is true, indulged himself with the heady wine of this new doctrine only twice, on page 195, *supra.* But the learned Agent [Professor Jaenicke, who presented these arguments after the writer] was much less abstemious ; for ten times did he have recourse to it on the last dozen pages of his speech." (*Ibid.,* p. 275.)

Nevertheless, this terminology does now prevail in some cases for the

delimitation of the continental shelf, though often in totally different situations from those I originally had in mind.

70. (Offshore islands as irregularities.) Although the status of offshore islands in connection with the delimitation of the continental shelf was not provided for in either the 1958 Convention or the 1982 Convention, views have often been expressed on whether all islands should have baseline status for measuring the equidistance line when delimiting the continental shelf. I have sufficiently dealt with the question of islands in the context of "irregularities in coastlines" in my dissenting opinion in 1982 (*I.C.J. Reports 1982*, pp. 263-266, paras. 170-173). I have nothing to add, but would draw the following conclusion : it is evident that the presence of an island may "influence the equity of a delimitation" according to its geographical position. It must be admitted that it would be difficult, if not impossible, to devise a general formula applicable to all cases in such a way as to indicate the precise shape of any coastline or the nature (size, economy, distance from mainland, etc.) of any island to be wholly or partially disregarded. Yet geographical and demographic criteria will normally be sufficient to determine whether it should be treated as a rectifiable irregularity. In other words, an island should be considered on its own merits when the baseline for the plotting of an equidistance line is being determined. Yet even if a dependent island is to be treated as a rectifiable irregularity in measuring the equidistance between two States, either lateral or opposite, this qualification of irregularity can never apply to an island *State* for which the delimitation of the continental shelf is to be drawn.

CHAPTER III. MISUNDERSTANDING OF "PROPORTIONALITY" AND "HALF-EFFECT OF AN ISLAND" IN RECENT JUDGMENTS

Introduction

71. I regretfully have to point out that the present Judgment's failure to give proper treatment to the "equidistance/special-circumstances" rule, which was adopted as a conventional rule in UNCLOS I and given special significance in one way or another in the 1969 Judgment of the Court and the 1977 Decision of the Anglo-French Arbitration, originates in the later jurisprudence of the Court, that is, its 1982 Judgment in the *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* case and the 1984 Judgment by the Chamber in the *Delimitation of the Maritime Boundary in the Gulf of Maine Area* case, both of which suggested no other rule but only some random ideas. Not only in the first but also in the second of these decisions, it would seem that the applicability and potential of the "equidistance/special-circumstances" rule were either unappreciated or ignored, while the

notions of "proportionality" and "half-effect of an island" were randomly misused.

1. The 1982 Judgment in the Continental Shelf (Tunisia/Libyan Arab Jamahiriya) *case*

72. (Arbitrarily fixed veering point.) In the Court's 1982 Judgment in the *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* case the Court did not appear to me to suggest any rule for the delimitation. In suggesting a line of delimitation, the Court did not apply any persuasive reasoning but rather put forward certain whimsical ideas. For example, in the Judgment it stated that the first sector of the dividing line should veer at –

> "the point of intersection with the parallel passing through the most westerly point of the Tunisian coastline between Ras Kaboudia and Ras Ajdir, that is to say, the most westerly point on the shoreline (low water-mark) of the Gulf of Gabes" (*I.C.J. Reports 1982,* p. 94, para. 133 C. (2)).

On this point, I stated in my dissenting opinion :

> "I suggest that, if the configuration of the area is looked at from a position and angle different from the traditional north-south/west-east view, it will immediately be apparent that the suggested veering point has no special relationship with the most westerly point in the Gulf of Gabes. Unless there is specific agreement between the Parties to attach special significance to parallels or meridians, it is surely a serious error in delimitation to treat them as anything more than convenient lines of reference for descriptive purposes." (*Ibid.,* p. 268, para. 178.)

73. (Misapplication of "half-effect" in the second sector.) Furthermore, the Court suggested that the second sector was –

> "to run parallel to a line drawn from the most westerly point of the Gulf of Gabes bisecting the angle formed by a line from that point to Ras Kaboudia and a line drawn from that same point along the seaward coast of the Kerkennah Islands, the bearing of the delimitation line parallel to such bisector being 52° to the meridian" (*ibid.,* p. 94, para. 133 C. (3)).

On this point I stated :

> "Why should this segment of the line be parallel with the coast of Tunisia rather than the coast of Libya ? In any case, a line in parallel to the coastline can appropriately be used for the outer limit of maritime zones, but not for the lateral or common boundaries of the zones of adjacent or even opposite States. If a geometrical method of delimitation such as a parallel to the bisector of the angle made by one line drawn from the most westerly point of the Gulf of Gabes to Ras

> Kaboudia and another to the seaward coast of the Kerkennah Islands is to be used, why should not this idea of bisecting angles have been applied for drawing the first segment of the boundary ?" (*I.C.J. Reports 1982,* pp. 268-269, para. 179.)

Integral with the above anomaly is the thorough misunderstanding of the "half-effect" allowed to dependent islands, as first applied by the 1977 Decision in the Anglo-French Arbitration. In that case, half-effect was given to the Scilly Isles in order to determine the notional coastline for the United Kingdom and thus prepare the way for an acceptable bisecting line, that is, an equidistance line between the coast of France and the rectified coast of the United Kingdom. The 1982 Judgment departed crucially from the 1977 precedent. Admittedly, it similarly made use of "the 'half-effect' or 'half-angle' " technique (*I.C.J. Reports 1982,* p. 89, para. 129) in order to modify its imaginary reference baseline on the Tunisian side so as to make what it regarded as proper allowance for the Kerkennah Islands. This it did in the context of a finding that a situation had nearly been produced in which the position of an equidistance line had become a factor to be given more weight (*ibid.,* p. 88, para. 126). Yet, despite this, it did not apply the result of the half-effect in order to determine any median line between opposite coasts but proceeded to consecrate a *parallel* to that adjusted baseline as the second segment of the delimitation, just as if the Court had been asked to determine an outer limit of one party only rather than a common lateral boundary. France would have gained considerably had this method been followed in 1977.

2. The 1984 Judgment of the Chamber in the Delimitation of the Maritime Boundary in the Gulf of Maine Area *case*

74. (Rough description of the area.) The principle of non-principle seems to have been repeated in the Judgment given in 1984 by a special Chamber : the first such chamber ever set up in the 40-year history of the Court. The Judgment in the *Gulf of Maine* case begins by defining the delimitation area in a very equivocal geographical context. According to the Judgment (*I.C.J. Reports 1984,* pp. 268-270, paras. 29-34), the Gulf of Maine, having *"roughly"* the shape of an elongated rectangle, or taking "the form of a large, *roughly* rectangular indentation", consists of four side-lines :

line (i) : this line is not clearly defined, but seems to represent "the general south-southeast/north-northwest direction of the Massachusetts coast abutting on the Gulf of Maine", starting from Nantucket Island ;

line (ii) : the coast of Maine "from Cape Elizabeth to the international

boundary between [the two Parties] which terminates in the Grand Manan Channel" ;

line (iii) : "the *imaginary* line which runs from the international boundary terminus across the Canadian island called Grand Manan Island to Brier Island and Cape Sable at the two extremities of Nova Scotia" ;

line (iv) : "an *imaginary* line drawn across from the southeastern point of Nantucket Island, to Cape Sable, at the southwestern end of Nova Scotia", which the Parties had agreed as "the seaward 'closing line' of the Gulf of Maine".

In fact, in this *roughly* rectangular shape, side-line (ii) is not connected with side-line (i), leaving nearly a 60-mile gap between the two side-lines, which forms the base of a triangle at that corner. Yet, according to the Judgment, the "quasi-" parallelism is "striking". Side-line (iii), which is "imaginary", is parallel with the coast of Nova Scotia, which, "almost" opposite to the international boundary terminus, swings "sharply" in an "overall" south-southeasterly direction at "almost" a right angle. In fact this is an angle of about 98° to side-line (ii), as the Judgment indirectly – and perhaps without noticing its implication – suggests at another place (para. 213). In such an imaginary area of "the form of a large, roughly rectangular indentation", the Judgment attempted to suggest a concrete delimitation line which in my view has no rational or convincing justification.

75. (Non-bisecting first segment.) Starting from Point A, which had been agreed upon by the Parties, and which is a point equidistant from their respective coasts as this is a point on the line claimed by Canada as an equidistance line (this geographical fact is what the Chamber does not want to admit), the first segment of the line drawn is a bisector of side-line (ii) and the "imaginary" side-line (iii) (in spite of the complicated explanations given in paragraph 213 of the Judgment, the suggested line is simply a bisector at Point A of the angle between lines parallel to the two "basic" coastlines, as mentioned above). A line drawn as a bisector of the angle between two basic lines will, in principle, represent the equidistance line, but only on condition that it starts from the apex. In the case of the Gulf, however, the line does not start from the intersection of the baselines but from Point A, which does not have any relevance to the apex forming the angle of the two coastlines. How could the Chamber have

> "believe[d] that this practical method combines the advantages of *simplicity* and *clarity* with that of producing . . . a result which is probably as close as possible to an equal division of the . . . area to be delimited" (*I.C.J. Reports 1984*, p. 333, para. 213 ; emphasis added),

if Point A, though agreed by the Parties, is nothing but an arbitrary point without any geographical significance ? If the bisecting line of the two coasts had started, as might have been reasonable, from the centre of the

Gulf, this line would certainly have been different from the suggested line, but should have been the bisecting line reaching to the apex, in other words the international terminus point, but not to Point A. I am not suggesting that the dividing line should not have started from Point A, which had been agreed upon by the Parties. Yet if the line had to start from Point A, which did not have any role in forming the angle between the two coastlines, the bisecting line from that point would not possess the special properties ascribed to it.

76. (Trifling with geography for the second segment.) The Judgment errs further in its suggestion of the second segment of the delimitation line. Considering the "quasi-parallelism" between the lines of the Massachusetts coast and the coast of Nova Scotia (this time not side-lines (i) and (iii) but a line linking the promontory of Cape Ann to the elbow of Cape Cod and a line joining up Brier Island and Cape Sable), both being "practically" parallel coasts, a median line is considered first but only for the purpose of determining the orientation of the delimitation line. A correction is then suggested to shift the intersection of this median line with the location line drawn across the Gulf where the coasts of Nova Scotia and Massachusetts (this time, *not* the opposite sides of the "imaginary rectangle") are nearest to each other, considering *(a)* the total length of the United States coastline "as measured along the coastal fronts from the elbow of Cape Cod to Cape Ann, from Cape Ann to Cape Elizabeth, and from the latter to the international boundary terminus" (*ibid.*, p. 336, para. 221) (approximately 284 miles), and *(b)* "the overall length of the Canadian coastline, as similarly calculated along the coastal fronts from the terminal point of the international boundary to the point on the New Brunswick coast off which there cease to be any waters in the bay more distant than 12 miles from a low water-line . . . then from that point across to the corresponding point on the Nova Scotian coast . . . thence to Brier Island, and from there to Cape Sable" *(ibid.)* (approximately 206 miles). The ratio between the coastal fronts of the United States and Canada as thus measured is 1.38 to 1. Hence the median line, so as to reflect this ratio, could have been shifted along the shortest line crossing the Gulf where the coasts of Nova Scotia and Massachusetts are nearest to each other, that is, a point near the northeastern tip of Cape Cod and Chebogue Point, Nova Scotia. But the Chamber further corrected this point so as to take into account the presence off Nova Scotia of Seal Island and certain islets in its vicinity. Seal Island being given "half-effect". Half-effect in this case meant that a length of 7,117 metres, namely, half of the distance between the southwestern point of Seal Island and the main coast of Nova Scotia, should be added to the Canadian portion of the location line. Thus the dividing point on the location line is fixed in the ratio of 1 to 1.32. In my view, however, this ratio does not reflect the ratio of even the "imaginary" coastline of both countries, that is, 1 to 1.38, because a factor of a totally different nature is herein introduced. This second segment starts where it meets the first segment, in other words Point B. The second segment, according to the Judgment,

"though it may be the shortest, will certainly be the central and most decisive segment for the whole delimitation line". This certainly is true. I simply want to say, however, that I do not see how the drawing of this short line, reflecting the ratio of the two long coastlines, can really divide the continental shelf of the Gulf of Maine. It is difficult to find any justifiable reasoning reflecting equity in drawing such a second segment. In my view, the line thus shifted cannot be a "corrected median line" in any sense at all, and in addition the Chamber seems to fail to understand the "half-effect" of an island, first suggested in the 1977 Decision. Even more radically than that of 1982, the *Gulf of Maine* Judgment departs from that Decision in its use of "half-effect", which is no longer related to drawing any bisector or median line but is simply used to confirm the sliding point on the line connecting the northeastern tip of Cape Cod and Chebogue Point. Personally, I am at a loss to understand what the Judgment was trying to prove by this reference to "half-effect". At any rate, the half-effect of an island as referred to in the 1977 Decision for the purpose of rectifying the bases for the equidistance line (= bisector) would appear to have been either misunderstood or misapplied.

77. (Groundless division of the area off the Gulf.) The third segment starting from Point C, the point where the extension of the second segment meets the closing line of the Gulf of Maine (connecting Nantucket Island – not Cape Cod this time – and Cape Sable) is a line perpendicular to that closing line. Thus the area off the Gulf of Maine is divided between the United States and Canada far more favourably for the United States than for Canada, since it reflects the ratio of the respective overall coastlines of both countries in the Gulf, which in my view cannot have any relevance to the area outside the Gulf of Maine.

78. (Lack of reasonable and objective analysis.) After having examined with great care the line of delimitation drawn in and off the Gulf of Maine by the Chamber, I feel bound to say that the Chamber has created an impression of justice which has insufficient foundation in reasonable and objective analysis. It is not underpinned by any legally justifiable postulate. I share the view of Judge Gros, when he properly stated that –

> "[I]t 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." (*I.C.J. Reports 1984*, pp. 361-362, para. 3.)

3. *Conclusion*

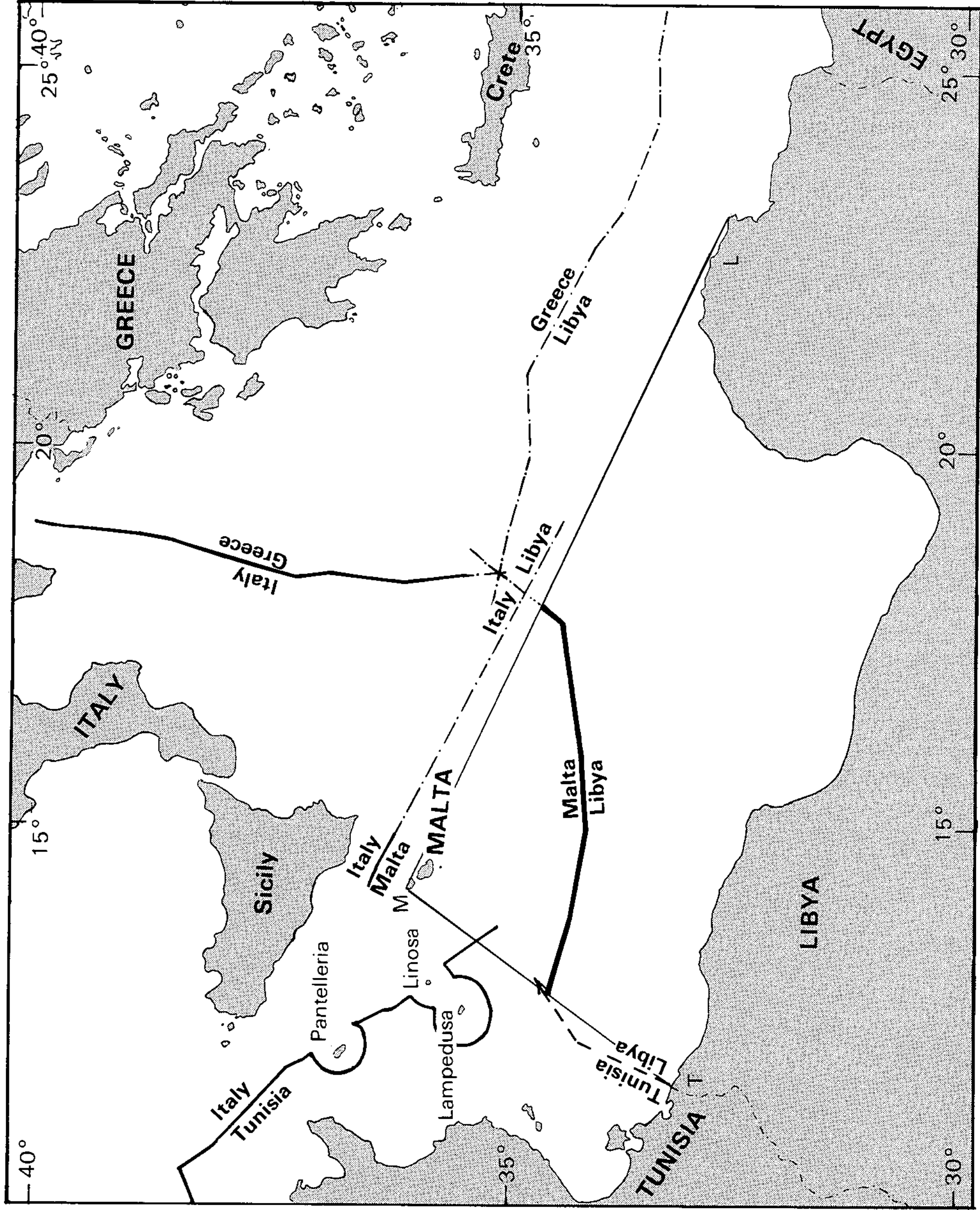
79. On looking at these two Judgments of 1982 and 1984, one derives the impression that the Court, without being aware of the proper context of the concepts of proportionality and half-effect of an island, is simply trifling with them by suggesting a product of its imagination which it has mistaken for equity. First, the concept of "proportionality" which had been mentioned in the specific circumstances of the *North Sea Continental Shelf* cases was overgeneralized in these two Judgments. In order to speak of "proportionality" between the area and length of the coast it is logically unavoidable to assume in advance the relevant areas and relevant coastlines with which only the Parties in dispute are concerned. The Court did not show itself sufficiently aware of its arbitrariness in assuming the relevant coasts and areas without any decisive warrant. Secondly, both Judgments were mistaken in relying on the concept of "half-effect" of an island, which was employed for the first time in the 1977 Decision, where "half-effect" was given in considering to what extent an island should be counted as a basis of calculation for drawing an *equidistance line*, but *not* for the purpose of replacing the very concept of equidistance.

CHAPTER IV. SUGGESTED LINE OF DELIMITATION

80. While the "equidistance/special-circumstances" rule, as a rule of international customary law, should apply in this case, I would suggest that the existence of the island of Filfla constitutes a special circumstance because of its size, location and limited function, thus being excluded from the measurement of the equidistance between Malta and Libya. Ignoring the island of Filfla, the equidistance line may be drawn between the Maltese and Libyan coasts. The chart attached for illustration purposes indicates an idea of what the delimitation line should be. Attention should be drawn to the fact that the line is drawn as far as its intersection with the equidistance line between Italy and Libya. The portion of the line extending beyond its intersection with the line connecting the outermost points of the Maltese and Libyan coasts, in their opposite relationship, is indicated by a dotted line. I must emphasize that I have no intention whatever of implying that the equidistance line on the chart which Malta shares with Italy definitively divides the area between those States. Referring to my dissenting opinion in Italy's application to intervene in this case, I must repeat my regret that Italy's intervention was not admitted, but, if it be borne in mind that the Court is of the view that the interests of the third

party are protected by Article 59 of the Statute, this suggested line of division between Libya and Malta would simply mean that neither of these Parties is entitled to claim against the other the area beyond that line. Whether some areas where this suggested delimitation line extends may properly be claimed by Tunisia or Italy will be another problem.

(Signed) Shigeru ODA.



MAP APPENDED TO THE OPINION OF JUDGE ODA

▬ My suggested line

—·— Equidistance lines

—— Lines agreed by the States concerned

MT, ML Lines defined in paragraph 80 of the Opinion