SEPARATE OPINION OF JUDGE SHAHABUDDEEN

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

PART I. THE DELIMITATION RÉGIME APPLICABLE TO THE CONTINENTAL SHELF

(i) *The Central Issue*

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

> "The main element of that language is prescriptive and self-executing: 'In the absence of agreement . . . the boundary is the median line.' There is no detour by way of reference to 'principles'

which require 'application', as in paragraph 2 relating to adjacent States. The language is direct and dispositive, and has room for only one element of appreciation: the proviso for the event that 'another boundary line is justified by special circumstances'." (CR 93/6, p. 43, 18 January 1993, Mr. Haug, Co-Agent for Norway. See also CR 93/8, pp. 49, 52, 53, 20 January 1993.)

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

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

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

In taking the position that the 1958 Convention is still in force, the Parties would not appear to be at variance with such jurisprudence as there exists on the subject. In the case concerning the *Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland and the French Republic*, 1977 (*Reports of International Arbitral Awards (RIAA)*, Vol. XVIII, p. 3, at pp. 35-37), France argued that the new trends which were then evolving, and which later took shape in the 1982 Convention, had rendered obsolete the 1958 Convention, to which both France and the United Kingdom were parties. The submission was overruled, the Court of Arbitration holding that, within limits set by certain French reservations to the 1958 Convention, the latter was in force as between the two States (*ibid.*, p. 37, para. 48). In the case concerning *Delimitation of the Maritime Boundary in the Gulf of Maine Area*, the Chamber held that the 1958 Convention did not apply to the delimitation

of a single line for the continental shelf and the fishery zone between Canada and the United States of America; but the Chamber clearly considered that the Convention was in force as between the two States in respect of the continental shelf even as it emerged after 1958 and would have applied if the shelf alone were being delimited (*I.C.J. Reports 1984*, p. 301, para. 118, p. 303, para. 124. See also the *Canada/France Arbitration*, 1992, Decision, paras. 39 and 40, and the 1982 Convention, Arts. 83 and 311).

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

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

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

The resolution of the questions of interpretation which arise will make it necessary to consult a body of case-law the principal items of which are footnoted below[1]. They will be referred to in brief as the *North Sea* cases,

[1] *North Sea Continental Shelf, I.C.J. Reports 1969*, p. 3; *Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland and the French Republic*, 1977, *RIAA*, Vol. XVIII, p. 3; *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), I.C.J. Reports 1982*, p. 18; *Delimitation of the Maritime Boundary in the Gulf of Maine Area, I.C.J. Reports 1984*, p. 246; *Continental Shelf (Libyan Arab Jamahiriya/Malta), I.C.J. Reports 1985*, p. 13; and *Delimitation of the Maritime Areas between Canada and France*, Decision of 10 June 1992.

the *Anglo-French Arbitration*, the *Tunisia/Libya* case, the *Gulf of Maine* case, the *Libya/Malta* case, and the *Canada/France Arbitration*, respectively. However, although these cases may assist, they do not pre-empt the answers to the questions presented. In the *North Sea* cases the Court said:

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

The provision was not in issue in the *Tunisia/Libya* case or in the *Libya/Malta* case, Libya not being a party to the Convention. In the *Gulf of Maine* case, as has been seen, the Chamber took the view that the provision, which would otherwise have applied, was inapplicable to the delimitation of a single boundary for the continental shelf and the fishery zone (*I.C.J. Reports 1984*, pp. 300-303, paras. 115-125). The Court of Arbitration in the *Canada/France Arbitration* took a similar view in relation to the delimitation of an all-purpose line (*Canada/France Arbitration*, Decision, paras. 39 and 40). In the *Anglo-French Arbitration*, the provision was involved and it did receive an interpretation by the Court of Arbitration (*RIAA*, Vol. XVIII, p. 45, para. 70, and p. 57, para. 97). That interpretation will be considered below.

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

formation of the original meaning of so important a treaty provision been managed?

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

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

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

> "[i]t is clear that, in the same legal system, there cannot at the same time exist two rules relating to the same facts and attaching to these facts contradictory consequences . . ." (*ibid.*, p. 90, separate opinion. And see, *ibid.*, p. 105, Judge Urrutia, dissenting. Cf. *I.C.J. Pleadings, Nuclear Tests*, Vol. I, p. 238, Mr. Elihu Lauterpacht, Q.C.).

How has the problem been resolved in this case? The substitution of the 1982 definition of the continental shelf for the 1958 definition could not

[1] See, *inter alia*, M. K. Yasseen, "L'interprétation des traités d'après la convention de Vienne sur le droit des traités", 151 *Recueil des cours* (1976-III), pp. 64 ff.; G. E. do Nascimento e Silva, "Le facteur temps et les traités", 154 *Recueil des cours* (1977-I), at pp. 266 ff.; T. O. Elias, "The Doctrine of Intertemporal Law", 74 *American Journal of International Law* (1980), pp. 285 ff.; Sir Humphrey Waldock, "The Evolution of Human Rights Concepts and the Application of the European Convention on Human Rights", in *Mélanges offerts à Paul Reuter*, 1981, pp. 535, 536, 547; and Sir Ian Sinclair, *The Vienna Convention on the Law of Treaties*, 2nd ed., pp. 124-126, 139-140.

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

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

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

States are entitled by agreement to derogate from rules of international law other than *jus cogens* (which seems to have little, if any, application in

[1] *Yearbook of the International Law Commission*, 1950, Vol. II, p. 368, para. 29; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, I.C.J. Reports 1984*, p. 424, para. 73, and *ibid., Merits, I.C.J. Reports 1986*, pp. 93-94, paras. 174-175.

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

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

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

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

I do not enter into the view, for which there is high authority, that the idea of equidistance is not inherent in the concept of the continental shelf (*North Sea, I.C.J. Reports 1969*, p. 23, para. 23, pp. 33-34, paras. 48-50, and pp. 46-47, para. 85). By itself, equidistance is a technical method and not a principle of international law. But there is nothing which can seriously suggest that the use of a technical method in prescribed circumstances

cannot be commanded by a rule of law. "[T]he real question", as was correctly submitted by Professor Jaenicke (to whose arguments on the 1958 Convention I shall be referring with some frequency),

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

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

No doubt, as remarked by Professor Jaenicke:

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

But the International Law Commission was a commission of jurists, not a committee of technical experts. It was effectively the Commission which adopted the method in relation to the case of the continental shelf. To be sure, equidistance *per se* remained a geometric method even as incorporated in Article 6, paragraph 1, of the 1958 Convention. But it now held a place within the normative framework of a treaty provision, which stipulated that, in certain circumstances, the boundary *is* the median line. As therein used it became part of a rule of law. With his usual grasp of principles, Judge Tanaka put the matter this way:

> "We have before us a technical norm of a geometrical nature, which is called the equidistance rule, and may serve a geographical purpose. This norm, being in itself of a technical nature, constitutes a norm of expediency which is of an optional, i.e., not obligatory character, and the non-observation of which does not produce any further effect than failure to achieve the result it would have rendered possible. This technical norm of a geometrical nature can be used as a method for delimiting the continental shelf. The legislator, being aware of the utility of this method for legal purposes, has adopted it as the content of a legal norm.
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> Thus the equidistance method as a simple technique is embodied in law, whether in Article 6, paragraph 2, of the Geneva Convention

or in corresponding customary international law. By being submitted to a juridical evaluation and invested with the character of a legal norm, it has acquired an obligatory force which it did not have as a simple technical norm." (*North Sea, I.C.J. Reports 1969*, pp. 182-183.)

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

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

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

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

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

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

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

For all that the literature might suggest to the contrary, it does not seem possible to erase a distinction which Article 6, paragraph 1, of the 1958 Convention prima facie establishes between the median line part

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

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

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

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

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

One knows that, in response to concern expressed in the International Law Commission about possible hardship which might be produced by the equidistance method in certain circumstances, the Special Rapporteur, Professor François, suggested that equidistance should be recognized only "as a general rule", but that that suggestion encountered opposition, whereupon Mr. Spiropoulos proposed a reservation reading, "unless another boundary line is justified by special circumstances"

[1] T. J. Lawrence, *The Principles of International Law,* 7th ed., 1930, preface to the first edition, p. vii.

(*Yearbook of the International Law Commission*, 1953, Vol. I, p. 130, para. 62). Obviously, the inclusion of the words "as a general rule" could have subverted the equidistance provision. Hersch Lauterpacht contended that "it was at least arguable that they deprived the rule of its legal character" (*ibid.*, p. 128, para. 47). Without putting it so high, one might concede that that, at any rate, could be the practical result of using the adjectival form of what Mr. Albert Thomas once referred to as "the notorious word 'generally' which is found in a great many documents" (*Competence of the ILO in Regard to International Regulation of the Conditions of Labour of Persons Employed in Agriculture, P.C.I.J., Series C, No. 1*, p. 136). It seems clear that the Spiropoulos reservation, which was accepted, was intended to avert such a risk and to preserve the integrity of the provision subject only to an exception.

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

> "81. In the matter of the delimitation of the boundaries of the continental shelf the Commission was in the position to derive some guidance from proposals made by the committee of experts on the delimitation of territorial waters. In its provisional draft, the Commission, which at that time was not in possession of requisite technical and expert information on the matter, merely proposed that the boundaries of the continental shelf contiguous to the territories of adjacent States should be settled by agreement of the parties and that, in the absence of such agreement, the boundary must be determined by arbitration *ex aequo et bono.* With regard to the boundaries of the continental shelf of States whose coasts are opposite to each other, the Commission proposed the median line — subject to reference to arbitration in cases in which the configuration of the coast might give rise to difficulties in drawing the median line.
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> 82. Having regard to the conclusions of the committee of experts referred to above, the Commission now felt in the position to formulate a *general rule*, based on the principle of equidistance, applicable to the boundaries of the continental shelf both of adjacent States and of States whose coasts are opposite to each other. The rule thus proposed is subject to such *modifications* as may be agreed upon by the parties. Moreover, while in the case of both kinds of boundaries *the rule of equidistance is the general rule*, it is subject to *modification* in cases in which another boundary line is justified by *special* circumstances. As in the case of the boundaries of coastal waters, provision must be made for departures *necessitated* by any *exceptional* configuration of the coast, as well as the presence of islands or of navigable channels. To that extent the rule adopted partakes of some *elasticity.* In view of the general arbitration clause ... no special provision was considered necessary for submitting any resulting disputes to arbitra-

tion. Such arbitration, while expected to take into account the *special* circumstances calling for *modification* of the *major principle* of equidistance, is not contemplated as arbitration *ex aequo et bono.* That *major principle must constitute the basis of the arbitration, conceived as settlement on the basis of law,* subject to reasonable *modifications* necessitated by the *special* circumstances of the case." (*Yearbook of the International Law Commission,* 1953, Vol. II, p. 216, paras. 81-82, footnote omitted; emphasis added. And see *I.C.J Pleadings, North Sea Continental Shelf,* Vol. I, p. 181.)

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

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

"special circumstances would be the rule rather than the exception, owing to the technical difficulty of applying an exact median line and to the possibility that such application would be open to the objec-

tion that the geographical configuration of the coast made it inequitable, because, for example, the low-water mark, which constituted the baseline, was liable to physical change in the course of time by silting. The point should be made in the comment that exceptional cases were liable to arise fairly frequently." (*Yearbook of the International Law Commission*, 1956, Vol. I, p. 152, para. 28.)

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

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

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

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

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

"Even if the equidistance method and the presence of special circumstances have to be considered together in appreciating all of the circumstances of the case, it remains nevertheless true that under Article 6 the application of the equidistance method or the use of some other method because of special circumstances stand in relationship to each other as rule and exception." (*I.C.J. Pleadings, Delimitation of the Maritime Boundary in the Gulf of Maine Area*, Vol. VII, p. 51.)

In the *North Sea* cases, Judge Morelli, in an argument of some refinement, did not think that the reference to special circumstances was "a true

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

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

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

where the exception is in fact repugnant to the rule[1], in which case the whole provision might well fall. Mere frequency of recourse to an exception is not proof of repugnance between rule and exception; and, unless it is, it cannot, in my view, serve to deprive the rule of its juridical character as a rule (cf. *Tunisia/Libya, I.C.J. Reports 1982*, p. 197, para. 64, Judge Oda, dissenting).

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

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

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

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

Briefly, it appears to me that to hold that the equidistance rule could never operate compulsorily under Article 6, paragraph 1, of the 1958 Convention would be to breach the Court's own declaration that its function is

[1] See, in English law, *Maxwell on the Interpretation of Statutes*, 12th ed., 1969, pp. 190-191; and *Craies on Statute Law*, 7th ed., 1971, pp. 218-220.

"to interpret . . ., not to revise" a treaty[1]. Nor does it appear that the case-law would safely support such a holding.

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

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

Thus, however the obligation to use the equidistance method might be ranked, the Court did refer to it as an "obligation", as it plainly was; even if it came second, it was an "obligation" in the same juridical sense in which there was an "obligation to effect delimitation by agreement". That the Court accepted that Article 6 of the Convention did create an obligation to use the equidistance method would seem to have been recognized by Judge Ammoun and Vice-President Koretsky (*ibid.*, pp. 149-150, separate opinion, and pp. 154-155, dissenting opinion, respectively). The Court's statements on the point may be harmonized by taking the view that any suggestion by it that equidistance was not obligatory under the 1958 Convention is to be understood not in an absolute sense, but in the qualified sense that it was not obligatory in all cases.

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

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

[1] *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Second Phase, I.C.J. Reports 1950*, p. 229. And see *Acquisition of Polish Nationality, P.C.I.J., Series B, No. 7*, p. 20; *Serbian Loans, P.C.I.J., Series A, No. 20/21*, p. 32; and *Rights of Nationals of the United States of America in Morocco, I.C.J. Reports 1952*, p. 196.

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

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

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

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

Judge Gros, dissenting, added:

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

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

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

Thus, a different line may well be established by agreement or through the operation of "special circumstances"; but, failing these, the Convention unquestionably "*imposes* upon the States parties to it an *obligation* of treaty-law . . . to have recourse to equidistance . . .", that "method" being one which "*is to be used* . . ." in those circumstances.

In the *Canada/France Arbitration*, it would appear that, as in the *Gulf of Maine* case, the Court of Arbitration, at least by implication, also took the position that, if the continental shelf alone were involved, it would have been obligatory to apply equidistance under Article 6 of the

1958 Convention, unless special circumstances were present (Decision, 10 June 1992, paras. 39 and 40).

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

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

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

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

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

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

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

There seems to be force in the argument that the category "special circumstances" is narrower than that of "relevant circumstances" (*I.C.J. Pleadings, Continental Shelf (Libyan Arab Jamahiriya/Malta*, Vol. II, Counter-Memorial of Malta, p. 292, para. 108). No doubt there is a

sense in which it can be said that every situation has its "special circumstances"; but the "special circumstances" which count under Article 6, paragraph 1, of the 1958 Convention are limited to those which justify a boundary other than an equidistance line on the ground that the latter will create an inequity which can be avoided only by using some other method or methods of delimitation.

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

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

The preparatory work of the International Law Commission does serve to emphasize the importance attached to the "special circumstances" provision, but it is far from suggesting that the Commission considered that special circumstances inhered in every case. The provision was formulated in terms of providing, exceptionally, for a non-equidistance line

(including a modified equidistance line) where the existence of special circumstances justified such a line as opposed to an equidistance line. The necessary assumption was that special circumstances would not exist in all cases. Were it otherwise, the foundation of the main rule would largely disappear and, with it, the usefulness of the rule itself; such a consequence stands excluded by the principle that an interpretation which would deprive a treaty of a great part of its value is inadmissible (*Acquisition of Polish Nationality, P.C.I.J., Series B, No. 7,* p. 17; and *Minority Schools in Albania, P.C.I.J., Series A/B, No. 64,* p. 20).

If the reference to the median line in Article 6, paragraph 1, of the 1958 Convention was intended merely to indicate one of any number of possible methods of delimitation, with the choice among them being always made by reference to equitable principles, taking account of the relevant circumstances, the drafters took care to conceal the intention. On that hypothesis, there was little point in singling out that particular method or, indeed, in speaking specifically of "special circumstances" which justify some other boundary; it would have sufficed, and should have been simpler, to state that, in the absence of agreement, the boundary was to be that justified by equitable principles, taking account of the relevant circumstances. As remarked above, if this were the correct meaning, it is difficult to see why, except for theoretical reasons, the Court in 1969 troubled itself with the question whether the provision was applicable, for the régime under the provision would have been the same as that under customary international law. As it happened, the Court reached the conclusion that the provision was not declaratory of the position under customary international law (*I.C.J. Reports 1969,* p. 41, para. 69). However it came about, the provision, as drafted, would seem to have been designed to present equidistance in a position of prominence, which was to yield to some other delimitation method only if there were special circumstances which justified another boundary. There is nothing of consequence in the relevant International Law Commission material, or indeed in that of the Geneva Conference of 1958, to set against this view.

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

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

ment is in fact reached otherwise than on the basis of the equities of the case?

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

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

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

The real object of the requirement to proceed by way of agreement was to avoid problems of opposability arising from unilateral delimitations (*North Sea, I.C.J. Reports 1969,* p. 184, Judge Tanaka, dissenting; *Tunisia/Libya, I.C.J. Reports 1982,* p. 194, para. 60, Judge Oda, dissenting; *Gulf of Maine, I.C.J. Reports 1984,* p. 292, para. 87; and *Libya/Malta, I.C.J. Reports 1985,* p. 141, paras. 32-33, Judge Oda, dissenting). The fact that the efficacy of such a delimitation as regards other States depends on international law had been earlier pointed out (the *Fisheries* case, *I.C.J. Reports 1951,* p. 132. And see, later, the *Fisheries Jurisdiction (United Kingdom* v. *Iceland), Merits, I.C.J. Reports 1974,* p. 22, para. 49, and p. 24, para. 54).

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

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

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

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

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

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

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

> "The high ideals which inspired the Convention provide, *by virtue of the common will of the parties*, the foundation and measure of all its

> provisions." (*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, I.C.J. Reports 1951*, p. 23; emphasis added.)

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

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

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

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

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

> "Si pour reprendre le *dictum* de la Cour internationale de Justice dans l'affaire du *Plateau continental de la mer du Nord* (par. 93) 'il n'y a pas de limites juridiques aux considérations que les Etats peuvent examiner afin de s'assurer qu'ils vont appliquer des procédés équitables', il n'y en a pas non plus aux combinaisons techniques que l'on peut mettre en œuvre pour réaliser une délimitation équitable."

> (Paul Jean-Marie Reuter, "Une ligne unique de délimitation des espaces maritimes?", in *Mélanges Georges Perrin,* 1984, p. 265. And see, *ibid.,* p. 266.)

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

An obvious problem is of course that the provision neither defines "special circumstances" nor lays down any criteria for identifying what is the "boundary line" which "is *justified* by" particular special circumstances. This being so, the scope of the concept of "special circumstances" and its precise relationship with the rule relating to equidistance must be sought in some higher criterion implicit in the provision as controlling the relationship between its two parts. Why? Because, to turn for the last time to the argument of Professor Jaenicke:

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

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

This approach rejoins the generally accepted view that equity is the overall controlling factor, both for the use of the equidistance method and for the use of some other possible method. But there is this difference, that some sense is sought to be given to the specific reference to the equidistance method, in so far as the use of this method is retained as obligatory in a situation in which an equitable solution may conceivably be offered either by the use of that method or by the use of some other (including a modification of the equidistance method). If this margin in favour of equidistance is excluded, it becomes difficult to explain the need for the specific reference to that method; for, excluding that margin, the provision,

as argued above, might have been more simply worded to say that, in the absence of agreement, the boundary shall in all cases be that required by equitable principles, taking account of the relevant circumstances. On this formula, no specific method being singled out, equidistance would rank (as received doctrine has it) equally with all other methods, the choice among them being made in all cases by the application of equitable principles, taking account of the relevant circumstances.

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

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

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

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

The 1953 Committee of Experts, by which the principle of equidistance was so "propounded", was concerned primarily with the delimitation of the territorial sea. It stated that equidistance was equally applicable to the delimitation of the continental shelf. According to the International Law Commission's Special Rapporteur, Professor François, the Committee of Experts, in so stating, "had confirmed the Commission's preliminary view that the technique of the median line could be adopted for States whose coasts faced each other . . ." (*Yearbook of the International Law Commission*, 1953, Vol. I, p. 106, para. 39). So, from the beginning the International Law Commission was involved in the thinking concerning the applicability of equidistance to the delimitation of the continental shelf, at least as between opposite coasts. In paragraph 162 of his Second Report on the High Seas of 10 April 1951, Professor François had himself submitted to the Commission nine draft articles on the continental shelf as a basis of discussion. Draft Article 9 read:

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

A footnote to this provision added:

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

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

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

Besides, it could not be said that the adoption of the substance of the International Law Commission's text at the Geneva Conference in 1958, following on a debate at the eleventh session of the United Nations General Assembly[1], was the result of an impromptu response by the Conference to a new text suddenly presented: it seems clear that the text was the subject of careful study by well-prepared jurists in 1958 and that opportunity had been given to Governments to be consulted in preceding intervals. "The scale and thoroughness of this process" was rightly noticed by Vice-President Koretsky (*North Sea, I.C.J. Reports 1969*, p. 156, dissenting opinion. And see *I.C.J. Pleadings, Delimitation of the Maritime Boundary in the Gulf of Maine Area*, Vol. II, pp. 78-79, paras. 203-204; and *Official*

[1] *Official Records of the General Assembly, Eleventh Session, Plenary Meetings*, Vol. II, 658th meeting, 21 February 1957, pp. 1181 ff.

Records of the United Nations Conference on the Law of the Sea, Vol. VI, Fourth Committee, Geneva, 24 February-27 April 1958, pp. 9 ff., *passim*, and 91-98). The need for flexibility in the working of the provision was recognized and, indeed, emphasized (*Official Records of the United Nations Conference on the Law of the Sea*, Vol. VI, *op. cit.*, p. 22, para. 35, Tunisia); but nothing said suggests that the equidistance method was not intended to play the ultimate concrete normative role *ex facie* assigned to it by the terms of the provision.

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

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

(xi) *Scholarly Opinion*

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

> "The legislative history of Article 6 suggests that 'special circumstances' operate as an exception to the general rule and not as an independent principle of equal validity. As the I.L.C. stated:

'. . . the rule of equidistance is the general rule, it is subject to modification in cases in which another boundary line is justified by special circumstances'.

Indeed, one might have thought that it could scarcely be otherwise, for if 'special circumstances' stood on an equal footing with the median/equidistance line rule, there would in effect be no rule to fall back on in the event of disagreement, and this the parties to the 1958 Convention clearly did not intend. On this view it would have followed from this relationship of rule to exception that the rule applies *unless* a party can discharge the dual onus of proving

(a) that 'special circumstances' exist, within the meaning of Article 6, and
(b) that these 'justify' another boundary." (Derek Bowett, *The Legal Regime of Islands in International Law*, 1979, pp. 149-150. Footnote omitted.)

There is no question here of what Henri Rolin referred to, deprecatingly, as "l'attrait de cette entreprise" of contradicting an advocate with his academic writings (*I.C.J. Pleadings, Right of Passage over Indian Territory*, Vol. V, p. 187). For Professor Bowett did also state that

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

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

(xii) *Conclusion*

Equidistance *per se* is certainly a geometric method and not a legal principle; but in the collocation in which it occurs, in the form of the median line, in Article 6, paragraph 1, of the 1958 Convention, it undoubtedly forms part of a rule of law to the effect that, subject to two conditions, namely, the absence of agreement and the non-existence of special circumstances, the boundary is the median line. To say that equidistance is applicable only where equitable principles as applied to the relevant circumstances indicate it as the most suitable method among other possible methods for achieving an equitable delimitation is to impose a condition for its application in addition to the two which have in fact been prescribed by the provision itself. "To impose an additional condition . . . would be equivalent, not to interpreting the [Convention], but to reconstructing it." (*Acquisition of Polish Nationality, P.C.I.J., Series B, No. 7*, p. 20. And see Judge Read, dissenting, in the

Interpretation of Peace Treaties case, *I.C.J. Reports 1950*, p. 246.) However widely the exception relating to special circumstances may be construed, it cannot be read so as to decapitate the clear intendment of the rule that, when the two prescribed conditions are satisfied, the equidistance method automatically and compulsorily applies to define the boundary.

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

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

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

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

[1] E. de Vattel, *Le droit des gens*, Vol. 2, Chap. 17, para. 263, cited by Mr. Basdevant in the *S.S. "Wimbledon", P.C.I.J., Series C, No. 3*, Vol. I, p. 197.

[2] See *Interpretation of the Convention of 1919 concerning Employment of Women during the Night, P.C.I.J., Series A/B, No. 50*, p. 383, Judge Anzilotti, dissenting.

give is to uphold the submission of Norway to the effect that, absent both agreement and special circumstances, "the boundary is the median line".

PART II. PROPORTIONALITY

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

(i) *The Broad Evolutionary Perspective*

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

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

Second, there seems to be a danger of overlooking the effect of a delimitation line in settling the question of the extent of the continental shelf to which the litigating parties are entitled in relation to each other. Almost certainly, this above all is what the parties really wish to know; it is the delimitation line which gives them the answer. As observed in the joint separate opinion in the *Libya/Malta* case, "the Court is establishing a line

which will determine the areas which 'appertain' to each of the Parties" (*I.C.J. Reports 1985*, p. 92, para. 40). This effect of a delimitation decision in determining what are the areas appertaining to each of the parties is apt to be obscured by the tendency of the jurisprudence to dwell on the principle that the continental shelf appertains to a coastal State *ipso jure*, and that, accordingly, the object of a delimitation is not to apportion the continental shelf (considered as an undivided common pool) in separate shares among the interested coastal States, but simply to determine what is the line separating areas of the shelf which already appertain to each of them individually (*North Sea, I.C.J. Reports 1969*, p. 22, para. 20; and see p. 188, Judge Tanaka, dissenting, and p. 199, Judge Morelli, dissenting).

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

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

> "Evidently any dispute about boundaries must involve that there is a disputed marginal or fringe area, to which both parties are laying

claim, so that any delimitation of it which does not leave it wholly to one of the parties will in practice divide it between them in certain shares, or operate as if such a division had been made." (*I.C.J. Reports 1969*, p. 22, para. 20.)

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

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

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

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

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

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

(ii) *Proportionality and Natural Prolongation*

Much of the received jurisprudence on the question of proportionality was influenced by what the Court in 1969 referred to as the "fundamental concept of the continental shelf as being the natural prolongation of the

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

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

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

> "at a very early stage in the development of the continental shelf as a concept of law, it acquired a more extensive connotation, so as eventually to embrace any sea-bed area possessing a particular relationship with the coastline of a neighbouring State, whether or not such area presented the specific characteristics which a geographer would recognize as those of what he would classify as 'continental shelf'" (*Tunisia/Libya, I.C.J. Reports 1982*, p. 45, para. 41. And see *ibid.*, pp. 45-46, paras. 42-43.)

It is for these reasons that the Court added:

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

But it would not be right to take these views too far back in time. The North Sea delimitations relating to the Norwegian Trough are sometimes cited as supportive of the opinion that even in 1969 the Court accepted

that natural prolongation was not always physical. That view is plausible. But the interpretation of the Court's Judgment on the point which I prefer is that, apart from expressly stating that it was not "attempting to pronounce on the status of that feature", the Court considered that the delimitations were explicable by reason of the decision of the Parties to ignore the existence of the Trough. In its words, "it was only by first ignoring the existence of the Trough that these median lines fell to be drawn at all" (*I.C.J. Reports 1969*, p. 32, para. 45). Had the Parties not agreed to ignore the existence of the Trough, different consequences might well have ensued from the fact that, as the Court found,

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

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

> "The institution of the continental shelf has arisen out of the recognition of a physical fact; and the link between this fact and the law, without which that institution would never have existed, remains an important element for the application of its legal régime. The continental shelf is, by definition, an area physically extending the territory of most coastal States into a species of platform which has attracted the attention first of geographers and hydrographers and then of jurists. The importance of the geological aspect is emphasized by the care which, at the beginning of its investigation, the International Law Commission took to acquire exact information as to its characteristics, as can be seen in particular from the definitions to be found on page 131 of Volume I of the *Yearbook of the International Law Commission* for 1956. The appurtenance of the shelf to the countries in front of whose coastlines it lies, is therefore a fact, and it can be useful to consider the geology of that shelf in order to find out whether the direction taken by certain configurational features should influence delimitation because, in certain localities, they point-up the whole notion of the appurtenance of the continental shelf to the State whose territory it does in fact prolong." (*North Sea, I.C.J. Reports 1969*, p. 51, para. 95; and see *ibid.*, p. 31, para. 43.)

For the Court, natural prolongation was the "fundamental concept of the continental shelf". It went out of its way to explain that what it had in mind was natural prolongation in a palpably physical sense. It offered no other version of the concept. The concept being "fundamental", it might be supposed that, if the Court had in mind the possibility of some other kind of natural prolongation, it would have mentioned it, and mentioned it the more explicitly the more esoteric it was. It did not. With some diligence, it

is possible to qualify this view by recourse to fragmentary remarks and tangential phrases dropped here and there in the Judgment. But one cannot now rewrite the Judgment in the hindsight of later jurisprudence or of more sophisticated ideas developed in relation to the Law of the Sea Convention 1982. Incidental expressions in the Judgment do not blunt its hard thrust. That thrust was clear: when the Court spoke of "natural prolongation" it meant just that — a prolongation which was "natural", and not one which was philosophical, theoretical or notional. It is not necessary, however, to take an absolute position; it suffices for present purposes to say that the working view which the Court took was that natural prolongation was physical in character.

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

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

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

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

Natural prolongation in a physical sense was equally the reason why, in the absence of any agreed solution, marginal areas of overlap had to be divided equally between the three States concerned in the *North Sea* cases (*ibid.*, p. 50, para. 91, p. 52, para. 99, and p. 53, para. 101 (C) (2)). As I interpret the Judgment, differentiation of separate prolongations being impos-

sible within marginal areas of overlap, but the geographical situation in the particular case being one of "quasi-equality" in which the "coastlines [were] in fact comparable in length", the prolongations in the areas of overlap would fall to be deemed of equal extent, with corresponding consequences for division of the areas. In other words, equal division in the particular case would be the result of a presumed equality in natural prolongations. Save on the basis of some such reasoning, the direction for equal division was at best mechanical, at worst arbitrary. As it was, it did not escape criticism from Vice-President Koretsky, on the ground that it transgressed the Court's own distinction between delimitation and distribution (*North Sea, I.C.J. Reports 1969*, p. 168).

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

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

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

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

> "In short, it is disproportion rather than any general principle of proportionality which is the relevant criterion or factor. The equitable delimitation of the continental shelf is not, as this Court has already emphasized in paragraph 78, a question of apportioning —

sharing out — the continental shelf amongst the States abutting upon it. Nor is it a question of simply assigning to them areas of the shelf in proportion to the length of their coastlines: for to do this would be to substitute for the delimitation of boundaries a distributive apportionment of shares. Furthermore, the fundamental principle that the continental shelf appertains to a coastal State as being the natural prolongation of its territory places definite limits on recourse to the factor of proportionality." (*RIAA*, Vol. XVIII, p. 58, para. 101.)

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

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

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

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

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

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

It is not a satisfactory answer to say that proportionality could result in one State exercising jurisdiction under the nose of another. The non-encroachment principle, extended to the continental shelf as now understood, still remains to prevent that from happening, by setting an appropriate limit to the extent to which proportionality can bring one State close to another (*Libya/Malta, I.C.J. Reports 1985*, p. 89, para. 34, joint separate opinion). Nor is it enough to iterate the unchallenged proposition that proportionality is not in itself a direct principle of delimitation; there have always been, and there still are, other considerations to be taken into account in determining a delimitation line (*ibid.*, p. 45, para. 58). To divide the continental shelf in mechanical proportion to the coastal lengths would impermissibly exclude such other considerations. Mathematical exactness is not the aim. This is apart from the circumstance that

proportionality could be satisfied by different conceivable lines (*Tunisia/Libya, I.C.J. Reports 1982*, p. 258, para. 162, Judge Oda, dissenting). These various considerations continue to place their own restraints on proportionality; and consequently the reference in the *Libya/Malta* case to "the need to avoid in the delimitation any excessive disproportion" seems a reasonable way of putting the matter (*I.C.J. Reports 1985*, p. 57). But, in construing and applying this formulation, it would be right to take the general view that the role of proportionality is now necessarily larger to the extent that the "definite limits" previously imposed on recourse to it by "the fundamental principle" of natural prolongation have been relaxed, if not removed, with the supersession of the latter by the principle of adjacency measured by distance.

(iii) *The Question of the Normative Status of Proportionality*

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

If the Court did not include proportionality among "the principles and rules of international law" set out in subparagraph (C) of the dispositif of the *North Sea* Judgment, the explanation is to be found in the fact, yet again, that the decision, in the then state of the law, proceeded on the assumption that the fundamental principle of the continental shelf was that of the "natural prolongation of the land domain", understood in a

physical sense. As has been seen, because of this principle and the way in which it was understood, two coasts could well be of the same length and the same configuration and yet generate different continental shelf areas if their natural prolongations were unequal. Hence natural prolongation could well have the effect of making it impossible to achieve a reasonable degree of proportionality of continental shelf areas to coastal lengths; as observed by the Anglo-French Court of Arbitration, it really operated to impose "definite limits" on recourse to proportionality. Thus, and for a reason which in my opinion no longer carries weight, proportionality could not be enunciated as part of "the principles and rules of international law". But it did not follow from this that, as compared with other factors, it was intended to occupy only a modest status.

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

What was it that was preoccupying the Court in paragraph 91 of the Judgment? I cannot read that all-important part of the Judgment without being fixed with the clear impression that the Court was concerned to ensure that, in "a geographical situation of quasi-equality as between a number of States" whose "coastlines are in fact comparable in length", steps should be taken to correct the distorting effect of a particular coastal configuration so as to ensure that one of the three States would not "enjoy *continental shelf rights* considerably different from those of its neighbours merely because" of that particular feature. The reference in the dispositif to "the element of a reasonable degree of proportionality . . . between the extent of the continental shelf areas appertaining to the coastal State and the length of its coast . . ." has to be read in the light of this driving concern to ensure, subject to any other relevant factors, a rough measure of equality of *"continental shelf rights"* in relation to coastlines that were *"in fact comparable in length"*. The Court's expressed objective of ensuring that no such State would "enjoy continental shelf rights considerably different from those of its neighbours" could obviously not be achieved without regard to the area of the continental shelf over which such rights would be

exercised. This objective might of course involve, but was not limited to, equality in respect of the seaward extent to which the continental shelf of a State was to extend; the latter was primarily addressed by the separate *principle* or *rule* of *international law* that the delimitation was to be effected "without encroachment on the natural prolongation of the land territory of" the other State (*I.C.J. Reports 1969*, p. 53, para. 101 (C) (1)). When the dispositif is thus construed, it is impossible to accept a parsing of its terms which results in a modest status for the third factor relating to reasonable proportionality. If this view is at variance with the position taken by the Court in the *Libya/Malta* case as to the status of the proportionality factor under the 1969 decision, I respectfully differ from that position (see *Libya/Malta, I.C.J. Reports 1985*, pp. 43-45, paras. 55-57).

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

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

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

Nor do I accept that the rationale underlying proportionality does not extend to the case of opposite coasts (cf. *I.C.J. Reports 1985*, p. 135, para. 18, Judge Oda, dissenting, and pp. 184-185, Judge Schwebel, dissent-

ing). In the *Libya/Malta* case, the Court did not think there was any such limitation. The idea of proportionality is inevitably directed to a comparison of the extent to which effect should be given to competing claims to the continental shelf. Such a competition exists just as much in the case of claims to the continental shelf as between opposite coasts as it exists in the case of claims to the continental shelf as between adjacent coasts.

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

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

Nor can I see that the position was different in the *Tunisia/Libya* case. The reasonable proportionality factor was reproduced in paragraph 133, subparagraph B (5), of the Judgment in terms almost identical with those of the 1969 formulation, except that, for obvious reasons, it was now to apply not in relation to "the length of [the] coast", but in relation to "the length of the relevant part of [the] coast". Also, reflecting the structure of the particular request to the Court, it was now stated as one of the "relevant circumstances . . . to be taken into account in achieving an equitable delimitation", and not as one of "the factors to be taken into account in the course of the negotiations" (*I.C.J. Reports 1982*, p. 93, para. 133 B (5), and *I.C.J. Reports 1969*, p. 53, para. 101 (D) (3)). But paragraph 133 A of the Judgment, which set out the "principles and rules of international law

[1] See, generally, *Anglo-French Arbitration, RIAA*, Vol. XVIII, pp. 57-58, paras. 98 ff.; *Tunisia/Libya, I.C.J. Reports 1982*, p. 91, para. 131, pp. 92-93, para. 133, and pp. 152-153, paras. 17 ff., Judge Gros, dissenting; *Gulf of Maine, I.C.J. Reports 1984*, pp. 322-323, paras. 184-185, and pp. 334-335, para. 218; *Libya/Malta, I.C.J. Reports 1985*, pp. 44-46; and *Canada/France Arbitration*, Award, paras. 61-63.

applicable for the delimitation", stated as the very first of these that "the delimitation is to be effected in accordance with equitable principles, and taking account of all relevant circumstances". Thus, proportionality having been stipulated as one of the relevant circumstances, the dispositif, read as a whole, was effectively propounding a principle or rule of international law which itself directed that the delimitation was to be effected in accordance with equitable principles and taking account of proportionality as a relevant circumstance. I am not able to appreciate how anything in this could reasonably mean that proportionality was not after all to be taken into account in the process of effecting the delimitation, but that it was to serve merely as an *ex post facto* test of the equitableness of a delimitation which had been carried out without taking account of it. If the delimitation was carried out without taking account of proportionality, this would represent a direct breach of the direction in the dispositif that the delimitation should be effected taking account of all relevant circumstances, proportionality being explicitly stated as one of these. It is true that in paragraph 131 of the Judgment, the Court, referring to the ratio between coastal lengths and continental shelf areas, said:

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

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

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

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

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

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

Unless, when taking account of a disparity in coastal lengths in the process of effecting a delimitation, one at the same time has an eye to the ultimate effect of the operation on the extent of the maritime areas which the delimitation will assign to each claimant, the disparity in coastal lengths will not have been realistically taken into account when effecting the delimitation. Conversely, as the available cases suggest, where a disparity in coastal lengths has been realistically taken into account, any *ex*

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

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

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

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

In brief, it is not possible to overlook the fact that it is "the extension in space of the sovereign powers and rights" of the State through its coastal front which generates its entitlement to continental shelf rights (*Aegean Sea Continental Shelf, I.C.J. Reports 1978*, p. 35, para. 85, and p. 36, para. 86; *Tunisia/Libya, I.C.J. Reports 1982*, p. 61, paras. 73-74; *Libya/Malta, I.C.J. Reports 1985*, pp. 40-41, paras. 47, 49, and p. 83, para. 21, joint separate opinion); that "the coast of the territory of the State is the decisive factor for title to submarine *areas* adjacent to it" (*Tunisia/Libya, I.C.J. Reports 1982*, p. 61, para. 73; emphasis added); that a longer coast

will tend to generate a greater area of continental shelf than a shorter coast, as implied in the *North Sea* cases (*I.C.J. Reports 1969*, p. 54, para. 101 (D) (3)); and that, consequently, where there is a lack of comparability between the two coasts in question, this should in principle enter as a factor into the very process of establishing the delimitation line with a view to ensuring a tolerable relationship between coastal lengths and continental shelf areas.

PART III. THE DISPARITY IN COASTAL LENGTHS

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

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

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

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

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

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

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

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

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

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

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

As to the first question, naturally the delimitation line would not lie outside the area of overlap. But, once constructed, what the line delimits is not the area of overlap, but the continental shelf lying between the two

opposite coasts. This must be so because what Article 6, paragraph 1, of the 1958 Convention speaks of is "the boundary of the continental shelf appertaining to [opposite] States" — words which I would construe to refer to a boundary relating to the entire continental shelf lying between the opposite coasts. Likewise, paragraph 3 of the provision speaks of "delimiting the boundaries of the continental shelf".

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

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

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

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

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

The passage which was stressed by Denmark was this:

> "In a sea with the particular configuration of the North Sea, and in view of the particular geographical situation of the Parties' coastlines upon that sea, the methods chosen by them for the purpose of fixing the delimitation of their respective areas may happen in certain localities to lead to an overlapping of the areas appertaining to them. The Court considers that such a situation must be accepted as a given fact

> and resolved either by an agreed, or failing that by an equal division of the overlapping areas, or by agreements for joint exploitation, the latter solution appearing particularly appropriate when it is a question of preserving the unity of a deposit." (*I.C.J. Reports 1969*, p. 52, para. 99. And see *ibid.*, p. 53, para. 101 (C) (2).)

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

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

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

But the question remains whether the idea of equal division applies to every delimitation as between opposite States regardless of disparities in coastal lengths. Here it is worth bearing in mind that a court in making a statement cannot always visualize all the varied circumstances to which it may later be sought to apply the statement. Is it really clear that, in speaking in 1969 of equal division by a median line of the continental shelf between "opposite States", this Court visualized all conceivable cases, however peculiar, in which one State may be said to be "opposite" to another? What was the picture in its mind when it spoke of "opposite States"? The thing furthest from the mind of the Court was a situation in which a small island and a long mainland coast were confronting each other as the primary components of the relevant geographical area. The sense in which the Court considered the position of islands was that in which "islets, rocks and minor coastal projections" might operate to distort a median line (*I.C.J. Reports 1969*, p. 36, para. 57). With the view which the Court then took of natural prolongation as being physical in character, it is doubtful that it would have entertained the idea of the natural prolongation of a small island coast realistically meeting and overlapping with the whole of the natural prolongation of a mainland coast nine times as long, in the practical sense in which the natural prolongations of two comparable and opposite coasts would. It is even less likely that the Court would have

taken that view where the distance between the coasts was as great as it is in this case.

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

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

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

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

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

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

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

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

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

In the *Libya/Malta* case, in which the Court recited paragraph 57 of the 1969 Judgment, the median line was not used as the boundary; it was only used "by way of a provisional step in a process to be continued by other

[1] *I.C.J. Reports 1984,* pp. 300-301, para. 115; pp. 312-313, para. 157; p. 328, para. 197; pp. 329-330, para. 201; pp. 331-332, para. 209; p. 332, para. 210; pp. 332-333, para. 212; p. 333, para. 213; p. 334, para. 217.

operations . . ." (*I.C.J. Reports 1985*, p. 47, para. 62). The Court adjusted the results produced by the median line precisely in order to take account of a marked disparity in coastal lengths. The ultimate result was not at all to divide the area equally between the two States; the State with the longer coast got much more.

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

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

The Court of Arbitration was indeed speaking of broadly equal division of the continental shelf by a median line. But how a median line could divide the intervening continental shelf equally where the opposite coasts are markedly unequal is thoroughly unclear. On the facts, this was not the kind of situation which the Court of Arbitration envisaged. What it had in mind was "an area of continental shelf which, in fact, lies between coasts that, in fact, face each other across that continental shelf". In such a case,

> "the equitable character of the delimitation results not from the *legal* designation of the situation as one of 'opposite' States *but from its actual geographical character as such*".

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

> "Between opposite States, as this Court has stated in paragraph 95, a median line boundary will in normal circumstances leave broadly equal areas of continental shelf to each State and constitute a delimitation in accordance with equitable principles. It follows that where the coastlines of two opposite States are themselves approximately equal in their relation to the continental shelf not only should the boundary in normal circumstances be the median line but the areas

> of shelf left to each Party on either side of the median line should be broadly equal or at least broadly comparable. Clearly, if the Channel Islands did not exist, this is precisely how the delimitation of the boundary of the continental shelf in the English Channel would present itself." (*RIAA*, Vol. XVIII, p. 88.)

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

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

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

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

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

tionality as between the coastal lengths and the corresponding maritime areas.

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

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

Objectively considered, there is nothing in the geography of the relevant area to suggest that each kilometre of Jan Mayen's coast must generate six times as much continental shelf as a kilometre of the relevant coast of East Greenland, as would be the case on Norway's proposal.

True, the idea of the continental shelf is a creature of law. But, even so, in a case of this kind one is supposed to be delimiting a maritime area between opposite physical coasts. This area — the "relevant area" — is the territory covered by converging projections from each opposite coast (see the reasoning in *Tunisia/Libya, I.C.J. Reports 1982*, pp. 61-62, para. 75). Norway did not present any idea of the relevant area, but Denmark did. I accept Denmark's idea of the area as accurate. It is represented roughly by the figure AEFB, BCDG, GH and HA shown in sketch-map No. 1 included in the Judgment. When this figure is interpreted in the light of the pertinent material, it will be seen that the relevant area which it represents is bounded on the west wholly by 504 kilometres of the coast of East Greenland, but that on the east it is only in very small part that it is bounded by 54 kilometres of the coast of Jan Mayen. On the east, it is bounded by the western coast of Jan Mayen notionally projected 200 miles to the north and 100 miles to the south-west up to the outer limit of Iceland's maritime area (see Memorial, Vol. I, Map II; Rejoinder, Map VI; Reply, Vol. I, Map V; and Figs. 12, 14 and 15, presented by Denmark). The use of a median line means that what is being divided is not the space between East Greenland and Jan Mayen, but the space between East Greenland and the western coast of Jan Mayen artificially extended to the north and to the south-west.

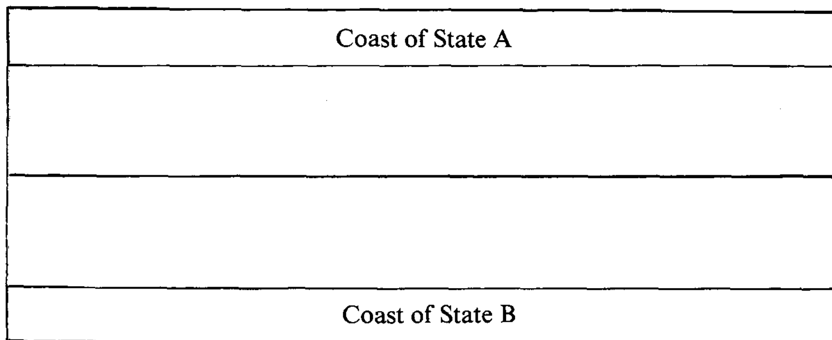
Hence, when Norway insists on "the legal equality of a median line" (CR 93/7, p. 58, 19 January 1993, Professor Brownlie), in the sense of equality in the seawards reach of the generating capacity of each coast, it is a legal equality which carries with it the benefit to Norway of being applied to an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

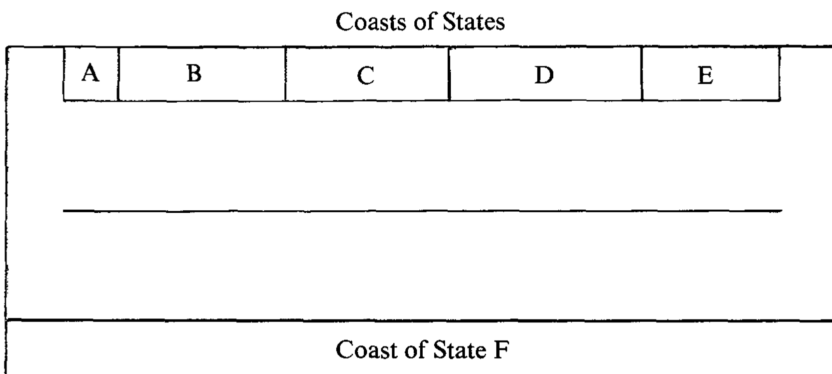
It was the argument of Denmark that, in the case of a short island coast confronting a long mainland coast, equity could not be achieved unless the delimitation line were drawn nearer to the short coast than would be the case if a median line were used, so as to avoid any excessive disproportionality.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

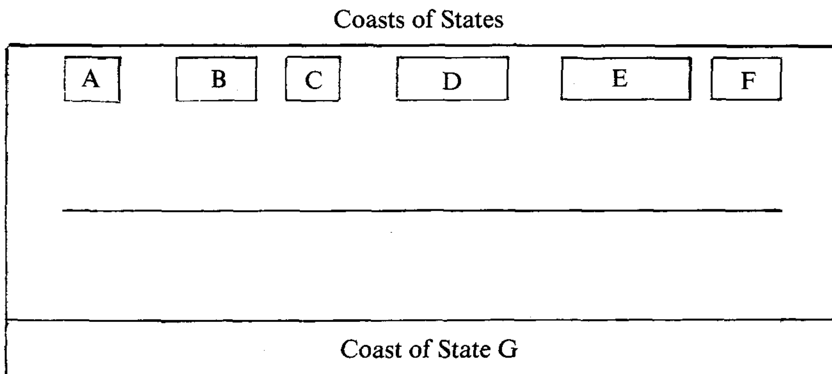
To illustrate its criticisms of Denmark's proposition, Norway introduced Figure No. 10, reproduced on the following page. It shows, as one would expect, that, as between two equal and parallel coastlines (one lying north of the other) a median line accomplishes an equal division of the intervening maritime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

FIG. NO. 10

SCHEMATIC ILLUSTRATION OF INFLUENCE OF COASTLINES ON MEDIAN LINE CONSTRUCTION







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

If that were the consequence of Denmark's reasoning, it would be plainly inequitable, tending, as it would, to favour the southern coast as against the northern coast taken as a whole, both being equal in length. But, contrary to Norway's analysis, each of the short coasts on the north would not, in that situation, be facing the whole of the long coast on the south. If the northern long coast came to be divided up among several States, any tendency in the projections of each resulting short coast to fan out seawards would be confined by an opposing tendency generated from the neighbouring short coast (*Libya/Malta, I.C.J. Reports 1985*, pp. 79-80, para. 10, and p. 80, para. 14, joint separate opinion). The projections from any given short coast would not oppose those from the whole of the opposite long coast. In the result, in the case of any of the short coasts, the relevant opposite coast would be, not the whole of the opposite long coast, but only that small part of it which was equal to that of the short coast. Thus the relevant coasts would be two equal and parallel short coasts, and the maritime space between them would be equally — and equitably — divided by a median line. Denmark's arguments do not lead in such a case to a northward shift in the position of the median line, and its thesis cannot be faulted on the basis that it would produce inequitable results if such a shift were made. So too if the northern long coast were broken up into a series of islands, each near to the other; for, in such a case, the radial projections of each island would be cut off by those of the island next to it, with the result that the coast of each island would be left to face only a corresponding length of the southern long coast and not the whole of the latter.

Denmark's submission that a shift is required to achieve equity is directed only to the case where an otherwise isolated short coast — such as that of a small island standing alone in the open seas — confronts a long mainland coast, such as the relevant part of the coast of East Greenland. Removing from Figure No. 10 all elements not relevant to such a case, it will be apparent from the remaining elements that in such a case — the case presented by Denmark — a median line will indeed divide the maritime area so as to give to each kilometre of the short coast a markedly greater area of the maritime zone than it would give to each kilometre of the opposite long coast. Granted that mathematical equality is not the criterion, yet where, as in this case, the discrepancy in areas attributable to a kilometre of each coast is in the order of a ratio of 6 : 1 in favour of the short coast, insistence that "legal equality" is nevertheless satisfied because the

distance between the coasts is still equally divided by the median line becomes too remote from common understanding to satisfy the kind of practical equality that it should be the aim of equity to achieve in international relations. In my opinion, a disproportionality of that magnitude amounts to an inequity disqualifying the median line as an equitable method of delimitation.

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

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

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

> "the principle of equality before the law does not mean the absolute equality, namely equal treatment of men without regard to individ-

> ual, concrete circumstances, but it means the relative equality, namely the principle to treat equally what are equal and unequally what are unequal" (*South West Africa, I.C.J. Reports 1966*, pp. 305-306, dissenting opinion).

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

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

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

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

Responding to Denmark's claim that Jan Mayen, *par excellence*, is a special circumstance, Norway contends that a special circumstance is some incidental physical feature which would distort a median line fixed by reference to the primary components of the relevant geographical region; that Jan Mayen is not such an incidental physical feature but is itself one of the components of the delimitation area; and that it cannot in

consequence be a special circumstance in the delimitation of its own coastal projections. The situations in some cases support Norway's idea of a special circumstance. See, for example, the *North Sea* cases, the *Anglo-French Arbitration,* and the *Tunisia/Libya* case. Cases in which some islet or other physical feature between opposite coasts would operate to impart an unduly distorting effect on a median line are obviously not apt in this case. Denmark's attempt, in the course of the written pleadings, to treat Jan Mayen itself as occurring "on the wrong side" of a delimitation line between mainland Norway and Greenland (Reply, Vol. I, p. 109, para. 299) was rightly not pursued in the oral arguments, there being no question of any continental shelf between these two territories falling to be delimited.

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

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

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

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

I do not think that I need take up a position on the question whether *a priori* a primary component of a relevant area may not be a special circumstance. The real question is not whether Jan Mayen is *per se* a special circumstance, but whether the relationship between Jan Mayen and Greenland is a special circumstance. No doubt, the International Law Commission had in mind particular physical features or irregularities which would have an unduly distorting effect on an equidistance line that would otherwise be required (*North Sea, I.C.J. Reports 1969,* pp. 92-94,

Judge Padilla Nervo, separate opinion; *Tunisia/Libya, I.C.J. Reports 1982*, pp. 187 ff., Judge Oda, dissenting; and *Libya/Malta, I.C.J. Reports 1985*, pp. 142 ff., Judge Oda, dissenting). But it would seem to me that the true underlying principle is that a circumstance is a special circumstance if it is such as to render the use of the median line inequitable. Thus viewed, special circumstances could include circumstances in addition to those which impart some peculiar shape to the median line. Even assuming that Jan Mayen is not *per se* a special circumstance, the disparity between its coastal length and that of East Greenland would render the use of the median line inequitable and is accordingly a special circumstance.

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

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

Judge Oda was critical of the Judgment on the point. Whether his criticisms were justified or not does not affect the correctness of his perception that the Court had in reality treated "the entire territory of one Party as a special circumstance" — or perhaps, more accurately, the entire coastline of the territory of one Party in its relationship with that of the other. The coastlines involved were, of course, those of a small island and that of an opposite long mainland coast. The island in this case is not only a small one facing a long mainland coast; it is an *isolated* small island facing a long mainland coast — isolated in the particular sense that its radial projections, in relation to the long coast, are not constrained by the projections from any third coasts. I am of opinion that this constitutes a special circumstance which excludes the use of the median line under Article 6, paragraph 1, of the 1958 Convention, and support the finding of the Court to the same effect.

(iv) *The Fishery Zone*

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

PART IV. THE DETERMINATION OF AN EQUITABLE LINE

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

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

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

I apprehend, however, that it is necessary to consider possible criticisms of the discretionary character of the decision. The method by which the line has been determined by the Court follows the precedent set in the *Libya/Malta* case. There, as has been seen, a two-stage procedure was applied involving the provisional drawing of a median line and a shift in the position of that line to take account of the disparities in coastal lengths, with the final line lying nearer to the short coast than to the long. The problem which this procedure presents is one of quantification of equity, in the sense of finding a rationale to justify the extent to which the shift is made. Why exactly that extent? Why not a little more, or a little less? The difficulty of finding a persuasive answer increases with the extent of the shift.

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

The Court has emphasized that its powers of appreciation in the application of equitable principles are to be distinguished from a power to decide *ex aequo et bono* (*Tunisia/Libya, I.C.J. Reports 1982*, p. 60, para. 71; and see *Libya/Malta, I.C.J. Reports 1985*, p. 39, para. 45, and *Gulf of Maine, I.C.J. Reports 1984*, p. 278, para. 59). Tightening up a less well-

defined position taken in the *Tunisia/Libya* case, it has recognized too that the equity which it applies "should display consistency and a degree of predictability" (*Libya/Malta, I.C.J. Reports 1985*, p. 39, para. 45). The response, however, is that the equitable principles which the Court applies lack concreteness of content to the point where the Court is in fact exercising a range of discretion which is practically indistinguishable from a power to decide *ex aequo et bono* (see, generally, E. Lauterpacht, *Aspects of the Administration of International Justice*, 1991, pp. 124-130). In the words of Judge Gros:

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

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

The judicial character of the Court, rightly emphasized by Judge Kellogg in *Free Zones of Upper Savoy and the District of Gex (P.C.I.J., Series A, No. 24)*, does not neutralize the fact that, pursuant to Article 38, paragraph 2, of its Statute, the Court, if authorized by the Parties, may act in disregard of existing international law (A. P. Fachiri, *The Permanent Court of International Justice*, 2nd ed., 1932, pp. 105-106; Dr. Max Habicht, *The Power of the International Judge to Give a Decision "ex aequo et bono"*, 1935, pp. 20-27; and Charles De Visscher, *op. cit.*, pp. 21-26). In such a case,

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

Although an *ex aequo et bono* power does not require a departure from principles of law, its hallmark is that it permits of such a departure. Where no such departure is in question, it is not correct to speak of a tribunal as

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

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

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

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

> "It certainly is true that the decision did not fully allow the claim of either party; but it is permissible to take the view that what appeared to the advocate of one of the parties, and no doubt equally to the advocate of the other party, to be a 'negotiation' rather than a 'Judicial determination', since it required the abandonment by each of a part of his contentions, was after all only an example of *the necessary process of adjustment, of the weighing of one consideration against another*, by which, in the presence of proofs concerning the effect of which opinions may inevitably differ, concurrent and just human judgments, judicial and otherwise, are daily reached." (J. B. Moore

(ed.), *International Adjudications Ancient and Modern*, 1930, Vol. 2, pp. 367-368; emphasis added.)

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

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

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

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

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

A little later he added:

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

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

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

The need to weigh and balance competing considerations necessarily places a limit on the capacity of a court to adjudicate with mathematical precision. Inability to demonstrate that level of exactness is not inconsistent with the due discharge of the judicial mission. To expect more is not merely to overestimate the judicial function; it is to misunderstand it. The misunderstanding is compounded where that function relates to maritime delimitation, a field in which it is particularly useful to bear in mind Pro-

fessor Paul Reuter's general remark that international law "est nécessairement simple et un peu rustique" (*I.C.J. Pleadings, Temple of Preah Vihear*, Vol. II, p. 85). To be sure, there is substance in the view that "a decision cannot be equitable when litigants do not understand the decision, how it was reached, nor why such legal rules should be applied to" the situation [1]. However generously one may be inclined to locate the boundaries of judicial discretion, it has always to be exercised on a disciplined basis and with reference to verifiable criteria. Yet, looking at the nature of the Court's functions in this case and at a certain indeterminacy in the circumstances to be taken into account, I consider that there is a sufficiency of reasoning to sustain its view that neither Norway's claim to the median line nor Denmark's claim to the 200-mile line is right, and that an equitable line is that established by its Judgment.

PART V. THE COMPETENCE TO ESTABLISH A SINGLE LINE

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

(*a*) the authority of the Court to fix a single dual-purpose line flows from the fact that the case relates to the delimitation of two zones, and that the agreement of the Parties to request the Court to fix such a boundary is not necessary;
(*b*) alternatively, if such an agreement is necessary, it can be derived from the fact that each Party in its separate submissions is in fact asking the Court to fix a single boundary.

As to the first question, it is necessary to begin by noticing the relationship between the boundary in the continental shelf and that in the fishery zone. Whatever might be their precise relationship to the exclusive economic zone, the continental shelf and the fishery zone are each an institu-

[1] Laura Nader and June Starr, "Is Equity Universal ?", in R. A. Newman (ed.), *Equity in the World's Legal Systems, A Comparative Study*, 1973, p. 125, at p. 133, cited in J. I. Charney, "Ocean Boundaries between Nations : A Theory for Progress", *American Journal of International Law*, 1984, Vol. 78, p. 582, at p. 595, note 69.

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

Now, it is possible to conceive of two sets of rights co-existing within the same physical space. Rights of that kind would be susceptible of delimitation by a single line. But the rights conferred by the continental shelf and the fishery zone do not exist within the same space. The continental shelf, which exists *ipso jure*, confers rights in respect of the natural resources of the sea-bed and the subsoil. The fishery zone, which requires to be established, confers rights in respect of the living resources of the superjacent water column. The latter is not "a mere accessory" of the underlying continental shelf (*Gulf of Maine, I.C.J. Reports 1984*, p. 301, para. 119). Though physically in contact, the two institutions are both legally and spatially distinct (*Fisheries Jurisdiction (United Kingdom* v. *Iceland), Merits, I.C.J. Reports 1974*, pp. 45-46, para. 4, first sentence, joint separate opinion of Judges Forster, Bengzon, Jiménez de Aréchaga, Nagendra Singh and Ruda; and *Gulf of Maine, I.C.J. Reports 1984*, p. 367, para. 12, Judge Gros, dissenting). Theoretically, the only sense in which it is possible to establish a single line for them is by way of the establishment of two *similar* lines, one superimposed on the other. But even a single line in this sense can be established only where the criteria governing the delimi-

tation of overlapping rights to each of the two sets of resources are the same; and they need not be[1]. The possibility of distinct lines was recognized in the *Gulf of Maine* case (*I.C.J. Reports 1984*, p. 314, para. 161).

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

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

Thus the establishment of a single line might require the Court

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

[1] See *I.C.J. Pleadings, Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, Vol. V, p. 246, question IV (1) of Judge Oda's questions, and p. 503, para. IV (1) of Libya's reply; *I.C.J. Pleadings, Maritime Delimitation in the Gulf of Maine Area*, Vol. VI, p. 461, President Ago's question; *Gulf of Maine, I.C.J. Reports 1984*, p. 317, para. 168, p. 326, paras. 192-193; Paul Jean-Marie Reuter, "Une ligne unique de délimitation des espaces maritimes ?", in *Mélanges Georges Perrin*, 1984, p. 251, at p. 256; D. W. Bowett, *The Legal Regime of Islands in International Law*, 1978, pp. 188-189; and R. R. Churchill, "Marine Delimitation in the Jan Mayen Area", in *Marine Policy*, 1985, Vol. 9, pp. 26-27. There is a well-known divergence between the boundary of the continental shelf and that of the economic zone in the case of the Australia/Papua New Guinea Maritime Boundaries Treaty of 1978.

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

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

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

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

On the first question, I am accordingly not persuaded by Denmark's submission that an agreement is not necessary.

As to the second question, concerning Denmark's alternative submission that there is an agreement, there is obviously no agreement in this case as there was in the *Gulf of Maine* case. Denmark, however, argues that each Party, in its submission, is in fact asking for a single line in respect of both the continental shelf and the fishery zone, and that this concurrence in submissions amounts in law to an agreement to request the Court to draw such a line. Norway is asking for congruent lines but on two important qualifying bases, first, that they should correspond with the median line only, and, second, that this correspondence should result from the operation of the criteria normally applicable at international law to the delimitation of each maritime area considered separately. Norway is not agreeable to any derogation from the normally applicable criteria so as to produce two congruent lines if those criteria would otherwise produce two non-congruent ones.

Hence there is no agreement. It follows that the only way in which the continental shelf and the fishery zone can have a single line (in the sense of two congruent lines) is if congruence is the incidental result of the operation of the normally applicable principles of international law. But two lines drawn independently for each area would coincide along their entire lengths only exceptionally. The factor concerning the location of fish stocks, relied on by the Court, may, in the circumstances of this particular case, be relevant to the delimitation of the fishery zone; it is not relevant to the delimitation of the continental shelf. Thus, I cannot say that I have found the question of a single line to be without difficulty. The doubts

which I have felt are not, however, sufficiently strong to prevent me from adhering to the Court's conclusion.

PART VI. THE JUDICIAL PROPRIETY OF DRAWING A DELIMITATION LINE

Norway submits that the Court should not undertake the drawing of a delimitation line. The submission was not made on the basis of jurisdiction, but it trenched sufficiently on this area to put one on enquiry as to the Court's competence, this being always a matter open to consideration. I shall accordingly address myself to this issue in the first place.

(i) *Jurisdiction*

The question which I propose to examine is whether the competence to determine the boundary is confided by international law exclusively to the process of agreement by the parties, with the result that the Court cannot determine it except on their joint request, and with the further consequence that, where, as here, there is no joint request, the Court can at most only provide guidelines to enable the parties themselves to determine the boundary by an agreement to be negotiated by them on the basis of such guidelines.

Without entering into details, I should first state that my understanding of the positions taken by the Parties is that they accept that the Court is competent to adjudge and declare what constitutes the boundary. The issue between them relates to a different question, namely, whether the Court's Judgment should be limited to a descriptive statement of what constitutes the boundary, or whether it should take the further form of including the actual drawing of the line. Neither Party has asked for guidelines on the basis of which negotiations will be undertaken with a view to determining by agreement what constitutes the boundary. Any negotiations visualized by Norway would be directed not to the question what constitutes the boundary, but to the technical question what is the specific line required to give expression to the Court's own judgment as to what constitutes the boundary.

The Parties having, in my view, accepted that the Court is competent to determine what constitutes the boundary, is it nevertheless possible to say that the Court lacks the necessary jurisdiction to do so?

On my reading of the record, after eight years of negotiations, not only has there in fact been no agreement, but there has been a failure to reach agreement.

Taking, first, the case of the continental shelf, what is the position where there has been a failure to reach agreement? The failure to reach agree-

ment means that the Parties have exhausted their own capacity to fix a boundary consensually on any basis whatever. So there is a dispute. It is not a dispute as to whether the Parties are under a duty to negotiate, for they have already negotiated, albeit unsuccessfully. It is a dispute as to what in fact is the boundary, there being no agreement as to what it is.

From this point onwards, it is necessary to read the 1958 Convention in partnership with any available procedure for the peaceful settlement of disputes. Theoretically, the failure of the Parties to determine the boundary by agreement does not preclude them at a later stage from still having recourse to agreement as a means of peaceful settlement of the dispute left over by such failure. But now, apart from the question of its practical usefulness, agreement is only one method among other available methods of settling the dispute.

The disputes settlement procedures of the 1982 Convention do not apply, and I express no opinion one way or another as to what the position might be if they did. Obviously, however, Article 36, paragraph 2, of the Statute of the Court is an available procedure for the settlement of disputes. Norway accepted that "it is Denmark's undisputed right to avail itself of the Court's general jurisdiction under Article 36, paragraph 2, of the Statute and the optional clause declarations" of the Parties made thereunder (CR 93/5, p. 21, 15 January 1993, Mr. Haug). There can be no doubt that a dispute relating to a maritime boundary is a legal dispute relating to a question of international law within the meaning of that provision. Referring to the machinery of this provision, Norway in fact recognized

> "that it lies within the scope and function of the Court to perform a delimitation of the continental shelf between Denmark and Norway, as well as a delimitation of the fishery zones between the same Parties, in the area between Jan Mayen and Greenland" (CR 93/11, p. 27, 27 January 1993, Mr. Haug).

Denmark, therefore, has an absolute right to invoke the Court's jurisdiction under that provision.

Bearing in mind that the dispute is one as to what is the boundary, the Court's response to it can only be to say what is the boundary. Depending on the adequacy of the material, the Court may be able to answer the question with more or less particularity. But I am unable to see how any proper sense of its judicial mission can compel the Court to avoid a direct response to the question submitted as to what is the boundary and to confine itself instead to giving guidance to the parties, which they have not sought, on what are the bases on which they should negotiate for the determination by agreement of that question. It would be especially beside the point, and somewhat gratuitous, for the Court to give such guidance where the parties have not committed themselves to negotiate on the basis

of legal principles (as in the *North Sea* cases), for they are always at liberty to agree a boundary on the basis of simple convenience or expediency.

Thus the failure to reach agreement bequeathed a legal dispute as to what constitutes the boundary. That dispute is susceptible of judicial settlement via unilateral application under Article 36, paragraph 2, of the Statute of the Court.

Assuming, however, that a consensual reference to the Court is required, the real question is whether both Parties have consensually established a settlement procedure relating to disputes and, if so, whether such disputes include a dispute as to the boundary of the continental shelf. This undoubtedly is the case under Article 36, paragraph 2, of the Statute. Under that provision, the Parties have consensually established a scheme for settlement of disputes which include the instant dispute as one which raises a question of international law. Where such a dispute has been unilaterally referred to the Court under this consensually established procedure, it is not open to the Respondent to complain that the proceedings were instituted without its consent. There is either consent or there is not. If none, there is no jurisdiction. But Norway accepts that there is jurisdiction. Hence an argument based on the unilateral nature of the Application collides with the fact that, in a fundamental sense, that unilateral Application is itself ultimately brought with the consent of Norway.

In my view, the foregoing approach would apply equally to the delimitation of the fishery zone in accordance with customary international law. There being a failure of the Parties to determine the boundary by agreement, there is a dispute as to what is the boundary. This being so, Denmark is entitled to invoke the machinery of Article 36, paragraph 2, of the Statute for the settlement of the dispute. And, again, the dispute being one as to what constitutes the boundary, the Court's response must be a response to that question, not to a question, unasked, as to what are the principles on which the Parties should negotiate for the settlement of the dispute.

(ii) *Judicial Propriety and Restraint*

The Court has not drawn a delimitation line. Thus, the substance of the Norwegian contention has prevailed. But the decision of the Court rests on the view that the drawing of a line by it could overlook possible deficiencies in the evidence, in the state in which it stands, concerning the technical aspects of such an operation. What I should like to make clear is that I do not understand the decision to be upholding Norway's contention in so far as this rests on the proposition that the mere non-consent of

Norway operates as a factor to prevent the Court, on grounds of judicial propriety and restraint, from drawing a line.

Norway carefully distinguished between jurisdiction and admissibility, on the one hand, and judicial propriety and restraint, on the other. However, it submitted that the

> "Court may usefully draw guidance from the analogous analyses that have been performed in cases such as *Tunisia/Libya* or *El Salvador/Honduras*, where the same issues were dealt with in the narrower context of interpreting the consent of parties, and were therefore properly viewed as being directly related to the jurisdiction of the Court, or Chamber, rather than to the discretion and restraint that the Court may choose to bring to bear in the exercise of its judicial powers and competence in this difficult area" (CR 93/9, p. 53, 21 January 1993, Mr. Keith Highet).

That Norway's interpretation of those two cases is correct is shown by the Judgments in the cases (*I.C.J. Reports 1982*, pp. 38-40, paras. 25-30; and *I.C.J. Reports 1992*, pp. 582-585, paras. 372-378. And see *I.C.J. Pleadings, Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, Vol. IV, pp. 440-441, and Vol. V, pp. 50, 214-216, 282-285, 353). And to those two cases, I think there could be added the *Libya/Malta* case (*I.C.J. Reports 1985*, pp. 22-24, paras. 18-19). They all bear on the question of competence, and do not, in my view, provide a safe analogy on the question of judicial propriety and restraint.

I understood counsel for Norway to be speaking of judicial restraint not in the kind of constitutional sense in which the concept has developed in certain municipal jurisdictions in response to the need to preserve a margin of appreciation in the exercise by each repository of State power of its allotted responsibilities[1]. The appeal was to judicial propriety and restraint not as limiting factors imposed by the relations between the elements of an institutionalized system within which a court may be functioning, but as factors which intrinsically influence the exercise of this Court's judicial function.

It was in this way that I understood counsel when he referred the Court to "the restraint articulated on the exercise of its judicial functions in the case concerning the *Northern Cameroons* (*I.C.J. Reports 1963*, p. 3)"

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[1] See *Corpus Juris Secundum*, Vol. 16, pp. 563 ff., para. 176, concerning judicial attitudes to political questions in the United States. And see Justice Stone's dissent in *United States* v. *Butler* (1926), 297 US 1 (78),

> "while unconstitutional exercise of power by the executive and legislative branches of the government is subject to judicial restraint, the only check upon our own exercise of power is our own sense of self-restraint".

As to judicial activism and judicial self-restraint in England, see S. A. de Smith, *Judicial Review of Administrative Action*, 4th ed., pp. 31 ff.

(CR 93/9, p. 53, 21 January 1993, Mr. Keith Highet). But there the Court was "relegated to an issue remote from reality" (*I.C.J. Reports 1963*, p. 33). Hence, as it remarked:

> "The function of the Court is to state the law, but it may pronounce judgment only in connection with concrete cases where there exists at the time of the adjudication an actual controversy involving a conflict of legal interests between the parties. The Court's judgment must have some practical consequence in the sense that it can affect existing legal rights or obligations of the parties, thus removing uncertainty from their legal relations. No judgment on the merits in this case could satisfy these essentials of the judicial function." (*Ibid.*, pp. 33-34.)

In that case there was really no triable issue the determination of which could serve any useful purpose. To decide the case would accordingly have been to undertake an exercise outside the judicial mission. In the instant case, there is, by contrast, a triable issue relating to a legal dispute as to what is the delimitation line in the continental shelf and fishery zone lying between Greenland and Jan Mayen, and the determination of that concrete issue would unquestionably serve a useful purpose.

Counsel also referred the Court to Sir Hersch Lauterpacht, writing

> "in his book, *The Development of International Law by the International Court* (1982, rev. ed., Part Two, Chap. 5, pp. 75-90), under the several and associated rubrics of 'judicial caution' and 'judicial restraint', as distinguished, of course, from 'judicial hesitation' or 'judicial indecision'" (CR 93/9, p. 53, 21 January 1993).

The exercise of inherently discretionary judicial powers apart, these rubrics encompass, *inter alia*, the need for caution in dealing with hypothetical or academic issues; questions as to how sparingly or fully the Court should give reasons for decision; and the question how far, if at all, the Court should deal with issues which, though arising, do not require determination in the light of the course taken by the reasoning relating to the decision finally taken. But I cannot think that these and other associated categories cover a case in which the real reason why it is asserted that the Court should as a matter of judicial propriety and restraint decline to exercise its admitted jurisdiction is that the Respondent has not been willing to co-operate in the evolution of some particular aspect of the litigation as fully as it might have done had the case been brought with its specific consent rather than by unilateral application.

In evaluating the submission that, as a matter of judicial propriety and restraint, the Court should not perform a delimitation in the absence of the consent of both parties to the Court doing so, it is helpful to consider the relationship between a statement of principles applicable to a particular delimitation and the carrying out of the delimitation itself.

In the *Libya/Malta* case, the Parties, by their Special Agreement, asked the Court to state the principles and rules applicable to the determination of their respective areas of the continental shelf, and also to indicate

> "how in practice such principles and rules can be applied by the two Parties in the particular case in order that they may without difficulty delimit such areas by an agreement . . ." (*I.C.J. Reports 1985*, p. 16).

The Special Agreement did not request the Court to draw a line, and the Court did not. Even so, the case illustrates the close, almost integral, relationship which exists between a statement of principles governing a delimitation and the actual drawing of a line. Commenting on the question how far the Court could go in indicating how in practice the relevant principles and rules could "be applied by the two Parties in order that they may without difficulty delimit such areas by an agreement", the Court said:

> "Whether the Court should indicate an actual delimitation line will in some degree depend upon the method or methods found applicable." (*Ibid.*, p. 24, para. 19. See also *ibid.*, p. 23, para. 18.)

Even though the Special Agreement had reserved to the Parties the function of drawing the line, the Court was prepared to "indicate an actual delimitation line" if it felt that, without doing so, it could not carry out its part of the task. So the relationship between a statement of delimitation principles and the drawing of a line expressive of the application of those principles can be close (see, also, with respect to *Tunisia/Libya*, the comments in Romualdo Bermejo, "Les principes équitables et les délimitations des zones maritimes : Analyse des affaires *Tunisie/Jamahiriya arabe libyenne* et du *Golfe du Maine*", *Hague Yearbook of International Law*, 1988, Vol. 1, p. 67).

That the drawing of a line is, indeed, an integral part of any delimitation exercise is apparent from the Court's remark in 1969 that

> "the process of delimitation is essentially one of *drawing a boundary line* between areas which already appertain to one or other of the States affected" (*North Sea, I.C.J. Reports 1969*, p. 22, para. 20; emphasis added).

So, too, in the *Aegean Sea Continental Shelf* case. In its Application Greece requested

> "the Court to adjudge and declare . . . what is the course of the bound-

ary (or boundaries) between the portions of the continental shelf appertaining to Greece and Turkey in the Aegean Sea . . ." (*I.C.J. Reports 1978*, p. 6, para. 12).

The Court said:

"It is therefore necessary to establish the boundary or boundaries between neighbouring States, that is to say, to draw the exact line or lines where the extension in space of the sovereign powers and rights of Greece meets those of Turkey." (*Ibid.*, p. 35, para. 85.)

Thus, although denying jurisdiction, the Court had no hesitation in holding that the resolution of a continental shelf boundary dispute necessarily involved the drawing of "the exact line or lines" of delimitation.

In the case of a terrestrial boundary dispute, as where a watershed line is concerned, one accepts that the Court cannot take the "place of a delimitation commission", still less that it can mark "a new frontier line on the ground" (*Temple of Preah Vihear, I.C.J. Reports 1962*, p. 68, Judge Moreno Quintana, dissenting). In such a case —

"Once the Court has indicated what it considers to be the correct line of the watershed, it will be for the Parties to determine how that line is to be given expression on the ground. The latter task is of a technical nature, and not within the judicial field which belongs to the Court." (*Ibid.*, p. 69.)

But in the instant case no physical demarcation in the relevant areas is either visualized or required.

It is conceivable that a dispute could be presented to the Court as to the accuracy of an existing line, including a baseline. The normal way of resolving such a dispute would be for the Court not merely to pronounce upon "definitions, principles or rules", but to decide on the validity or otherwise of the specific method or line challenged in the case before it. That was the position in the *Fisheries* case *(United Kingdom* v. *Norway)* in which the Application was in fact made unilaterally under Article 36, paragraph 2, of the Statute of the Court (*I.C.J. Reports 1951*, pp. 118, 126 and 143). If the Court can properly do that in the case of a baseline, it should be equally proper for it to draw a delimitation line where it is necessary to do this in order to express its decision definitively on the concrete dispute before it. The drawing of a line is merely one way of expressing the decision reached with a view to achieving the kind of stability which it should be the object of a boundary decision to produce.

No doubt, as a general matter, in the absence of co-operation based on consent, there could be evidential and other difficulties (see generally, in relation to advisory proceedings, the *Eastern Carelia* case, *P.C.I.J., Series B, No. 5*, p. 28). But the absence of such co-operation does not

necessarily disable the Court from deciding. Where the relevant material is before the Court, it would seem to me that a litigating party, as a party to the Statute, has a right to expect, and indeed to require, the Court to exercise its jurisdiction under the Statute. The existence of this duty has been noticed by the Court itself. In 1984 it observed that, barring circumstances which do not apply here, "it must be open to the Court, and indeed its duty, to give the fullest decision it may in the circumstances of each case" (*Continental Shelf (Libyan Arab Jamahiriya/Malta), Application for Permission to Intervene, I.C.J. Reports 1984*, p. 25, para. 40). In 1985 it added, "The Court must not exceed the jurisdiction conferred upon it by the Parties, but it must also exercise that jurisdiction to its full extent" (*Libya/ Malta, I.C.J. Reports 1985*, p. 23, para. 19. And see *Frontier Dispute, I.C.J. Reports 1986*, p. 577, para. 45). As it was succinctly put by Judge Moreno Quintana, "The Court cannot refuse to discharge its judicial task" (*The Temple of Preah Vihear, I.C.J. Reports 1962*, p. 68, dissenting opinion).

I do not see that the thrust of these purposeful statements can be offset by the stress which counsel has placed on the role assigned to consent in delimitation matters (CR 93/9, p. 50, 21 January 1993, Mr. Highet). That role is clearly important. But it is just as clear that, in the absence of agreement, any dispute as to what is the delimitation line is a dispute cognizable under Article 36, paragraph 2, of the Statute and, in a properly constituted case, such as this, must be fully decided by the Court thereunder.

It is useful to bear in mind that there are two ways of moving the Court. One is by way of proceedings instituted pursuant to an agreement (of one kind or another) under Article 36, paragraph 1, of the Statute of the Court. The other is by way of proceedings instituted pursuant to the optional clause provisions of Article 36, paragraph 2, of the Statute. As between the same parties, both methods may well be applicable (*Electricity Company of Sofia and Bulgaria, P.C.I.J., Series A/B, No. 77*, p. 76). The availability of one method is not necessarily inconsistent with the concurrent availability of the other. It may with even greater justice be held that it cannot be right to use a theoretical but unavailable possibility of recourse to one method to limit the exercise of an existing right of recourse to the other. That this is the substance of the issue arising may be seen from Norway's submission that —

> "Delimitation is inherently unsuitable for cases brought by unilateral application unless there is some form of agreement on the part of the respondent as to the role and powers of the Court." (CR 93/9, p. 81, 21 January 1993, Mr. Keith Highet.)

Norway admits that jurisdiction exists under Article 36, paragraph 2, of the Statute. Yet it seems to be saying that the case could only be brought under that provision if "there is some form of agreement on the part of the respondent as to the role and powers of the Court". But, if there is such agreement, the case might as well be brought under Article 36, paragraph 1, of the Statute. Norway's submission, if correct, would represent a restriction on the exercise of the Court's compulsory jurisdiction; it would operate to impose a hidden proviso to Article 36, paragraph 2, of the Statute, the effect of which would in practice be to exclude some cases from this provision and to limit the right to bring proceedings in respect of them to Article 36, paragraph 1, only. The gravity of this consequence is not mitigated by the fact that the argument has been made on the basis of judicial propriety and restraint.

The Court is always mindful of the consensual basis of its jurisdiction. But there is a limit to contentions based explicitly or implicitly on voluntarism. The Statute and the Rules prescribe a number of conditions for the exercise of the Court's power to decide disputes on a consensual basis. But once the power comes into play, I cannot see that any further consent is required for its effectual exercise. There is a conceivable exception where a case is brought pursuant to an agreement by the very terms of which some further consent is required before a particular issue is considered by the Court (see *Free Zones of Upper Savoy and the District of Gex, P.C.I.J., Series A/B, No. 46*, p. 165). But that is not the situation here.

In this case, Counsel for Norway himself expected that it would have been open to Denmark to say that "Norway cannot both be in the litigation and out of the case . . ." (CR 93/9, p. 78, 21 January 1993, Mr. Keith Highet). More particularly, as he also correctly remarked, "After all, it is a *litigation* that we are conducting, not a conciliation, or mediation procedure" (*ibid.*, p. 79). But precisely because it is a litigation — a litigation duly instituted — the Court cannot act on extraneous considerations. Jurisdiction having been admitted, the fact that the case was not brought with the agreement of the Respondent is, by itself, not relevant to the manner in which the Court should approach the issue which it presents and express its decision thereon. Accordingly, had the Court judged that the available material was sufficient to enable it to draw a line, it could, in my opinion, properly have done so notwithstanding the non-consent of Norway to that particular step being taken.

(Signed) Mohamed SHAHABUDDEEN.