CHAPTER- IV

JUDICIAL AND ARBITRAL DECISIONS ON MARITIME DELIMITATION OF CONTINENTAL SHELF
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Introduction:

The study in this chapter has been made under two different periods.

i) Under Pre 1982 Law of the Sea Convention

ii) Under Post 1982 Law of the Sea Convention


During this period, North Sea Continental Shelf cases 1969 and Aegean Sea Continental Shelf case 1978 between Greece / Turkey) decided by the International Court of Justice and two cases (U.K. / France, 1977 and Beagle Channel Region Case (Chile/Argentina, 1977) decided by the Arbitral Courts explaining the equitable principles applied in the settlement of maritime delimitation of Continental Shelf have been analysed.

4.1.0. List of Cases Decided in Pre 1982 Law of the Sea Convention:


iii) Controversy concerning Beagle Channel Region (Chile/Argentina) - Decision of the Court of Arbitration dated 18th February 1977 - Award dated 2nd May 1977.

iv) Aegean Sea Continental Shelf case (Greece/Turkey) Judgment of 19th December 1978.

The above listed cases are studied in detail hereunder.

4.1.1. North Sea Continental Shelf cases 1969. (Federal Republic of Germany (FRG)/Denmark; FRG/Netherlands, (Judgment of 20 February 1969.)

The International Court of Justice decided these cases based upon the principles and rules of international law applicable to delimitation of the continental shelf among adjacent States. In these cases, Denmark and Netherlands, which were parties to the Geneva Convention on the Continental Shelf, 1958, have been recognised by I.C.J as parties in the same interest within the meaning of Article 31, paragraph 5, of the Statute of the Court.¹ The Federal

¹ North Sea Continental Shelf cases (Federal Republic of Germany (FRG)/Denmark; FRG/Netherlands) 1969 I.C.J Reports, (Judgment of 20 February), para.7
Republic of Germany (FRG) was one of the signatories of the Convention (1958) but has never ratified it, and is consequently not a party.\(^2\)

**4.1.1 (i) Facts of the North Sea cases 1969:**

Regarding the facts of the cases, the Federal Republic of Germany (hereafter called as FRG) and Netherlands entered into a partial boundary Agreement on 1 December, 1964. covering the boundary in the North Sea up to 26 miles from the existing terminal point. The FRG also entered with Denmark an Agreement on 9th June, 1965 settling a partial boundary in the North sea upto 26 miles. Both these Agreements followed the equidistant line. Denmark and Netherlands also concluded an agreement on 31 March, 1966 settling the boundary line between them beyond the notional equidistance line boundaries between them and the FRG in the North Sea. This was also drawn on the basis of an equidistance line. Differences arose between parties (FRG and Denmark; FRG and Netherlands) regarding the alignment of the boundary beyond the partial boundary Agreement of 9th June, 1965 and 1st December 1964 respectively. To solve these differences, the parties by entering into two Special Agreements of 2 Feb 1967 agreed to refer the question of the applicable principles and rules of international law to the International Court of Justice and further agreed to negotiate the remaining boundary in the light of the decision of the Court.

In the written memorials and in oral pleadings, the FRG submitted that the basic principles of delimitation is that each coastal State is entitled to a just and

\(^2\) North Sea Continental Shelf cases, see note 1 above, p. 7
equitable share.³ and contended that keeping in mind the nature of the North Sea as a quasi-enclosed sea, the FRG should be entitled to a proper share of the continental shelf area in the North Sea on the basis of the length of its coastline or the 'coastal front' or facade and that its continental shelf should converge in the North Sea towards a central point situated on the median line of the whole seabed rather than be 'cut-off', by the strict application of the equidistance line due to the concavity of its coasts.⁴ The method of equidistance was not a rule of customary international law, and its application in the North Sea between them would not lead to an equitable apportionment.⁵ Alternatively, if the equidistance method was applicable to the area, the concave configuration of the FRG coast should constitute a 'special circumstances' to justify a departure there from.⁶

The Netherlands and Denmark submitted that the principles of delimitation for the maritime boundary between them and the FRG in the North Sea would be those which were expressed in the 'equidistance - special circumstances' rule embodied in Article 6, paragraph 2, of the Geneva Convention on the Continental Shelf 1958,⁷ namely that in the absence of agreement and unless another boundary was justified by special circumstances, the boundary between them and the FRG is to be determined by the application of the principle of equidistance.⁸ Alternatively, the boundary is to be determined on the basis of the exclusive right of each Party over its continental shelf adjacent to its coasts and

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³ North Sea Continental Shelf cases, see note 1 above, p. 20, para. 15
⁴ I.C.J. Reports 1969, see note 1 above, para. 15
⁵ Ibid, p. 9 para 2 & 3 of Memorial submitted by Federal Republic of Germany
⁶ Ibid, p. 11, para 2(c) of oral proceedings submitted by Federal Republic of Germany
⁷ Ibid, p. 10, para 1 of Counter Memorial submitted by Netherlands and Denmark
⁸ Ibid, p. 11, Para 2 of Counter Memorial submitted by Netherlands and Denmark
should leave to each Party every point of the continental shelf which lies nearer to its coast than to the coast of the other party.⁹

**Article 6 of the Geneva Convention on the Continental Shelf 1958, reads as follows:**

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

2. Where the same continental shelf is adjacent to the territories of two adjacent States, the boundary of the continental shelf shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary shall be determined by application of the principles of equidistance from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured.¹⁰

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⁹ I.C.J. Reports 1969, *see note 1 above*, para. 4 of Counter Memorial submitted by Netherlands and Denmark

¹⁰ Article 6, paragraph 2 of Geneva Convention on Continental Shelf 1958 Text referred in I.C.J. Reports 1969, *see note 1 above*, p. 24, para. 26(1) & (2)
The comparative length of the coasts of the FRG, the Netherlands and Denmark were 152, 189 and 203 nautical miles respectively.\(^{11}\)

4.1.1. (ii) Judgment of the Court:

The Court confined the judgment to indicating the delimitation principles applicable to adjacent States for the continental shelf boundary, as distinct from the delimitation principles applicable to States with opposite coasts or for the lateral territorial sea boundary.\(^{12}\)

While considering the contentions put forward on behalf of the FRG, the Court said that its task in the present proceedings relates essentially to the delimitation and not to the apportionment of the area concerned, or their division into converging sectors. Delimitation is a process which involve establishing the boundaries of an area already, in principle, appertaining to the coastal State and not the determination \textit{de novo} of such an area.\(^{13}\)

With reference to the contentions advanced on behalf of Denmark and Netherlands, the main question considered by the Court was thus the following:

Does the 'equidistance - special circumstances' principle constitute a mandatory rule, either on a conventional or on a customary international law basis, in such a way as to govern any delimitation of the North Sea continental shelf areas between the Federal Republic and the Kingdoms of Denmark and the Netherlands respectively? Another and shorter way of formulating the question

\(^{11}\) S.P. Jagota, \textit{Maritime Boundary}, Dordrecht, the Netherlands 1985, p. 130
\(^{12}\) Ibid.
\(^{13}\) I.C.J. Reports, 1969, \textit{see note 1 above}, p.22, para.18
would be to ask whether, in any delimitation of these areas, the Federal Republic is under a legal obligation to accept the application of the 'equidistance - special circumstances' principle.  

This question was dealt exhaustively by the Court in its judgment. It recognised that the equidistance method has the combination of practical convenience and certainty of application. Yet these factors do not suffice of themselves to convert what is a method into a rule of law, making the acceptance of the results of using that method obligatory in all cases in which the parties do not agree otherwise, or in which 'special circumstances' can not be shown to exist. The equidistance line can under certain circumstances produce results that appear on the face of them to be extra ordinary, unnatural or unreasonable. The Court added: The plea that, however this may be, the results can never be inequitable, because the equidistance principle is by definition an equitable principle of delimitation, involves a postulate that clearly begs the whole question at issue.

In the first place, the Court decided that Article 6 of the 1958 Convention as a conventional rule, was not applicable or opposable to the FRG in the present case because the FRG was not a party to that Convention, and if and when it decided to become a Party, the FRG could enter into reservations relating to that Article. The conduct of the FRG did not amount to its assumption or acceptance of the conventional rule in Article 6, nor its recognition as a generally applicable

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14 I.C.J. Reports, 1969, see note 1 above, p.22, para. 18
15 Ibid, p. 23, para. 21
16 Ibid, Para. 24
17 Ibid.
18 Ibid, para. 29
rule. Nor did the FRG conduct create a situation of estoppel because, relying thereon, Denmark or the Netherlands did not change their position detrimentally or suffer prejudice.\footnote{I.C.J. Reports, 1969, see note 1 above, para. 30} Nor did the Court consider it appropriate to interpret Article 6 to indicate the stage of the application of equidistance.\footnote{Ibid, para. 34} It did however hold that the Agreement reached between Denmark and the Netherlands on 31 March 1966, which was claimed to be valid \textquoteleft erga omnes \textquoteright\footnote{Ibid, para. 35} could not be based on Article 6, since Denmark and the Netherlands were neither adjacent States nor States with opposite coasts, and that the validity of this delimitation must be sought in some other source of law.\footnote{Ibid, para. 36}


The Court then examined at length the second part of the main question stated above, namely, whether the \textquoteleft equidistance - special circumstances\textquoteright principle embodied in Article 6 of the 1958 Convention was a part of customary international law, which would be applicable to all States whether or not they were Parties to the Convention. The Court examined this question from two angles, namely first, whether equidistance was inherent in the concept of the continental shelf itself which was the natural prolongation of the land territory of a coastal State under the sea and therefore had the qualities of adjacency and proximity to the landmass, and secondly, whether equidistance had attained the status of a customary rule on a positive law basis or by way of State practice.\footnote{Ibid, para. 37}

As to the inherency argument, the Court recognised that the argument of Denmark and the Netherlands about closer proximity, namely that all those parts
of the shelf should be considered as appurtenant to a particular coastal State which are closer to it than to any other State, had much force since as a matter of normal topography, the greater part of a State's continental shelf areas will in fact be nearer to its than to any other, but added that 'post hoc' is not 'propter hoc', and this situation may only serve to obscure the real issue.\textsuperscript{24}

As regard to equidistance inherently resulting from the concept of natural prolongation or extension of land territory, the Court said that the use of the equidistance method would frequently cause areas which are the natural prolongation or extension of the territory of one State to be attributed to another, when the configuration of the latter's coast makes the equidistance line swing out laterally across the former's coastal front, cutting it off from areas situated directly before that front.\textsuperscript{25}

The Court said that, the fluidity of these notions is well illustrated by the case of the Norwegian Trough \textsuperscript{26} and added:

Without attempting to pronounce on the status of that feature the Court notes that the shelf areas in the North Sea separated from the Norwegian coast by the 80-100 kilometres of the Trough can not in any physical sense to be said to be adjacent to it, nor to be its natural prolongation. They are nevertheless considered by the States parties to the relevant delimitations to appertain to Norway up to the median lines. True these median lines are themselves drawn on equidistance

\textsuperscript{24} I.C.J.Reports,1969, see note 1 above, para 40
\textsuperscript{25} Ibid, para.44
\textsuperscript{26} Ibid, para.45
principles; but it was only by first ignoring the existence of the Trough that these
median lines fell to be drawn at all.  

The Court from the above analysis concluded that the notion of equidistance
as being logically necessary, in the sense of being an inescapable \textit{a priori}
amcompanion of basic continental shelf doctrine, is incorrect.\footnote{27} Nor was the
inherency argument noticeable in the history of the development of the
equidistance method of delimitation. The `Truman Proclamation issued by the
Government of the United States of America on 28 September, 1945, came to be
regarded as the starting point of the positive law on the subject, and the chief
doctrine it enunciated, namely that of the coastal State as having an original,
natural and exclusive (in short a vested) right to the continental shelf off its
shores, came to prevail over all others, being now reflected in Article 2 of 1958
Geneva Convention on the Continental Shelf.\footnote{29}

The Truman Proclamation stated that such boundaries shall be determined
by the United States and the State concerned in accordance with equitable
principles. These two concepts, of delimitation by mutual agreement and
delimitation in accordance with equitable principles, have underlain all the
subsequent history of the subject.\footnote{30}

Reviewing the work of the International Law Commission from 1950 to
1956, the Court held that equidistance as a mandatory rule or as having \textit{a priori} a
character of inherent necessity: it was never given any special prominence at all,
and certainly no priority.\textsuperscript{31} Apart from equidistance, the Commission discussed various other possibilities as having equal if not superior status such as delimitation by agreement, by reference to arbitration, by drawing lines perpendicular to the coast, by prolonging the dividing line of adjacent territorial waters (the principle of which was itself not as yet settled), and on occasion the Commission seriously considered adopting one or other of these solutions.\textsuperscript{32} All these were referred by the Commission to a Committee of Experts in 1953, which examined the question of lateral boundary between adjacent territorial waters, and only incidentally the lateral continental shelf boundary.

The Committee of Experts decided that the (lateral) boundary through the territorial sea - if not already fixed otherwise - should be drawn according to the principle of equidistance from the respective coastlines.\textsuperscript{33} They recognise that in a number of cases this may not lead to an equitable solution, which should be then arrived at by negotiation.\textsuperscript{34} As a rider to this conclusion, the Committee said that the same could also be used for the delimitation of the respective continental shelves of two States bordering the same continental shelf.\textsuperscript{35} The Commission accepted this recommendation in 1953 and drafted Article 6 accordingly by adding references to `special circumstances'.

The Court thought it to be a legitimate supposition that the experts were actuated by considerations not of legal theory but of practical convenience and

\textsuperscript{31} I.C.J. Reports, 1969, see note 1 above, para. 50
\textsuperscript{32} Ibid.
\textsuperscript{33} Ibid, para.52
\textsuperscript{34} Ibid.
\textsuperscript{35} Ibid.
cartography.\textsuperscript{36} There was no end to the Commission's hesitations and doubts continued to be expressed in 1956 that its rigid application would be open to the objection that "the geographical configuration of the coast would render a boundary drawn on this basis inequitable.\textsuperscript{37} Nor did the Commission or the 1958 Conference consider the case of 'two or more' adjacent States for the purpose of delimitation in Article 6, which was the situation in the present case. Instead in respect of median lines the reference in paragraph 1 of Article 6 of Geneva Convention 1958 on continental shelf is to 'two or more' opposite States.\textsuperscript{38}

In the light of this history, the Court concluded that at no time was the notion of equidistance as an inherent necessity of continental shelf doctrine entertained, \textsuperscript{39} that current legal thinking was that no one single method of delimitation was likely to prove satisfactory in all circumstances, and that delimitation should, therefore, be carried out by agreement (or by reference to arbitration); and that it should be effected on equitable principles.\textsuperscript{40} Accordingly, in drafting Article 6, the Commission gave priority to delimitation by agreement and introduced the exception in favour of special circumstances.\textsuperscript{41} However, "even with these mitigations, doubts persisted, particularly as to whether the equidistance principle would in all cases prove equitable.\textsuperscript{42}

The Court did however recognise that for good reason the same difficulty may not apply for a median line boundary between opposite States, and said:

\textsuperscript{36} I.C.J. Reports, 1969, see note 1 above, para. 53
\textsuperscript{37} Ibid.
\textsuperscript{38} Ibid, para. 54
\textsuperscript{39} Ibid.
\textsuperscript{40} Ibid.
\textsuperscript{41} Ibid.
\textsuperscript{42} Ibid.
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.\(^43\)

The Court distinguished the two situations as follows:

Whereas a median line divides equally between the two opposite countries areas that can be regarded as being the natural prolongation of the territory of each of them, a lateral equidistance line often leaves to one of the States concerned areas that are a natural prolongation of the territory of the other.\(^44\)

The justification for a lateral boundary between adjacent territorial waters drawn on an equidistance basis was given by the Court on the ground that the distorting effect of coastal configuration are comparatively small and on the ground of the nature of rights therein. As to the latter, the court said:

There is also a direct correlation between the notion of closest proximity to the coast and the sovereign jurisdiction which the coastal State is entitled to exercise and must exercise, not only the seabed underneath the territorial waters but over the waters themselves, which does not exist in respect of continental

\(^{43}\) I.C.J. Reports, 1969, see note 1 above, para. 57  
\(^{44}\) Ibid, para. 58
shelf areas where there is no jurisdiction over the superjacent waters, and over the seabed only for purposes of exploration and exploitation.\textsuperscript{45}

Turning now to the positive law basis of equidistance being a mandatory rule of customary international law, the Court said that for this purpose, it is necessary to examine the status of the principle as it stood when the Convention was drawn up, as it resulted from the effect of the Convention, and in the light of State practice subsequent to the Convention.\textsuperscript{46}

The Court held that Article 6 of the 1958 Convention was not declaratory of a customary rule. Reviewing the history of equidistance, it added that the 1958 Convention did not crystalise equidistance as an emergent rule of customary law by including in Article 6. Moreover, reservations were also allowed to that Article, even though only a few were actually made. The position was summed up by the Court as follows:

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.\textsuperscript{47}

The Court then dwelt at length on the question whether equidistance had since 1958 developed as a customary rule through the requisite quality of State practice...

\textsuperscript{45} Ibid, para. 59
\textsuperscript{46} Ibid, para. 60
\textsuperscript{47} Ibid, para. 69
practice. It held that to develop such quality, a provision in a Convention should be of a norm creating character.\textsuperscript{48}

Further the Court added that within the period in question, although short, "State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked; and should more over have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved."\textsuperscript{49} As to the norm-creating character, the Court held that Article 6 did have such a quality, since under this Article, equidistance will apply only in the absence of agreement, it was qualified by 'special circumstances', and reservations could be made to the Article. Nor was there a widespread and representative participation in the Convention since 1958 (46 signatures and 39 rectifications or accessions by 1969) the reasons may be speculative, but the facts remain.\textsuperscript{50}

As to State practice, leaving out the Agreement concluded between the Parties to the case before the Court, and those which did not establish international boundaries, only 15 cases were cited before the Court as having been concluded since 1958. Four of these related to the North Sea.\textsuperscript{51} Over half of the total were among States which were parties to the 1958 Convention and therefore they applied the conventional rule embodied in Article 6. In the remaining cases, their action in applying equidistance can only be problematical and must remain

\textsuperscript{48} I.C.J. Reports, 1969, see note 1 above, para. 72
\textsuperscript{49} Ibid, para. 74
\textsuperscript{50} Ibid, para. 73
\textsuperscript{51} Ibid, para. 75
entirely speculative here is no lack of other reasons for using the equidistance method.\textsuperscript{52}

For assessment of the evidence of State practice, the Court said the following:

The essential point in this connection - and it seems necessary to stress it - is that even if these instances of action by non-parties to the Convention were much more numerous than they in fact are, they would not, even in the aggregate, suffice in themselves to constitute the \textit{opinio juris}; - for, in order to achieve this results, two conditions must be fulfilled. Not only must the acts concerned amount to a settle practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the \textit{opinio juris sive necessitatis}.\textsuperscript{53}

These conditions were not fulfilled in the present case, the Court held.

Most of the Agreements cited were also among opposite States, which should not constitute a precedent for the delimitation of lateral boundaries, the Court said. Only one case was comparable to the situation in the cases before the Court, but here the delimitation had not yet been completed.\textsuperscript{54}

\textsuperscript{52} I.C.J. Reports, 1969, \textit{see note 1 above, para. 75}
\textsuperscript{53} Ibid, para.77
\textsuperscript{54} Ibid, para.79
Against this background, on the question of a positive law basis for the customary rule of equidistance, the judgment concluded as follows:

The Court accordingly concluded that if the Geneva Convention was not in its origins or inception declaratory of a mandatory rule of customary international law enjoining the use of the equidistance principle for the delimitation of continental shelf areas between adjacent States, neither has its subsequent effect been constitutive of such a rule; and that State practice up-to-date has equally been insufficient for the purpose.  

In view of these conclusions, the Court did not consider it necessary to determine whether or not the configuration of the German North Sea coast constitutes a ‘special circumstances’ for the purposes either of under Article 6 of the Geneva Convention or of any rule of customary international law.  

The Court rejected the contention of Denmark and the Netherlands that equidistance was a mandatory rule of customary international law on delimitation, either in its fundamental aspects or on the basis of positive law, and said that the basic principles, which have from the beginning reflected the opinio juris, are that “delimitation must be the object of agreement between the States concerned, and that such agreement must be arrived at in accordance with equitable principles.  

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55 I.C.J. Reports, 1969, see note 1 above, para 81  
56 ibid, para. 82  
57 ibid, para. 85
4.1.1. (iii) Rules established by the Court:

The Court then elaborated the principles which govern the delimitation of adjacent continental shelves, emphasising that it is not a question of applying equity simply as a matter of abstract justice, but of applying a rule of law which itself requires the application of equitable principles. The elaborated rules were:

4.1.1.(iii)(a) Parties under obligation to conduct negotiations:

The parties are under an obligation to enter into negotiations with a view to arriving at an agreement, and not merely to go through a formal process of negotiation as a sort of prior condition for the automatic application of a certain method of delimitation in the absence of agreement; they are under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it.

4.1.1.(iii)(b) Parties to apply equitable principles taking all circumstances into account:

The parties are under an obligation to act in such a way that, in the particular case, and taking all the circumstances into account, equitable principles are applied, for this purpose the equidistance method can be used, but other methods exists and may be employed, alone or in combination, according to the areas involved.

4.1.1.(iii)(c) Parties to apply the theory of Natural Prolongation:

58 I.C.J.Reports, 1969, see note 1 above, para 85
59 ibid, para.85(a)
60 ibid,para.85(b)
The continental shelf of any State must be the natural prolongation of its land territory and must not encroach upon what is the natural prolongation of the territory of another State.\(^1\)

The Court again stressed how in the present case, because of the geographical circumstances, the application of the equidistance method for delimitation would be inequitable. In this context, the Court explained the relation between equity and equality in the present case as follows:

Equity does not necessarily imply equality. There can never be any question of completely refashioning nature, and equity does not require that a State without access to the sea should be allotted an area of continental shelf, any more than there could be a question of rendering the situation of a State with an extensive coastline similar to that of a State with a restricted coastline. Equality is to be reckoned within the same plane, and it is not such natural inequalities as these that equity could remedy. But in the present case there are three States whose North Sea coastlines are in fact comparable in length and which, therefore, have been given broadly equal treatment by nature except that the configuration of one of the coastlines would, if the equidistance method is used, deny to one of these States treatment equal or comparable to that given the other two. Here indeed is a case where, in a theoretical situation of a equality within the same order, an inequity is created. What is unacceptable in this instance is that a State should enjoy continental shelf rights considerably different from those of its neighbours merely because in the one case the coastline is roughly convex in form and in

\(^1\) I.C.J. Reports, 1969, *see note 1 above, para. 85(c)*
other it is markedly concave, although those coastlines are comparable in length. It is therefore not a question of totally refashioning geography whatever the facts of the situation but, given a geographical situation of quasi-equality as between a number of States, of abating the effects of an incidental special feature from which an unjustifiable difference of treatment could result.\textsuperscript{62}

Elaborating the methods of delimitation for ensuring equity, the Court emphasised that it is necessary to seek not one method of delimitation but one goal,\textsuperscript{63} that there is no legal limit to the considerations which State may take account of for the purpose of making sure that they apply equitable procedures, and more often than not it is the balancing-up of all such considerations that will produce this result rather than reliance on one to the exclusion of all others. The problem of the relative weight to be accorded to different considerations naturally varies with the circumstances of the case.\textsuperscript{64}

4.1.1.(iii)(d) Factors to be taken into account in Delimitation:

The Court specified the factors which have to be balanced and taken into account in delimitation as follows:

4.1.1.(iii)(d)1. The geographical aspects of the coastline and the area:

The land dominates the sea; it is consequently necessary to examine closely the geographical configuration of the coastline of the countries whose continental shelves are to be delimited since the land is the legal source of the power which a

\textsuperscript{62} I.C.J. Reports, 1969, \textit{see note 1 above}, para. 91
\textsuperscript{63} Ibid, para. 92
\textsuperscript{64} Ibid, para. 93
State may exercise over territorial extensions to seaward, it must first be clearly established what features do in fact constitute such extensions. The legal regime of the continental shelf is that of a soil and a subsoil, two words evocative of the land and not the sea.  

4.1.1.(iii)(d)2. The geology of the shelf in order to find out whether the direction taken by certain configurational features should influence delimitation;  

4.1.1. (iii)(d)3. The unity of any deposits ;  

4.1.1.(iii)(d)4. A reasonable degree of proportionality between the extent of the continental shelf appertaining to the States concerned and the length of their respective coastlines, measured according to their general direction in order to reduce the effect of concavity, convexity or irregularity of their coastlines ; One method discussed in the course of the proceedings, under the name of the principle of the coastal front, consist in drawing a straight baseline between the extreme points at either end of the coast concerned, or in some cases a series of such lines. Where the parties wish to employ in particular the equidistance method of delimitation, the establishment of one or more baselines of this kind can play a useful part in eliminating or diminishing the distortions that might result from the use of that method;  

4.1.1.(iii)(d)5. To resolve by agreement if any overlap of areas arose from the application of these principles: If any overlap of areas arose from the

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65 I.C.J. Reports, 1969, see note 1 above, para. 96  
66 Ibid, para. 95  
67 Ibid, para. 97  
68 Ibid, para. 98
application of these principles, the parties should resolve it by agreement, failing which it should be divided equally or the parties may agree to joint exploitation in order to preserve the unity of the deposit.69

4.1.1. (iv) Decision of the Case with Reasons:

The Court concluded the case by reaching the following decision by eleven votes to six:

The Court find that in each case,

(A) the use of the equidistance method of delimitation not being obligatory as between the Parties; and

(B) there being no other single method of delimitation the use of which is in all circumstances obligatory;

(C) the principles and rules of international law applicable to the delimitation as between the Parties of the areas of the continental shelf in the North Sea which appertain to each of them beyond the partial boundary determined by the agreements of 1 December 1964 and 9 June 1965, respectively, are as follows:

(1) delimitation is to be effected by agreement in accordance with equitable principles, and taking account of all the relevant circumstances, in such a way as to leave as much as possible to each Party all those parts of the continental shelf that constitute a natural prolongation of its land territory into and under the sea,

69 I.C.J. Reports, 1969, see note 1 above, para. 99
without encroachment on the natural prolongation of the land territory of the other;

(2) if, in the application of the preceding subparagraph, the delimitation leaves to the Parties areas that overlap, these are to be divided between them in agreed proportions or, failing agreement, equally, unless they decide on a regime of joint jurisdiction, user, or exploitation for the zones of overlap or any parts of them;

(D) in the course of negotiations, the factors to be taken into account are to include:

(1) the general configuration of the coasts of the Parties, as well as the presence of any special or unusual features;

(2) so far as known or readily ascertainable, the physical and geological structure and natural resources, of the continental shelf areas involved;

(3) the element of a reasonable degree of proportionality, which a delimitation carried out in accordance with equitable principles ought to bring about between the extent of the continental shelf areas appertaining to the coastal State and the length of its coast measured in the general direction of the coastline, account being taken for this purpose of the effect, actual or prospective, of any other continental shelf delimitations between adjacent States in the same region.70

4.1.1. (v) Dissenting Opinion of the Judges:

70 I.C.J. Reports 1969, see note 1 above, para. 101
"The Judgment in the case was contained in 54 pages of the Report, which altogether consist of 257 pages. The remaining 203 pages contain the declarations and separate but concurring opinions by six Judges and dissenting opinions by five Judges. Among the separate opinions, President Bustamante y Rivero supported the convergence theory, which appears to have in fact affected the FRG's approach in subsequent negotiations which led to the conclusion of an agreement between the FRG and UK of a common boundary along the median line of the seabed of the North Sea. Judge Ammoun in a detailed separate opinion supported the rule of 'equidistance - cum - special circumstances', and opposed an equitable delimitation where the two boundary lines between the FRG and Denmark on the one hand and the FRG and the Netherlands on other would meet further than the true equidistance points but short of the median line in the seabed of the North Sea.71

The dissenting Judges emphasised that the equidistance principle was a rule of customary international law. Judge Manfred Lachs supported it on the basis of State practice and held that "the delimitation as between the Parties of the areas of the continental shelf in the North Sea which appertain to each of them beyond the partial boundaries already determined by agreement is to be carried out in accordance with the provisions of Article 6, paragraph 2, of the Geneva Convention of 1958, and in particular by the application of the equidistance rule. There are no special circumstances which justify any departure from this rule."72 Further he said that "nor should the concept of 'special circumstances' be allowed

71 S.P. Jagota, see note 11 above, para.138
72 I.C.J. Reports, 1969, see note 1 above, p. 240
to substitute another rule for the equidistance rule. The provision should be thus understood: that a special situation, created by 'special circumstances' calls for a special, ad hoc arrangement. 73 In the present case he found no adequate basis for exemption from the equidistance rule.

4.1.1. (vi) Effect of the Judgment:

"Pursuant to this judgment, the Parties undertook further negotiations and reached several decisions and Agreements in 1971, by which

(i) the Agreement reached between the Netherlands and Denmark of 31 March 1966 settling the boundary between the true equidistant point between them and the median line of the sea bed of the North Sea was cancelled;

(ii) new Agreements were concluded between the FRG and Denmark on the one hand and the FRG and the Netherlands on the other, whereby the two boundary lines did not join together but joined the median line of the seabed of the North Sea at separate places;

(iii) accordingly, an Agreement, was reached between the FRG and the UK in September 1971 settling the boundary between the two countries along the median line of the seabed at the North Sea;

(iv) the Agreements between Denmark and the UK on the one hand and the Netherlands and the UK on the other were revised or amended in conformity with the above decisions. 74

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73 Ibid, p. 239
74 S.P. Jagota, see note 11 above, para.139
4.1.1.(vii) Impact of North Sea cases for the Development of International Law on Delimitation:

Until 1950, maritime delimitation was concerned only with territorial waters, for which a pragmatic approach sufficed. The International Court of Justice raised the problems in 1969, in the North Sea Continental Shelf cases, its first judgment dealing with maritime delimitation. What the Court considered in the North Sea cases was not the specific concept of maritime delimitation but the general concept of outer limits of continental shelf. The declamatory Concept of continental shelf delimitation which the Court adopted in 1969 was in reality a denial of the whole idea of delimitation. It took many years for this self-destructive approach to be abandoned in favour of a constitutive, man-determined concept.

4.1.1.(vii)1. Origin of the Theory of Natural Prolongation in the 1969 North Sea Continental Shelf cases:

In the North Sea cases the Court declared that a State’s continental shelf constitutes a natural prolongation of its land territory into and under the sea", and that the rights of the State in respect of this shelf exist *ipso facto* and *ab initio*, by virtue of its sovereignty over the land, and as an extension of it.  

As a result of this decision, the jurisdiction of the coastal State over the continental shelf was seen not so much as having a specifically maritime nature

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75 *North Sea Continental Shelf Cases, Federal Republic of Germany (FRG)/Denmark; FRG/Netherlands, 1969 I.C.J. Reports, Judgment of 20 February, Para. 19*
but rather in the form of rights over a piece of submerged territory which was the natural prolongation of land territory which had emerged from the water.

As the judgment puts it, the underwater areas in question although covered with water are a prolongation or continuation of that territory, an extension of it under the sea. They are not "areas of sea, such as the contiguous zone, but "stretches of submerged land" and the legal regime applicable to them is that of a soil and a subsoil, two words evocative of the land and not of the sea. Against the background of this natural, physical, conception of the continental shelf the Court was drawn irresistibly into adopting a view of its delimitation equally natural and physical.

4.1.1.(vii)2. Interpretation of the word 'Delimitation':

According to the language of the judgment in North Sea cases: Delimitation is a process which involves establishing the boundaries of an area already, in principle, appertaining to the coastal State and not the determination de novo of such an area. 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.

Delimitation does not mean that there has been an apportionment of something that previously consisted of an integral, still less an undivided whole.

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76 Ibid, paras. 43 & 96
78 I.C.J. Reports 1969, see note 1 above, p. 18 & 20
79 Ibid, p. 23, Para. 20
Therefore the delimitation is not a matter of dividing, according to legally determined criteria. The delimitation exercise is limited to discovering how far the natural prolongation of each of the two States extends under the sea, in other words, to determining the extent of the underwater platform which already belongs to them. In a sense, the demarcation line predates the delimitation, the sole purpose of which is to establish where exactly it lies. In truth, there is nothing to delimit; it is a matter simply of establishing the title of each, 'suum cuique tribuere'. Delimitation is declaratory, an act of recognition: there is nothing about it man-made or constitutive.  

4.1.1.(vii)3. Maritime Delimitation under Natural Prolongation Concept:

According to natural prolongation theory, delimitation "was not a question of a sharing but simply of allocating to each what nature had given it, the demarcation line was not drawn in such a way as to effect an apportionment of the areas concerned and to award just and equitable shares to each State in common as yet undelimited area of shelf."  

By adopting this natural prolongation concept, the Court rejected the idea of equidistance. The Court says in the judgment of North Sea cases, equidistance clearly can not be identified with the notion of natural prolongation or extension. This reveals that there is a clear and close link in the 1969 judgment between the declaratory concept and the Court's negative attitude towards the equidistance concept.

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80 Prosper Weil, see note 77 above, p. 23
81 Anglo-French Channel Continental Shelf Arbitration (UK/France) HMSO Misc. No.15 (1978) Cmnd 7438, para. 78
82 I.C.J. Reports 1969, see note 1 above, p. 31, para. 44
Although the judgment in the North Sea cases is dominated by the physical concept of natural prolongation and the declaratory view of continental shelf delimitation, the Court recognised the idea that in exceptional cases, where there was a single shelf which could be seen as the natural prolongation of one State just as much as of the other, the idea of delimitation confined to allocating to each party what 'already' belonged to it would be unworkable. Nature being silent, it is necessary to make the delimitation on the basis of man-made rule of law.\(^{83}\)

"Hence the Court's cautious language: delimitation must take account of the physical and geological structure 'so far as known or readily ascertainable'. It must be effected in such a way as to 'leave as much as possible to each Party all those parts of the continental Shelf that constitute a natural prolongation of its land territory into and under the sea. If this objective can not be achieved because 'the claims of several States converge, meet and intercross and cause 'overlapping,' then it is question of 'division' of these overlapping areas.\(^{84}\)

As far as the North Sea Continental Shelf cases 1969 are concerned, although they were confined to lateral continental shelf boundary delimitation, they had a tremendous impact on further refinement and development of international law on delimitation. However, in comments made on the Judgment and at the Third United Nations Conference on the Law of the Sea, as well as in State practice, its practical impact or effect has been varied. It has been hailed by countries which have insisted upon equity as the governing principle of delimitation. It has been criticised by others who have insisted on a equidistance,

\(^{83}\) Prosper Weil, see note 77 above, p. 24
\(^{84}\) Ibid.
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supplemented by special circumstances, as the reliable guide for delimitation and they have cited State practice in support. The polarisation of views between the equity and the equidistance groups continued at the Third United Nations Conference on the Law of the Sea between 1978 and 1981, which ultimately led to a compromise which did not make an express reference either to a equitable principles or to equidistance.

4.1.2 Arbitration between the United Kingdom of Great Britain and Northern Ireland and the French Republic on Delimitation of the Continental Shelf - Decisions of the Court of Arbitration dated 30 June 1977 and 14 March 1978: After the North Sea Continental Shelf cases 1969, the applicable principles and rules of delimitation were reviewed by a Court of Arbitration in the case between the United Kingdom and France, which gave its decision in 1977. In this decision, the Court of Arbitration appeared to have revised the judgment in the North Sea Continental Shelf cases 1969 and established a single rule, namely the ‘equidistance-cum- special circumstances’ rule as the conventional and customary rule of law on delimitation.

There were two decisions of the Court of Arbitration in this case, the first given on 30 June 1977 and the second in 14 March 1978.

4.1.2 (i) The First Decision of 30 June 1977:

The first decision is connected with a dispute which had arisen between the United Kingdom and France regarding the alignment of the maritime boundary in the English Channel and the Atlantic region. The parties on 10 July 1975 had agreed that the Court would be requested to decide, in accordance with the rules
of international law applicable in the matter as between the Parties, the following question:

What the courses of the boundary (or boundaries) between the portions of the continental shelf appertaining to the United Kingdom and the Channel Islands and to the French Republic, respectively, westward of 30 minutes west of the Greenwich Meridian as far as the 1,000 metre isobath? 85

It was also agreed between them that the Court's decision shall include the drawing of the course of the boundary (or boundaries) on a chart. 86 Unlike the North Sea Continental Shelf cases 1969, in this case the Tribunal was asked to determine the boundary.

Both parties agreed that their coasts were opposite in the Channel. During the course of negotiations between 1970 and 1974, they had also agreed on portions of the boundary line in the Channel to follow a 'simplified' median line. Differences had arisen about the alignment of the boundary line in relation to the Channel Islands which were located close to the French mainland, that is, across the median line drawn with reference to the mainland of the two countries. The United Kingdom wanted the median line to be drawn between these islands and the French mainland whereas France wanted the main boundary line to be drawn between the mainland of the two countries by ignoring these islands as special circumstances. Differences had also arisen regarding the effect to be given to the Eddystone Rocks as a base point for determining the median line. Finally,

85 Arbitration Award, Cmnd, 7438 p. 6, Article 2
86 Ibid, p. 8, Article 9(1)
differences had arisen regarding the extension of the median line in the Atlantic region upto the 1,000 metre isobath.²⁷

The Court of Arbitration, consisting of five members with Mr. Eric Castren of Finland as President, gave the unanimous decision on 30 June 1977 which was delivered to the representatives of the two Governments on 18 July, 1977. The important aspects of this arbitration relate to (1) separate treatment given to the UK Channel Islands by making them enclaves, (2) recognition of the Eddystone Rocks as an island for the purpose of delimitation, and (3) giving half effect to the isles of Scilly in the boundary delimitation between the United Kingdom and France in the Atlantic region as a measure of equity.²⁷

The decision of the Court on these three points and the alignment of the boundary in the relative sectors was preceded by an exhaustive discussion of the rules of international law applicable to the matter as between the parties. In this respect also the Court decision has had a substantial impact on the development of international law at the Third United Nation Conference on the Law of the Sea and will have a similar impact on State practice. Although the Court was consciously attempting to indicate that its own judgment was in conformity with the judgment of the International Court of Justice in the North Sea Continental Shelf cases 1969, in fact the Court of Arbitration did develop a new concept of a rule of international law regarding maritime delimitation.²⁸

There were two major differences between the references to International Court of Justice and to this Court of Arbitration: In the 1969 North Sea cases, the

²⁷ S.P. Jagota, see note 11 above, p.141
²⁸ S.P. Jagota, see note 11 above, p.143
I.C.J. was requested only to indicate the applicable principles or rules of international law but not to determine the boundary, whereas in the present case, the Court of Arbitration was asked to determine the course of boundary (or boundaries) between the two countries in the specified area. Secondly, in the 1969 cases, the boundary related to States with adjacent coasts, whereas in the present case the boundary related mainly to States with opposite coasts. Even in the 1969 cases, the International Court of Justice had recognised that a median line should be equitable in determining the maritime boundary among States with opposite coasts. In the present case also, the two countries had themselves recognised that in some sectors the boundary will be the median line, which had in fact been drawn by them and adopted by the Court.

Because of these differences, the Court of Arbitration took a more practical view of finding a workable principle or rule of international law which could be applied to concrete situations in a manner which was fair and equitable to both sides. With regard to the rules or principles of international law relating to delimitation, both the parties made elaborate submission in their written and oral pleading before the Court of Arbitration. The United Kingdom submitted that since the coasts between the two States were opposite in the arbitration area, Article 6(1) of the 1958 Convention on the Continental Shelf should apply and since parties had not reached an agreement, and unless France could discharge the burden of proving the existence of special circumstances, the median line should be the boundary in the arbitration areas, including in the western approaches to the Channel. Alternatively, if a continuous median line could not be adopted as a boundary throughout the arbitration area, the axis of the Hurd Deep and Hurd
Deep Fracture Zone provided the only appropriate dividing line between the natural prolongation of their respective continental shelves.\textsuperscript{89}

France on the other had emphasised that in view of their reservations to the 1958 Convention, Article 6 thereof could not only apply between them, and the boundary should be drawn on the basis of customary international law and the equitable principles as elaborated by the International Court of Justice in the North Sea Continental Shelf cases, 1969. France added that the application of the median line in relation to the Channel Islands which were located close to the French coast would be inequitable, and that in the Atlantic region up to the 1,000 metre isobath, where the situation between France and the U.K was neither of opposite coasts nor of adjacent coasts, but was \textit{sui generis}, the boundary line should be drawn by a bisector of the angle made by the general direction of the coasts of France and the U.K.\textsuperscript{90}

4.1.2 (i) (a) Relevant excerpts from the Decision of the Court:

Article 6, as both the United Kingdom and the French Republic stress in the pleadings, does not formulate the equidistance principle and 'special circumstances' as two separate rules. The rule there stated in each of the two cases is a single one, a combined equidistance- special circumstances rule. This being so, it may be doubted whether, strictly speaking, there is any legal burden of proof in regard to the existence of special circumstances. The fact that the rule is a single rule means that the question whether 'another boundary is justified by special circumstances' is an integral part of the rule providing for application of

\textsuperscript{89} S.P. Jagota, \textit{see note 11 above}, p. 144
\textsuperscript{90} Ibid, p. 143
the equidistance principle. As such, although involving matters of fact, that question is always one of law of which, in case of submission to arbitration, the tribunal must itself, *propria motu*, take cognisance when applying Article 6.91

After examining the provisions (Articles 70 and 71) in the Revised Single Negotiating Text prepared at the Third United Nations Conference on the Law of the Sea in 1976, the Court of Arbitration reached the following conclusion:

In short, this Court consider that the appropriateness of the equidistance method or any other method for the purpose of effecting an equitable delimitation is a function or reflection of the geographical and other relevant circumstances of each particular case. The choice of the method or method of delimitation in any given case, whether under the 1958 Convention or customary law, has there fore to be determined in the light of those circumstances, and of the fundamental norm that the delimitation must be in accordance with equitable principles. Furthermore, in appreciating the appropriateness of the equidistance method as a means of achieving an equitable solution, regard must be had to the differences between a 'lateral' boundary between 'adjacent' States and a 'median' boundary between 'opposite' States.92

The Court also gave a restrictive interpretation and application to the principles of proportionality and the reasonable evaluation of the effects of natural features. It did not regard proportionality as a general feature providing an independent source of rights to areas of a continental shelf, but as an element in

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91 Arbitration Award, Cmnd.7438, paras. 68 & 70
92 S.P. Jagota, *see note 11 above*, pp. 145 & 146
the appreciation of a particular method of delimitation. Proportionality is to be used as a criterion or factor relevant in evaluating the equities of certain geographical situations, not as a general principle providing an independent source of rights to areas of continental shelf, the Court said. Regarding the natural features, the Court gave a restricted interpretation, and while applying it to the case, it refused to regard the Hurd Deep - the Hurd Deep Fault Zone as a feature which would 'interrupt the essential geological continuity of the continental shelf in the English Channel. This zone, as compared to the Norwegian Trough by the North Sea was a minor fault, the Court said, and added that attaching critical significance to such a feature, would run counter to the whole tendency of State practice on the continental shelf in recent years. To sum up, in determining the boundary in the arbitration area, the Court thus adopted the simplified median line agreed to between the parties in the English Channel between 1970 and 1974, covered the gaps therein by giving full value to Eddystone Rock as a basepoint and by establishing the primary boundary in the region of the Channel Islands as the median line measured from the respective mainlands, and extended the median line of the English Channel into the Atlantic region for a distance of 170 nautical miles up to the 1000 metro isobath by giving half-effect to the Scilly Isles.

4.1.2(ii) The Second Decision of 14 March, 1978:

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93 Ibid, p.146
94 Ibid.
95 Ibid.
96 S.P. Jagota, *see note 11 above*, p.152
In the second Decision of 14 March 1978 concerning the dispute as to the meaning and scope of the award of 30 June 1977, pursuant to an Application made by the United Kingdom, the Court of Arbitration dealt with two matters: the first related to the correction of the boundary line to the North and west of Channel Islands; and second related to the correction of an alleged error in the delimitation of the boundary between two points where the isles of Scilly had been given half-effect.

4.1.2(ii)(a) Relevant excerpts from the Decision of the Court:
The Court found as a fact that, in the light of the particular geographical circumstances of the Atlantic region the projection seawards of the Scilly Isles and their tendency to obtrude upon the continental shelf lying off the more westerly facing French coasts constituted a 'special circumstance' having a distorting effect on the delimitation of an equidistance boundary. From this it concluded that it must adopt a method of delimitation that would abate the effects of the distortion and remedy the inequity resulting from the particular location of those islands. Having made its appreciation of the various elements of the geographical situation, it further concluded that, in principle, it should adopt a method of delimitation based upon the use of the equidistance principle but giving only half-effect to the Scilly Isles. The Court then consulted its Expert, as appears from the Decision and the Technical Report, regarding the possible techniques for applying the concept of giving half-effect to the Scillies and at the same time taking account of the change in the problem of delimitation from that of median line between 'opposite' States in the Channel to that of a delimitation between laterally related States in the Atlantic region giving half-effect to those islands.
After considering illustrations of the possible techniques and their results presented to it on standard navigational charts the Court adopted the technique, including the specific basepoints to be used.\textsuperscript{97}

The Court held that there was no contradiction between the reasoning of the Court and the relevant provision in the decision in the \textit{depositif}. It follows, the Court concluded, that the principle of \textit{res judicata} applies and that it is not open to the Court to entertain the request of the United Kingdom for the rectification of this segment of the boundary. The Court decided, by four votes to one, that the course of the line M-N defined in the \textit{dispositif} and traced on the Boundary - Line Chart was not incompatible with the method of delimitation mentioned in the decision and that the United Kingdom's request for the rectification of this segment of the boundary was not well-founded and must be rejected.\textsuperscript{98}

Mr. Herbert W. Briggs of the United States gave a dissenting opinion. He concluded that the technical misapplication of what the Court decided should be corrected as a part of the process of interpretation by the Court of the obscurities resulting from the contradictory passages of its decision.\textsuperscript{99}

The importance of the Decision in the United Kingdom - France case arises from the fact that it enunciated the applicable rule as the single rule of 'equidistance - special circumstances', particularly for delimitation among States with opposite coasts. This rule will apply without any onus of proof on the party invoking special circumstances. To this extent, the conventional rule in Article 6

\textsuperscript{97} S.P. Jagota, \textit{see note 11 above}, p.152
\textsuperscript{98} Ibid, p.160
\textsuperscript{99} S.P. Jagota, \textit{see note 11 above}, p.161
of the Convention on the Continental Shelf 1958 and customary international law were identical. In their application, both should lead to an equitable result. In this case, the Court of arbitration recognised the special circumstances created by the Channel Islands and the Isles of Scilly. The former were given restricted marine spaces and enclaved within the French continental shelf surrounding them. The later were given half-effect in determining the boundary line in the Atlantic Ocean region. The technical aspects of the construction of a boundary line in higher latitudes, which led to the second case and was settled in 1978, will also have a cautionary effect.\textsuperscript{100}

Thus, in some respects this decision modified the judgment in the North Sea Continental Shelf cases, 1969.

4.1.3. Controversy Concerning the Beagle Channel Region (Chile/Argentina)
- Decision of Court of Arbitration dated 18 February 1977 - Award dated 2 May 1977:

The case related primarily to title to territory, namely the islands of Picton, Nueva and Lennox, and the question whether these were located 'south of the Beagle Channel' in terms of Article III of the Boundary Treaty of 1881 between Argentina and Chile. The Court of Arbitration held that this was so and accordingly decided that the islands belonged to Chile. It also dealt with the maritime boundary between the two countries in the Beagle Channel and traced the boundary line on a chart. The boundary line followed in principle a median line adjusted in certain relatively unimportant respects for reasons of local

\textsuperscript{100} Ibid, p. 163
configuration or of better navigability for the parties. Title to the islands, islets, reefs, banks and shoals, if situated on the northern side of the boundary line, was vested in Argentina and, if situated on the southern side of the boundary line, was vested in Chile.\(^{101}\)

The decision was given by the Court of Arbitration on 18 February, 1977 and it was affirmed as the Award by the British Queen on 18 April, 1977. But the Argentina Government denounced the Award on 25 January, 1978 by issuing a declaration of nullity. This was rejected by the Government of Chile on 26 January, 1978. To resolve the controversy, talks have been held between the two Governments through the intermediary of the representative of the Pope, but have not yet led to a mutually acceptable solution.

4.1.4 Aegean Sea Continental Shelf case (Greece / Turkey), Judgment of 19 December 1978:

This judgment related to the jurisdiction of International Court of Justice to deal with a dispute concerning the Aegean Sea continental shelf. The proceedings were instituted by Greece on 10 August, 1976. Turkey did not enter appearance, although it did send observations to the Registry both on the question of interim measures and on the question of jurisdiction of the Court to entertain the Greek application. The main point related to the interpretation of reservation (b) made by Greece to its accession to the General Act of 1928, under which it claimed to found the jurisdiction of the Court. The reservation excluded 'disputes relating to

\(^{101}\) S.P. Jagota, see note 11 above, p. 163
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the territorial status of Greece from compulsory jurisdiction. The Court interpreted this reservation to include the present dispute before it.\footnote{S.P. Jagota, see note 11 above, p.164}

4.1.4 (i) Facts of the Case:

The origins of the dispute between Greece and Turkey over the Aegean seabed can be traced back to the early 1970s, when Turkey granted petroleum exploration permits in the Aegean Sea over areas of seabed that Greece claimed, belongs to its islands.\footnote{Aegean Sea Continental Shelf (Greece /Turkey) 1976 ICI Reports (interim judgment of 11th Sep 1976) para. 16} In February 1974, Greece, in a \textit{Note Verbale} sent to Turkey questioned the validity of the licenses granted by Turkey, reserved its sovereign rights over the continental shelf adjacent to the coasts of the Greek islands, and contended that delimitation between the two States be made on the basis of a median line.\footnote{Aegean Sea Continental Shelf case (judgment of Dec. 19) p.27} Turkey replied by \textit{Note Verbale} that the Greek islands close to the Turkish coast do not possess a continental shelf of their own, disputed the applicability of a median line, and sought to reach a solution by agreement.\footnote{Ibid, p.23}

According to Greece, delimitation could be accomplished by applying the principles enunciated under the 1958 Convention of the Continental Shelf (the Geneva Convention). Turkey expressed readiness to enter into negotiations; nevertheless, in May 1974 a Turkish vessel began an exploration programme in the Aegean Sea. In February 1975, Greece and Turkey agreed to draft a special agreement to enter into negotiations over the question of the Aegean Sea Continental Shelf. The Joint Communiqué Issued After the Meeting of Prime

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Ministers of Greece and Turkey (the Brussels Communiques), was issued in May 1975. It stated that the delimitation of the continental shelf should be resolved peacefully by negotiations and by the International Court of Justice. However, the parties subsequently failed to agree on the delimitation of the continental shelf.\textsuperscript{106}

On August 6, 1976, Turkey dispatched the research ship Sismik I to the Aegean Sea to carry out seismological explorations of portions of the continental shelf that Greece claimed as its own. Four days later, in view of what Greece called the dangerous situation created for peace and security in the Eastern Mediterranean as a result of arbitrary and provocative acts by Turkey against Greece, the Greek government asked for an urgent meeting of the United Nations Security Council and referred the matter to the I.C.J. The relationship between Greece and Turkey was already tense because of the Turkish presence in Cyprus since 1974.\textsuperscript{107}

On August 25, 1976, the Security Council adopted Resolution 395, calling on the two governments to exercise restraints and to reduce tensions. It asked Greece and Turkey to resume direct negotiations and appealed to them to do everything within their power to reach mutually acceptable solutions. Resolution 395 further invited the two governments to consider appropriate judicial means, such as the I.C.J for settling their legal differences.\textsuperscript{108}

In the application, Greece asked the I.C.J to declare that the Greek islands as part of the territory of Greece, are entitled to the portion of the continental shelf
which appertains to them according to the applicable principles and rules of international law, and over which Greece exercises sovereign and exclusive rights for the purpose of researching and exploring it and exploiting its natural resources, and to adjudge the boundary of the continental shelf appertaining to the two countries in the Aegean Sea. Greece further petitioned the Court to declare that Turkey shall not continue any further activities within the area of the continental shelf which the Court shall adjudge appertain to Greece. Pending the final decision of the I.C.J., Greece asked the Court to provide interim measures of protection.

While Turkey did not appear before the I.C.J., it sent a letter to the Court asking that "the Greek request for interim measures of protection be dismissed and in view of the lack of jurisdiction to remove the case from the Court’s list." Turkey further claimed that Greece’s application for interim measures was premature because they were not required to protect Greece’s rights and that the Court lacked jurisdiction over the case because no agent had been appointed to represent Turkey before the Court.

4.1.4 (ii) Judgment of the Court with Reasons:

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109 Aegean Sea Continental Shelf case (Greece / Turkey) 1976, I.C.J. Reports, (Interim protection order of Sept.11) para. 1
110 Ibid.
111 Aegean Sea Continental Shelf case (Greece / Turkey) 1976, I.C.J. Reports, (Interim protection order of Sept.11) para. 1
112 Ibid, para. 1
113 Ibid, para. 8
114 Ibid, para. 8
The I.C.J. held that Turkey did not have to appear for the Court to indicate interim measures of protection. However, the I.C.J. denied Greece’s request for interim injunctive relief, because the denial would not cause irreparable prejudice to the parties. The Court reasoned that Turkey’s seismic exploration did not involve any risk of physical damage to the seafloor or subsoil or to their natural resources. Further the Court refused Turkey’s request to remove the case from the list, leaving determination of jurisdiction and the actual merits to a later time.

On November 11, 1976, while the case was pending before the I.C.J., Greece and Turkey signed the Agreement on Procedures for Negotiations of Aegean Continental Shelf Issue (the “Berne Agreement”) in Berne, Switzerland. The parties agreed to conduct negotiations in good faith on the delimitation of the continental shelf. They further agreed to abstain from any initiative or act that might prejudice the negotiations or discredit the other party. Finally, the parties agreed to study state practice and international rules, and to identify principles and practical criteria useful in the delimitation of the continental shelf.

In 1978, I.C.J addressed the question of whether it had jurisdiction to decide the case on the merits. According to Article 53 of the Statute of the International Court of Justice, when a party does not appear before the Court or

115 Ibid, para. 25
116 Ibid, para. 30
117 Agean Sea Continental Shelf case (Greece / Turkey) 1976, I.C.J. Reports, (Interim judgment of Sept.11) para. 46
118 Aurelia A. Georgopoulos, see note 106 above, p. 95
119 Agean Continental Shelf Case, see note 117 above, pp. 3 & 7
fails to defend its case, the Court must be satisfied that it has jurisdiction over the case and that the claim is well founded in fact and law.

Greece argued that Turkey had consented to the I.C.J.'s jurisdiction on the basis of two agreements. First, Greece and Turkey had agreed to the General Act on the pacific settlement of International Disputes (the '1928 Act'), a treaty providing that all disputes between the parties be submitted to the I.C.J. Second, the parties had issued the Brussels Communique, which provides that the problems of relations between the two countries be negotiated peacefully and, specifically, that the dispute of the continental shelf be resolved by the I.C.J.

The Court refuted both of Greece's claims and refused to consider the application filed by Greece. The I.C.J. concluded that the 1928 Act did not apply to the present dispute because Greece expressly excluded from the Court's jurisdiction disputes relating to its territorial status. Furthermore, the Court reasoned that the Brussels Communique was not intended to constitute a commitment by the two governments to accept unconditionally the jurisdiction of the Court. Rather, the parties intended first to conclude a special agreement defining the issues to be resolved before they jointly accepted the jurisdiction of the I.C.J. Although negotiations floundered following the I.C.J.'s decision of 1976 and 1978, the two nations refrained from any overt acts in the Aegean Sea until 1987.

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120 Ibid, p. 14
121 Ibid.
122 Agean Continental Shelf Case, see note 121 above, p. 30
123 Ibid, pp. 38 & 44
124 Ibid, p. 37
125 Ibid, p.44
126 Ibid, pp.43 & 44
In February 1987, a private international consortium that was granted a license by Greece announced its intent to begin drilling for oil in late March 1987, in disputed waters in the Aegean Sea. Greece asked the Consortium to postpone its drilling plans and, in February 1987, submitted to the Greek Parliament a draft law authorizing it to buy a majority of the consortium’s shares. The Greek Prime Minister and Greek secretary of industry and energy claimed that the purpose of the buyout was not to expropriate the consortium’s investment but rather to safeguard the national resources located at places of national importance and security. They also claimed that control of the consortium would enable the Greek government to decide how, when and where, to drill. Turkish officials claimed that the plan indicated an intention by Greece to proceed with the drilling. Subsequently, the Turkish government sent an oceanographic research vessel, the *Piri Reis*, into international waters off the Greek island of Thassos early in March, 1987 and prepared the Sismik I to set sail later that month.\(^{127}\)

### 4.1.5 Summing up of Arbitral and Judicial Decisions on Maritime Boundary Delimitation Disputes during the pre 1982 Law of the Sea Convention Phase:

In this Chapter the major judicial, arbitral and other decisions relating to maritime boundary have been reviewed. All these cases related to the delimitation of the continental shelf. The period of time covered is between 1969 and 1978. In 1982 the entire law of the sea was reviewed by the international community through the United Nations Seabed Community and the Third United Nations Conference on the Law of the Sea.

\(^{127}\) *Aurelia A Georgopoulos*, pp. 96 & 97
The role of the Courts and other forums in the cases reviewed in this Chapter, varied from indicating the applicable principles and rules of international law relating to delimitation (North Sea Continental Shelf cases, 1969) to determining the course of the boundary (or boundaries) between the portions of the continental shelf appertaining to the parties (United Kingdom - France Arbitration, 1977-78).

The Judgment of the International Court of Justice in the North Sea Continental Shelf cases, 1969 and the decisions of the Court of Arbitration in the United Kingdom - France case, 1977-78, have made the most significant contribution not only to settling the disputes referred to them but also the development of international law on the maritime delimitation.

The basic principle of delimitation as set out by the International Court of Justice in the 1969 North Sea Continental Shelf cases, is that delimitation is to be effected by agreement in accordance with the equitable principles, and taking account of all the relevant circumstances.

In the 1969 Judgment, the application of the principle is to leave to each party all those parts of the continental shelf that constitute a natural prolongation of its land territory into and under the sea, without encroachment on the natural prolongation of the land territory of the other. This emphasises the principles of natural prolongation and of non-encroachment. Further, the 1969 Judgment indicated the methods of resolution of areas of overlap emerging from the application of the equitable principles, as well as the factors to be taken into account in the course of negotiations, which included the configuration of the
coasts, the physical and geological structure and the resources of the continental shelf areas involved and the test of proportionality taking into account the delimitation between other States in the same region.

Negatively, the Court held that the use of the equidistance method of delimitation was not an obligatory rule of customary international law. This method may be applied and may lead to an equitable solution for delimitation between States with opposite coasts. But among States with adjacent coasts, the equidistance method may not be equitable. It is necessary to seek not one method of delimitation but one goal, the Court said. The relative weight to be accorded to different considerations will vary with the circumstances of each case.\textsuperscript{128}

In the case before the Court in 1969 (North Sea Continental Shelf cases), the States were adjacent, the coasts of the parties were more or less equal, and the concavity of the coasts of the Federal Republic of Germany made the application of the equidistance line inequitable.

In the UK-France case 1977-78, the Court of Arbitration, while upholding the fundamental norm that the delimitation must be in accordance with equitable principles and also said that the 'equidistance - special circumstances' rule and the rules of customary International law have the same object - the delimitation of the boundary in accordance with equitable principles. The equidistance-special circumstances rule should however be applied without an onus of proof on the Party invoking the special circumstances.\textsuperscript{129}

\textsuperscript{128} S. P Jagota, see note 102 above.
\textsuperscript{129} Ibid.
As to the principle of proportionality, the Court held in UK-France Arbitration Case that it should be a criterion or factor relevant in evaluating the equities of certain geographical situations, not a source of light to areas of the continental shelf. Thus the Court gave a higher status to the 'equidistance- special circumstances' rule, without supplanting the equitable principles. Their correlation, which was vertical under the 1969 Judgment of the International Court of Justice, appeared to be shaping up horizontally, although the equitable principles held the position of plume.\textsuperscript{130}

The disputes between Greece and Turkey in Aegean Continental Shelf case 1978 could not be resolved by the International Court of Justice as Turkey did not submit to the jurisdiction of the Court. The case of Greece and Turkey consists of two disputes. First, they disagree on the method of settling their maritime boundary dispute. Second, they dispute what the proper continental shelf boundary in the Aegean Sea should be. Greece wants to submit the question of the continental shelf delimitation to the I.C.J. Turkey, however, wants to continue negotiations in the context of Berne Agreement.\textsuperscript{131}

The very real danger that the Aegean dispute might lead to armed conflict between Greece and Turkey was demonstrated in 1976 and again in 1987. The expressed willingness of both countries to work towards a negotiated settlement and to refrain from provocative action has recently broken down. International law indicates that the delimitation of the boundary of the continental shelf in Aegean Sea appertaining to the two countries should be effected by the method of

\textsuperscript{130} S.P. Jagota, \textit{see note 128 above}, p. 208
\textsuperscript{131} Aurelia A. Georgopoulos, \textit{see note 127 above}, pp. 115 & 116
a median line, because the two States are primarily opposite. This median line should give half-effect to the Eastern Islands but should not enclave them.\textsuperscript{132}

Thus the principles and rules of international law relating to delimitation, as emerging from the judicial and arbitral decisions reviewed in this Chapter, give a place of primacy to equitable principles, the application of which requires the assessment of all relevant circumstances prevailing in the area, with a view to finding an equitable solution. The equidistance method may be used for this purpose, either by the Parties, or even by the Court, if it leads to an equitable solution. Among States with opposite coasts, the application of the equidistance method may generally lead to an equitable solution. The single rule of 'equidistance-special circumstances' applied by the Court of Arbitration in U.K.-France (1977-78) case, leading to an equitable solution, may also obtain greater acceptance and application as an accompaniment of the rule of equitable principles. This development, along with the developments in the law of maritime delimitation at UNCLOS III which emphasise the equitable solution of a maritime boundary dispute in accordance with international law, may help to maintain the distinction between a decision in accordance with international law and a decision 'ex aequo et bono'. The applicable rules should neither lead to an automatic or geometric application of a method nor to the discretionary assessment of the relevant circumstances.

As to the special circumstances, the 1969 Judgment was affected the concavity of the coast of the Federal Republic of Germany. The 1977-78 UK -

\textsuperscript{132} Ibid, p. 125
France case took into account the position of islands on the wrong side of the median line, the position of low-tide elevations, and the distorting effect of the Scillies. Thus the Special Circumstances in the area for delimitation may vary and their assessment, with a view to an equitable delimitation, may also vary from case to case.

4.2. Judicial and Arbitral Decisions under Post 1982 Law of the Sea Convention:

The further development of law in UNCLOS III and its application to new cases involving delimitation from 1982 onwards has been discussed below

1) Case Concerning the Continental Shelf (Tunisia/ Libyan Arab Jamahiriya) I.C.J. Rep. 1982,

2) Case Concerning Delimitation of Maritime Boundary in the Gulf of Maine Area (Canada V United States of America) I.C.J. Rep. 1984

3) Case Concerning the Continental Shelf (Libyan Arab Jamahiriya / Malta) I.C.J. Rep. 1985,

4) Case concerning Land, Island and Maritime Frontier Dispute (El Salvador / Honduras: Nicargaua Intervening) ICJ Reports 1992

5) Case concerning Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark V Norway) ICJ Reports 1993,

6) Case concerning Maritime Delimitation and Territorial Questions Between Qatar and Bahrain (Qatar V Bahrain) ICJ Reports 2001
7) Case concerning Maritime Delimitation between Nicaragua and Honduras in the Caribbean Sea (Nicaragua V Honduras) ICJ Reports 2007

4.2.0 Legal Regime of Law of the Sea Convention 1982:

The principle aim of Third United Nations Conference on the Law of the Sea (UNCLOS III) was to review and develop the law of the sea concerning the outer limits of national jurisdiction and to establish an international legal regime and machinery for the exploitation of the resources of international seabed area. The question of maritime boundary was considered mainly in relation to the question of limits of national jurisdiction between States with opposite or adjacent coasts.

The UNCLOS III had worked from December 1973 to December 1982, and had eleven sessions. On April 30, 1982 UNCLOS III adopted the United Nations Convention on the Law of the Sea (hereafter called as 1982 Convention). On December 10, 1982, the 1982 Convention was opened for signature at Montego Bay, Jamaica, and was signed by 117 States, apart from the Cook Islands and the Council for Namibia. By the end of 1983 the Convention had been signed by 131 States, including Japan and the Republic of Korea, and ratified by 9 States, including Fiji, Mexico and Jamaica. "The deliberations at UNCLOS III on the maritime boundary were concentrated around three main elements or aspects, namely (1) delimitation criteria, (2) interim arrangements pending agreement
between parties, and (3) settlement of delimitation disputes.\textsuperscript{133} The provisions finally adopted for inclusion in the Convention on the Law of the Sea 1982 would not establish the new conventional rules but might also embody the customary rules of international law on the subject. The discussions at UNCLOS III were influenced by State practice and judicial, arbitral and other decisions. The judgment in the North Sea Continental Shelf cases 1969, triggered the assertion at UNCLOS III that equitable principles should be the basic delimitation criteria; the United Kingdom - France Arbitration, 1977, developed the concept of a single equidistance-cum special circumstances rule which promoted a compromise mood; and the United Kingdom- France Arbitration, 1977, interpreted the delimitation provisions developed at UNCLOS III in 1976 as being in conformity with the afore mentioned single rule\textsuperscript{134}

The developments at the Third United Nations Conference on the Law of the Sea on the question of the maritime boundary between 1973 and 1982 and leading to the adoption of the UN Convention on the Law of the Sea, 1982 are summed up follows:

1) On the delimitation of the territorial sea, the position of the 1958 Convention on the Territorial sea and the Contiguous Zone and customary international law has been retained in Article 15 of the UN Convention on the Law of the Sea, with minor drafting changes.

2) On the delimitation of the contiguous zone, no provision has been made.

\textsuperscript{133} S.P. Jagota, "Maritime Boundary" (1985 Dordrecht, the Netherlands) p. 220
\textsuperscript{134} S.P. Jagota, see note 133 above, p. 220
3) On the delimitations of the exclusive economic zone and the continental shelf, identical provisions have been made which make no distinction between the two maritime zones or between States with opposite or adjacent coasts. Only the term between adjacent or opposite States was changed to between States with opposite or adjacent coasts in April 1980 on the advice of the Drafting Committee. The delimitation criteria emphasize the need for an agreement, which is based on applicable international law and which leads to an equitable solution. They are not formulated to apply in the absence of an agreement. Since the Convention itself refers to international law, and identifies it with reference to Article 38 of the Statute of the International Court of Justice, which article itself refers to the source of international law and includes international conventions, whether general or particular, establishing the rules expressly recognised by the contesting States, the standard or delimitation criteria may appear to be circular. In practical application, such reference will imply a greater emphasis on international custom as evidence of a general principle accepted as law, among other sources of international law, but supplemented always by the requirement to achieve an equitable solution. No direct reference has been made either to equitable principles or to equidistance in Article 74 and 83. Again, although no specific reference has been made to islands or other special circumstances, these will be covered by reference to the applicable international law and the need for an equidistance solution. It has also been provided that a rock which cannot support economic life of its own cannot have an economic zone or continental shelf of its own.\textsuperscript{135}

\footnote{135S.P. Jagota, \textit{see note 133 above}, p. 270}
4) The provision on interim arrangements is so defined in such a way that it should promote and not prejudice the conclusion of an agreement in accordance with the aforementioned delimitation criteria.

5) Maritime delimitation disputes shall be resolved by negotiations, falling which by making reference to compulsory conciliation. If the dispute still remains unsettled, it shall, by mutual consent, be referred to compulsory third-party settlement procedures set out in the Convention, unless the parties otherwise agree.

Unsettled disputes concerning sovereignty or other rights over continental or insular land territory, disputes already finally settled between the parties, and disputes which are to be settled in accordance with a bilateral or multilateral agreement binding upon the parties have been excluded from the application of the settlement procedures set out in the Convention.  

6) No reservations may be made to the maritime delimitation provisions of the Convention by the States parties to the Convention. Now a critical study of the following three cases has been made in the emergence of Regime of Law of the Sea Convention.


4.2.1.(i) Introduction of the Case:

136 S.P. Jagota, see note 133 above, p. 270
On February 24, 1982, the International Court of Justice delivered a judgment in the Case Concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya) that entails a significant restatement of the law of maritime boundary delimitation as set forth in the Court’s 1969 Judgement in the North Sea Continental Shelf cases. Although both Libya and Tunisia based their cases primarily on the principle of natural prolongation in its physical dimension, the I.C.J. found that concept inapplicable in the case before it. At the same time, the majority of the Court declined to consider the equidistance method as a possible means of effecting a delimitation in accordance with equitable principles. Rather, the Court laid down the general rule that “delimitation is to be effected in accordance with equitable principles, and taking account of all relevant circumstances,” and the Court undertook the task to balance up the various considerations which it regards as relevant in order to produce an equitable result.

The judgment has been criticized by the four dissenting judges, as lacking in legal principle, verging on an unauthorized determination ‘ex aequo at bono’ and providing little guidance for the delimitation of maritime boundaries in other disputes. While recognizing some merit of these concerns, it is to be noted that the Court has taken a significant step towards the formulation of integrated principles that can be applied to the delimitation of unitary maritime boundaries governing both the continental shelf and the exclusive economic zone. The Court has reconfirmed its decision in the North Sea Continental Shelf cases 1969 that

137 Case concerning the continental shelf (Tunisia/Libyan Arab Jamahiriya) 1982 I.C.J. Reports (Judgment of 24 Feb.) p.92, para. 133(A)(1)
138 Ibid, p. 60, para. 71
139 Ibid, p. 94, Judges Gros and Oda and Judge ad hoc Evensen appended dissenting separate opinion but Judge Forster, one of the four dissenting judges did not give separate opinion.
delimitation does not entail an equitable distribution (sharing out) of the resources of the shelf. The Court has also reconfirmed the principle that "the land dominates the sea" a delimitation must not encroach upon area in front of the coasts of the parties. Generally, geology will not be a significant factor in maritime delimitation, but a delimitation will be expected to effect a reasonable degree of proportionality, between the areas pertaining to the coastal States and the length of their relevant coasts.

4.2.1.(ii) Brief Facts of the Case:

Tunisia and Libya are adjacent neighbouring States in North Africa adjoining the Mediterranean Sea. Their land boundary is settled and the terminal point at the coast is Ras Ajdir. The Libyan coastline from Ras Ajdir is in east-south-east direction. The Tunisia coastline is in west-north-west direction for some 97 miles when it turns suddenly to north-east direction in the Gulf of Gabes. Tunisia has two main islands or islands groups in this area: the island of Jerba is some 45 miles west of Ras Ajdir and the Kerkennah Islands are located 11 miles east of the Tunisian coast. The water between the Kerkennah Islands and the Tunisian mainland is shallow. These Islands cover an area of some 180 square kilometres and have a number of shoals and the low-tide elevations to their east between 9 and 27 kilometres therefrom. Tunisia has enclosed the waters around the Kerkennah Islands and in the Gulf of Gabes by straight baselines, and also

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140 I.C.J. Reports 1982, see note 137 above, p. 61, para. 73
claims historical fishing rights up to the 50-metre isobath. Tunisia has settled its maritime boundary with Italy.¹⁴²

4.2.1 (iii) The Issue Involved in the Case:

The dispute was submitted to the Court by special agreement entered by the parties pursuant to Article 40 of the Statute of the Court on December, 1978. The parties put the following question to the Court.

What are the principles and rules of international law which may be applied for the delimitation of the area of the continental shelf appertaining to the Republic of Tunisia the area of the continental shelf appertaining to the socialist people’s Libyan Arab Jamahiriya and, in rendering its decision, to take account of equitable principles and the relevant circumstances which characterize the area, as well as recent trends admitted at the Third Conference on the Law of the Sea (Article 1).¹⁴³

The Court was not asked to draw the course of the boundary, but rather to specify precisely the practical way in which the aforesaid principles and rules apply in this particular situation so as to enable the experts of the two countries to delimit those areas without any difficulties (Article 1).¹⁴⁴

The parties differed sharply as to the mandate given to the Court by these words. Tunisia asked the Court to resolve all the issues that might face the experts of the two countries called upon to implement the judgment, up to the ultimate

¹⁴² S.P. Jagota, see note 133 above, pp. 171 & 173
¹⁴³ I.C.J. Report 1982, See Note 137 above, p.21, para. 2
¹⁴⁴ Ibid.
point before the calculation of the coordinates of the boundary line, i.e., to specify the method of delimitation. Libya took the position that the Court should indicate the factors to be taken into account, but should not go so far as to prescribe the method of delimitation.

The Court minimized the differences between the parties on this point, but it specified the precise bearing of a boundary line in two segments and gave specific coordinates for the point of intersection of those segments. The Court was clearly concerned with the efficacy of its judgments. It emphasised the obligation of the parties to comply with the judgment.

The Court stated that there will be no need for negotiation between experts of the Parties regarding the factors to be taken into account in their calculations. The only task remaining will be the technical one making possible the drafting of the treaty incorporating the result of the work by the experts. Nearly a year after the Court made that statement; the parties still had not reached agreement on a treaty giving to the judgment.

4.2.1.(iv) The Contentions of the Parties:

The parties adopted similar positions on the law. Both Tunisia and Libya relied on natural prolongation. Each eschewed equidistance principle. However, they disagreed about both the facts and the application of the law to the facts.
4.2.1. (iv) (a) Contention of Libya:

Libya recalled primarily on the assertion that the continental shelf off the coast of North Africa is a prolongation to the north of the continental landmass and it argued that a boundary due north from Ras Ajdir would reflect this prolongation. However, in its Counter Memorial Libya recognised the equity of an adjustment of such a line to the north-east opposite the point of significant change in the general direction of the Tunisian coast.

The Libyan position was based on (1) the broad geographical relationship of the two States as neighbours to the east and west of each other facing north on the Mediterranean; (2) the geological unity of the African landmass and the submerged shelf as part of the same tectonic plate, 'the African platform'; and (3) the projection seaward of the terminal point of the land boundary. Libya argued that the general direction of the North African coast is east-west and that the east-facing Tunisian coast in the Sahel area is an anomaly, an 'incidental special feature' that should be discounted in any delimitation. A substantial portion of the Libyan Memorial was devoted to demonstrating that a delimitation based on the equidistance method would be inequitable because of the distorting effect of the bulge of the Sahel coast and the Tunisian islands. The Libyan reply laid the foundations for the argument that France and Italy had agreed to a fisheries modus vivendi along the 260 line in the early 1900's.
4.2.1. (iv) (b) The Contention of Tunisia:

Contrary to expectations, Tunisia did not propose an equidistance boundary. Rather, it supported a delimitation much further to the east. Relying primarily on geomorphology and historic fisheries, Tunisia argued that the natural prolongation of the continent in the boundary area is eastward and that the continental shelf at issue is 'submerged Tunisia'. Tunisia suggested a sheaf of lines, based on geomorphological and geometric factors, trending at approximately 60-63°, which it believed reflected the natural prolongation of the two States.152

4.2.1. (v) The Judgment of the Court:

The Court reviewed the position and rejected the lines proposed by the parties. It held that a delimitation based on equitable principles, taking into account the relevant circumstances, called for the boundary area to be treated as two sectors, and it indicated a line of delimitation in two segments. The first segment, closer to the coast, began at the outer limits of the territorial sea and ran at a bearing of approximately 26° east of north153 (measured from Ras Ajdir) to a point on the parallel of latitude drawn from the most westerly point of the Tunisian coastline between Ras Kaboudia and Ras Ajdir.154 That segment corresponded to the concession lines utilised by Tunisia (1966) and Libya (1968), to a fisheries modus vivendi observed by France and Italy since 1919, and to the perpendicular to the coast at the terminus of the land boundary.

152 Mark B. Feldman, see note 141 above, p. 223 & 224
153 I.C.J. Reports 1982, see note 137 above, p. 93, para. 133(c)(2)
154 Ibid, p. 94, para. 133 (c)(2)
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The second segment of the maritime boundary, more seaward of the coast, veered to the east to take account of the radical change in all direction of the Tunisian Coast. However, the Court concluded that the Karkennah Islands should not be given full effect in determining the direction of the coast. Therefore, this segment of the line ran "parallel to a line drawn from the most westerly point of the Gulf of Gabes bisecting the angle formed by a line from that point to Ras Kaboudia and a line drawn from that same point along the seaward coast of the Kerkennah Islands, "^{155}\) i.e., at a bearing of 52^\circ. Judges Gros, Forster, and Oda and Judge ad hoc Evensen (Tunisia) dissented.

The Court began its analysis with a discussion of the principle of natural prolongation. It then examined the concept of equitable principles. Finally the judgment reviewed the relevant circumstances of the area and the method or methods of delimitation that would take account of such circumstances. These aspects are detailed below.

4.2.1.(vi) Analysis of the Court on the Principle of Natural Prolongation:

Tunisia and Libya agreed that the governing principle of delimitation was that stated by the I.C.J. in the North Sea Continental Shelf cases 1969:

\[\text{Delimitation is to be effected by agreement in accordance with equitable principles, and taking account of all the relevant circumstances, in such a way as to leave as much as possible to each Party all those parts of the continental shelf that constitute a natural prolongation of its land territory into and under the sea,}\]

\(^{155}\) I.C.J. Report 1982, see note 137 above, p. 94, para. 133(c)(3)
without encroachment on the natural prolongation of the land territory of the other.\textsuperscript{156}

Indeed, Libya contended that a delimitation giving effect to the principle of natural prolongation is \textit{ipso facto} in accordance with equitable principles,\textsuperscript{157} because it respects the inherent rights of each State\textsuperscript{158} over its appurtenant continental shelf. According to the view of Libya, natural prolongation is to be determined solely on the basis of geological criteria. Tunisia agreed that natural prolongation is the controlling principle, but it argued that the satisfying of equitable principles in particular geographical situation is part of the process of the identification of the natural prolongation.\textsuperscript{159}

The Court did not confirm the preeminence of natural prolongation. Rather, it held that the ‘satisfaction of equitable principle\textsuperscript{160} is of ‘cardinal importance’\textsuperscript{161} in the delimitation process; identification of natural prolongation may, where the geographical circumstances are appropriate, have an important role to pay in defining an equitable delimitation, but the satisfying equitable principles and the identification of the natural prolongation are not to be placed on a plane of equality.\textsuperscript{162}

The significance of natural prolongation, in the Court’s view, is that it is the basis for the sovereign right of the coastal State over it appurtenant continental

\textsuperscript{156} North see Continental Shelf cases I.C.J. Reports 1969, p.53, para. 101(c)(1)
\textsuperscript{157} I.C.J. Reports 1982, see note 137 above, p.44, para. 39
\textsuperscript{158} Ibid.
\textsuperscript{159} Ibid.
\textsuperscript{160} Ibid, p. 47, para. 44
\textsuperscript{161} Ibid.
\textsuperscript{162} Ibid.
shelf. But the appurtenance of a given area, considered as an entity, in no way governs the precise delimitation of its boundaries. The idea of the natural prolongation of the land territory would not necessarily be sufficient, or even appropriate, in itself to determine the precise extent of the rights of one State in relation to those of a neighbouring State. Thus, the Court was unable to accept the contention of Libya that once the natural prolongation of a State is a determined, delimitation becomes a simple matter of complying with the dictates of nature.

The Court was not persuaded by the scientific argument of either side. It concluded that since Libya and Tunisia both derive continental shelf title from a natural prolongation common to both territories, the ascertainment of the extent of the areas of shelf appertaining to each State must be governed by criteria of international law other than those taken from physical features. While the Court rejected the relevance of both geology and geomorphology in the case before it, it made a significant distinction between the two. ‘deep’ or ‘historical’ geology was dismissed (at least where the data do not clearly demonstrate the existence of two distinct continental shelves) as having no bearing on the human interests affected by maritime delimitation. For legal purposes it is not possible to define the areas of continental shelf by references solely or mainly to geological considerations. What must be taken into account in the delimitation of shelf areas are the physical circumstances as they are today; that just as it is the geographical configuration of the present-day coasts, so also it is the present-day

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163 North Continental Shelf cases I.C.J. Reports 1969, p.32, para. 46
164 Ibid, p. 46, para. 43
165 Ibid, p. 47, para. 44
166 I.C.J. Reports 1982, see note 137 above, p.58, para. 67
sea-bed, which must be considered. It is the outcome, not the evolution in the long-distant past, which is of importance.\textsuperscript{167}

Similarly, the Court did not accept any of the features cited by Tunisia as involving "such a marked disruption or discontinuance of the sea-bed as to constitute an indisputable indication of the limits of two separate continental shelves, or two separate natural prolongations."\textsuperscript{168} However, the Court did not exclude the possibility.

"that certain geomorphological configurations of the sea-bed, which do not amount to such an interruption of the natural prolongation of one party with regard to that of the other, may be taken into account for the delimitation, as relevant circumstances characterizing the area. In such a situation, however, the physical factor constituting the natural prolongation is not taken as a legal title, but as one of several circumstances considered to be elements of an equitable solution."\textsuperscript{169}

In the view of the Court, no such features were present in the Tunisia - Libya case. So far, the Court’s reasoning can be said to be a clarification of the doctrine of natural prolongation as set forth in the North Sea cases. However, other passages in the judgment appear to depart from the North Sea cases by implying that ‘natural prolongation’ is relevant to delimitation only in cases where there are controlling physical features of the seabed. For example, the Court stated in the depositif that the area relevant for the delimitation constitutes a

\textsuperscript{167} I.C.J. Reports 1982, see note\textsuperscript{137} above, pp.53-54, para 61
\textsuperscript{168} Ibid, p.57, para66
\textsuperscript{169} Ibid, p.58, para 68
single continental shelf as the natural prolongation of the land territory of both parties, so that in the present case, no criterion for delimitation of shelf areas can be derived from the principle of natural prolongation as such. It is also significant that the Court did not reiterate the central provision of its 1969 Judgment, which had been relied upon by both parties.

Presumably, the arguments adopted by Libya and Tunisia convinced the Court that the 1969 Judgment confused the issue by overemphasising the physical aspects of prolongation and by appearing to make prolongation more fundamental than equitable principles. It is clear that the scientific arguments presented to the Court in the Tunisia-Libya case were speculative, contradictory, difficult to understand, and hard to relate to the interests involved in the delimitation of maritime boundaries. Judge ad hoc Jimenez de Arechaga (Libya) noted in his concurring opinion that the criticism by each Party of the scientific arguments presented by the other was far stronger and more convincing than their affirmative contentions. The theory of plate tectonics advanced by Libya was described by one expert as an essay in geopoetry.

However, to the extent the Judgment of this case appears to equate 'natural prolongation' exclusively with a physical division of the shelf, it ignores the legal dimension of the concept of 'natural prolongation' and does not do justice to the Judgment in the North Sea cases. Indeed, the continental shelf underlying the North Sea is continuous and relatively uniform. The references to geology and to features of the seabed in 1969 Judgment are obiter dicta.

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170 I.C.J. Reports 1982, see note 137 above, p. 92, para. 133(A)(2)
171 Ibid, Separate opinion of Jimenez de Arechaga, p. 110, para. 38
As Judge Jimenez de Arechaga explains in his concurring opinion in this (Tunisia/Libya) case, the real meaning of ‘Natural Prolongation’ in the 1969 Judgment is the continuation or extension seawards of each State’s coastal front. He agrees with the Court’s conclusions that ‘natural prolongation’ is not determined by geological or geomorphological facts, and that continental shelf delimitation is not governed in an unqualified and exclusive manner by such a notion of natural prolongation.

Jimenez de Arechaga states that the most natural prolongation is that which continues or extends more directly into the sea and is not cut off by the extension or prolongation of the coastal front of another State. In his view, the corresponding principle, the other side of the coin of natural prolongation is the principle of ‘non-encroachment’ a fundamental principle of equity.

This is a sound view of the 1969 Judgment, where the Court was clearly preoccupied with the cutoff effect of an equidistance line in the context of a concave coastline. The Court was also conscious of this concern in this (Tunisia-Libya) case. Tunisia raised the point, and the court recognised that the cutoff effect could be an objection to an equidistance line and to the northward line proposed by Libya. The Court sought to avoid a cutoff effect in this case by utilising the perpendicular to the coastline as the boundary in the first sector and by adjusting the line in the second sector to take account of the change in the

\[172\] Case concerning Continental Shelf, Separate Opinion of Judge Jimenez de Arechaga, 1982, I.C.J. Reports, see note 137 above, p.116, para.58
\[173\] Ibid, p.110, para.39
\[174\] Ibid, see note 137 above, p.117, para. 59
\[175\] Ibid.
general direction of the coast. However, the Court did not expressly connect this concern to the principle of natural prolongation.

The Judgment in the Tunisia-Libya case might have been more useful if, instead of implying that natural prolongation applies only in two shelf situation, it had redefined the doctrine to minimize its geological /geomorphological content. This approach has the advantage of maintaining continuity in the Judgments of the Court on maritime delimitation. Further, a Judgment so expressed would have been more firmly grounded in legal principle and would have provided clearer guidance for the resolution of other maritime boundary disputes. As it stands, the Judgment can be criticized for diminishing unduly the meaning of natural prolongation - an understandable, but unfortunate, overreaction to the tactics of Tunisia and Libya before the Court.

4.2.1. (vii). Analysis of the Court on Equitable Principles:

By the time the (Tunisia/Libya) case came before the Court, it was accepted without any dispute that ‘equitable principles’ formed the foundation of the law of maritime delimitation. The doctrine that maritime boundaries are to be determined by mutual agreement in accordance with equitable principles derives from the Truman Proclamation on the Continental Shelf of 28th September, 1945. The Truman Proclamation is regarded as the cornerstone of continental shelf law, and its criterion of equitable principles was adopted by the I.C.J. in the North Sea Continental Shelf cases 1969 and also by the Court of Arbitration in the Anglo-French Continental Shelf case. Moreover, the concept was carried forward in the

The North Sea Continental Shelf cases and the Anglo-French Arbitration case recognised the close relationship between equitable principles and natural prolongation. In this (Tunisia/Libya) case, however, the Court determined that it was bound to decide the case on the basis of equitable principles, divorced from the concept of natural prolongations. Thus, the Court's idea of the applicable equitable principles becomes decisive. However, it seems that the judgment does not identify any equitable principles as such. It merely affirms in its operative part that the delimitation is to be effected in accordance with equitable principles and taking account of all relevant circumstances. Indeed, the Court states that it is the result which is predominant; the principles are subordinate to the goal. The term 'equitable principles', can not be interpreted in the abstract. The equity of any principles depends on whether it produces a just result in the circumstances of the particular case. The task of the Court is to balance up the various considerations which it regards as relevant in order to produce an equitable result.

This approach is consistent with, and influenced by, the emerging law of the sea. Article 83 (1) of the Convention on the Law of the Sea adopted by the Third United Nations Conference on the Law of the Sea stipulates: The delimitation of the continental shelf between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article

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176 I.C.J. Reports, 1982, see note 137 above, p. 92, para. 133(A)(1)
177 I.C.J. Reports, 1982, see note 137 above, p.59, para. 70
178 Ibid, p. 60, para. 71

137
38 of the Statute of the International Court of Justice, in order to achieve an equitable solution. The Court noted that any indication of a specific criterion (in Article 83 (1)) which could give guidance to the interested States in their effort to achieve an equitable solution has been excluded, but it did not hesitate to adopt the formula as its rule of decision.

It should be noted in this connection that the Special Agreement between Tunisia and Libya requests that the Court take into account, inter alia recent trends admitted at the Third United Nations Conference on the Law of the Sea. The Court interpreted this mandate as referring to trends accepted by the conference through their incorporation in provisions of the Draft Convention on the Law of the Sea. The parties apparently wanted these trends to be considered even if they did not yet enjoy the status of customary international law, although the Court did not believe the parties had adopted the 'trends' as applicable between them in this case as lex specialis. Tunisia suggested the Court to take these 'trends' into account as factors in its interpretation of existing law.

The Court reviewed the provisions of article 76 and 83 of the Draft Convention on Law of the Sea - the one defining the extent of the continental shelf, the other dealing with the delimitation of the continental shelf between States with opposite or adjacent coasts. But the Court found no help for the case before it other than the emphasis in Article 83(1) on the equitable solution that has to be achieved. In the words of the Court, the principles and rules applicable to

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179 I.C.J. Reports, 1982, see note 137 above, p.49, para.50
180 Ibid, p.38, para. 24
the delimitation of continental shelf areas are those which are appropriate to bring about an equitable result.\textsuperscript{181}

The Court's reluctance to define the equitable principles that may apply to maritime delimitation has been criticized as deepening the uncertainty of this area of the law. Such criticism may be warranted, about the Judgment does provide several significant indications of the meaning of equitable principles in the context of maritime boundary delimitation.

4.2.1. (viii) Review of the Court Regarding Meaning of Equitable Principles in Delimitation:

4.2.1.(viii)(a) No Equitable Sharing of Resources:

First, the Court took pains to emphasize the differences between equity as a general principle directly applicable as law, and a decision ex aequo et bono, which would not be based on legal rules. Absent agreement of the parties, the Court was required to apply equitable principles as part of international law and to balance up the various consideration which it regards as relevant in order to produce an equitable result. While it is clear that no rigid rules exist as to the rigid rules exist as to the exact weight to be attached to each element in the case, this is very far from being an exercise of discretion or conciliation; nor is it an operation of distributive justice.\textsuperscript{182}

In this respect, the Court followed its decision in the North Sea Continental Shelf cases where it rejected the argument of the Federal Republic of Germany

\textsuperscript{181} I.C.J. Reports, 1982, see note 137 above, p. 49, para.50
\textsuperscript{182} Ibid, p.60, para 71
that delimitation should effect an equitable sharing of the resources of the shelf. In
this case, Tunisia urged the Court to consider its relative poverty in natural
resources, particularly oil and gas, and its dependence on fisheries, not to
refashion nature, but to avoid widening the disparities created by nature. The
Court was firm, however in holding that these economic considerations can not be
taken into account in the delimitation. They are virtually extraneous factors
since they are variables which unpredictable national fortune or calamity might at
any time cause to tilt the scale one way or the other.

4.2.1. (viii) (b) The Land Dominates the Sea:

Second, a delimitation in accordance with equitable principles must take
into account the relationship between the maritime areas to be delimited and the
coasts of the parties, as indicated by the general configuration of the coasts and
taking account of any particular features that might cause a boundary line to cut
off a State from shelf areas lying in front of its coasts. Among the relevant
circumstances to be taken into account in achieving an equitable delimitation, the
Court said, is the element of a reasonable degree of proportionality between the
extents of the continental shelf areas appertaining to the coastal State and the
length of the relevant part of its coasts, measured in the general direction of the
coastline.

4.2.1. (viii) (c). Identification of Coastal Fronts:

\[\text{I.C.J. Reports, 1982, see note 137 above, p. 77, para. 106}\]
\[\text{ibid, p. 77, para. 107}\]
\[\text{ibid.}\]
\[\text{ibid, p. 93, para. 133(B)(5)}\]
The Court began its discussion of relevant circumstances by stating that the geographic correlation between coast and submerged areas off the coast is the basis of the coastal State's legal title, and it reiterated its characterization in the North Sea cases of the Continental Shelf as a legal concept in which the principle is applied that the land dominates the sea. Thus, the coast of each party is the starting point for every delimitation. The identification of the relevant coastal fronts is critical to the projection of the general direction of the coasts, calculations of proportionality as between the length of the relevant coasts and the area attributed to each coastal State, and selection of those geographic features that should be discounted to allow for a delimitation that reflects the broad geographic relationship of the parties.

The Court observed that the areas relevant to the dispute would include only those areas 'off the coast' of one of the parties, and that the area in dispute, where one claim encroaches on the other, was that part of these areas that could be considered to lie off the coasts of both parties. It is clear from the context that the Court considers an area to lie 'off' the coast of party if it is situated in front of the coast of that party. In the case before it, the Court determined that the seabed areas beyond Ras Kaboudia on the Tunisian coast and Ras Tajoura on the Libyan coast should not be taken into account because they can not overlap with the extension of the coast of the other.\(^{187}\) Undoubtedly, the Court was influenced in the selection of these points by the presence of third States in the area with coast opposite the coasts of one or both parties.

\(^{187}\) I.C.J. Reports, 1982, see note 137 above, p.61, para.75
The importance attached to the coastal fronts of the parties is also evident in the Court’s stipulation that a line which does have bearing on the delimitation is the line designed to be ‘normal’ or ‘perpendicular’ to that section of the coast where the land frontier begins. The factor of perpendicularity to the coast and the concept of prolongation of the general direction of the land boundary are relevant criteria to be taken into account in selecting a line of delimitation calculated to ensure an equitable solution. In the (Tunisia/Libya) case, the Court concluded that these factors should be applied in that part of the delimited area closer to the coasts of the parties. It appeared to the Court that a line drawn on this basis would coincide with the $26^0$ line used by the parties and their predecessor regimes for resource management purposes.

4.2.1. (viii) (d) Requisite elements of Proportionality:

The Court tested the method of delimitation adopted by considering whether it affected the requisite element of proportionality. The Court agreed with the parties that that element is indeed required by the fundamental principle of ensuring an equitable delimitation between the States concerned. This formulation is consistent with the approach followed in the Anglo French Continental Shelf case, where the arbitral tribunal emphasized that it is disproportion rather than any general principle of proportionality which is the relevant criterion or factor.

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188 I.C.J. Reports, 1982, see note 137 above, p. 85, para. 120
189 ibid, p. 66, para. 86
190 ibid, p. 75, para. 103
191 ibid, p. 152, para. 17
The parties differed as to which coasts should be considered and as to whether large areas of Tunisian-claimed internal waters should be included in the proportionality calculation. This issue was complicated by a dispute over the validity of straight baselines drawn by Tunisia across the Gulf of Gabes. The Court concluded that there is no general rule indicting which areas of seabed should be included. The comparison could be more or less restricted depending on the relevant circumstances; the only absolute requirement of equity is that one should compare like with like.

On the facts of this case, the Court found that a comparison of all 'shelf areas' below the low water mark would be necessary to determine the equitable character of a line of delimitation. In so doing, the Court was careful to disclaim any judgment on the validity of the Tunisian straight baselines. It emphasized that the legal status of the superjacent waters was not controlling as regards determination of the areas to be compared. To make any proportionality calculation, it was also necessary for the Court to establish the seaward limits of the area to be delimited. This determination was complicated by the presence of third parties with actual or potential claims to the areas disputed by Libya and Tunisia. The Court concluded that it had no alternative but to treat the whole area within the lines of latitude and longitude joining Ras Kaboudia and Ras Tajoura as appertaining to the parties before the Court, and that it would do so without prejudice to the claim of other States.

Having established the area to be used for the calculation, the Court computed the proportion of the relative lengths of the relevant coastline as Libya:
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Tunisia equals 31:69 (sinuosites of the coast) or 34:66 (straight lines corresponding to the general direction of the coastlines). It then calculated the ratio of the seabed area attributable to each party by the boundary method indicated by the Court as Libya 40 : Tunisia 60. In the words of the judgment, 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.  

4.2.1.(viii) (e). Conduct of the Parties:

Third, an equitable delimitation must take into account the conduct of parties, in the boundary area, particularly where there are historical circumstances that establish a high degree of the consensus for various boundary purposes. In this connection, the Court found that Italy and France had accepted the perpendicular to the coast as a tacit modus vivendi for fisheries enforcement purposes since 1919. Because France’s consent was based only on silence and lack of protest, the majority did not join Judge Ago’s conclusion that this line had been adopted as a maritime boundary per se.

The Court by majority held, however, that the absence of protest, throughout a long period of time, could warrant its acceptance as a historical justification for the choice of the method of delimitation of the continental shelf between the two States, to the extent that the historic rights claimed by Tunisia could not in any event be opposable to Libya east of the modus vivendi line.  

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192 I.C.J. Reports,1982, see note 137 above, p.91, para.131
193 Ibid, p.71, para. 95
The Court also noted the existence of another defacto line from Ras Ajdir at an angle of 26° east of north, i.e., perpendicular to the coast, arising out of the oil and gas concessions granted by the two sides. Indeed, the Court pointedly stated that the parties had not given sufficient weight to this consideration, which the Court finds to be highly relevant to the determination of the method of delimitation. The Court invoked this concession line as evidence of the line or lines which the Parties themselves may have considered equitable or acted upon as such - if only as an interim solution affecting part only of the area to be delimited.

Even so, this aspect of the parties' conduct standing alone would not justify the method of delimitation adopted by the Court. It would be contrary to the public interest in the peaceful resolution of international disputes if a state that exercised restraint in its activities in an area claimed by another State were punished by implying it had consented to that claim. Nothing could be more inflammatory than drilling on the continental shelf claimed by another State. In this case, both Libya and Tunisia had authorised drilling in the boundary areas under concession, and there was a serious risk that hostilities might result. That risk would have been sharply increased if Tunisia had drilled even further to the east.

4.2.1. (viii) (f). The Relevant Circumstances:

After defining the area relevant to the delimitation, the Court turned its attention to the configuration of the coasts and other geographic circumstances.

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194 I.C.J. Reports, 1982, see note 137 above, p.71, para.96
195 Ibid, p.84, para. 118
Not surprisingly, the first circumstances it identified as relevant, was the change in direction of the Tunisian coast where it doubles back in a southwest-northeast direction. The second was the Tunisian islands. The non geographical circumstances deemed relevant by the Court were (1) the existing and potential delimitations with other States in the area, (2) the point of intersection of the land frontier with the coastline at Ras Ajdir and (3) prior conduct of the parties.

4.2.1. (viii) (g). The Method of Delimitation:

The Court began its examination of delimitation methods with a brief discussion of equidistance. It referred to the holding in the North Sea Continental Shelf cases 1969, that the equidistance method of delimitation of continental shelf is not prescribed by a mandatory rule of customary law (I.C.J. Reports 1969 p.46, para 83 ; p. 53, para 101)\(^{196}\) and it noted that both State practice and the history of Article 83 of the Draft Convention on the Law of the Sea support the conclusion that equidistance may be applied, if it leads to an equitable solution; if not, other methods should be employed.\(^{197}\) Further, the Court rejected the notion that it was required to examine the effects of applying the equidistance method as a first step, since equidistance is not, in the view of the Court, either a mandatary legal principle, or a method, having some privileged status in relation to other methods.\(^{198}\)

This position was severely criticized by the dissenting judges. Judge Gros believed that the Court had an obligation to test the equidistance method, as well as other methods and he found it suitable in this case. Indeed, Judge Gros

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\(^{196}\) I.C.J. Reports, 1982, *see note 137 above, p.79, para.109
\(^{197}\) Ibid.
\(^{198}\) Ibid, para110
objected to the ‘subjective’ approach taken by the Court, which he regarded as a
compromise sought at one and the same time between the claims of the parties
and the opinions held within the Court.\textsuperscript{199}

Judge Oda made a similar point by describing the Judgment as appearing, to
his eyes, simply as one appropriate to a case ‘ex aequo et bono’ such as might
have been decided, if the parties so agreed.\textsuperscript{200} In a long, scholarly dissent which
reviews the history of the subject in detail, Judge Oda argued that the recent
trends in the law of the sea give new life to the proximity principle as a basis for
delimitation of maritime boundaries. His argument relies in large measure on the
introduction of the 200 - mile distance criterion into the definition of the
continental shelf and the exclusive economic zone in Articles 76 (1) and 57 of the
Draft Convention. His analysis disregards the continued significance of the
concept of natural prolongation in the definition of the continental shelf,
particularly when the shelf, slope, and rise extend beyond 200 miles. It also does
not acknowledge that both the text and the history of the delimitation provisions
of the Convention, Article 83 (shelf) and 74 (exclusive economic zone),
demonstrate the Conference’s intention to eliminate the emphasis on equidistance
in Article 6 of the 1958 Convention on the Continental Shelf in light of the
Court’s judgment in the North Sea cases.

Judge Oda while giving his opinion in this (Tunisia- Libya) case
emphasized that delimitation of the continental shelf (or of the exclusion
economic zone ) should be effected in accordance with the geography of the area

\textsuperscript{199} I.C.J. Reports, 1982, see note 137 above, p.153, para.18
\textsuperscript{200} Ibid, p.157, para.1
concerned, i.e., so as to secure reasonable proportionality between lengths of coastline and the expenses allocated. To achieve that result, he proposed adoption of the qualified equidistance method, which he regarded as the equitable method \textit{par excellence} to be tried before all others.

The Court did not accept this point of view. Its methodology flows from its appreciation of the relevant circumstances. Since the perpendicular to the coast, the 26° line, reflects all appropriate factors, the delimitation should follow that line in its initial stage. However, the Court recognised that at a certain point such a line would require adjustment to take account of the radical change in direction of the Tunisian coast. In general terms, the Court noted that in cases of delimitation over a broad area, the use of one method to determine the whole course of the boundary may be inequitable. A multiplicity of methods may be necessary to minimize the distorting effects of particular features that, while tolerable close to shore, may be exaggerated to unreasonable proportions at a greater distance.

In the situation before it, the Court took the view that the perpendicular to the coastline was less suitable as a basis for delimitation further from the coast, because the configuration of the coasts was such that the relationship progressed from one of ‘adjacency’ at Ras Ajdir to one approaching ‘opposite’ as between Ras Kaboudia and Ras Tajoura. Further, the Court did not believe that the parties, in adopting the 26° line for resource management purposes comparatively close to shore, would both necessarily accept as equitable its effect further out to sea.

\footnotesize

\begin{itemize}
  \item \textsuperscript{201} I.C.J. Reports,1982, \textit{see note 137 above}, p.269, para.181
  \item \textsuperscript{202} ibid, p.270, para.181
  \item \textsuperscript{203} ibid, p.86, para.121
\end{itemize}
In the process of determining the direction of the Tunisian coast, the Court was required to address the weight to be given to the Kerkennah Islands and the low-tide elevations surrounding them. The Court determined that full effect would, in the circumstances of the case, amount to giving excessive weight to the Kerkennahs. Instead, it allowed half-effect, following the precedent of the Anglo-French Arbitration case, where the Court of Arbitration allowed only half effect to the Scilly Islands. This adjustment was effected by making the line of delimitation parallel to a line drawn bisecting the angle; between the line of the Tunisian coast (42°) and the line along the seaward coast of the Kerkennah islands (62°) at an angle of 52° to the meridian. The seaward extension of the line was left open, as that question implicates the interests of third States.

The effect to be given the Kerkennah islands was a troublesome issue for the Court. Judge Schwebel wrote a brief concurring opinion to make the single point that the Court has not carried the burden of demonstrating why granting full effect to the Kerkennahs would result in giving them excessive weight. Schwebel pointed out that these islands are substantial close to the Tunisian mainland, divided from it by shallow waters in whose banks fisheries are fixed; the considerable population has an ancient and sustained fishing and maritime tradition. For similar reasons, Judge Gross argued that the Kerkannah islands are entitled to full effect.

4.2.1. (viii) (h). The Import of the Judgment:

204 I.C.J. Reports, 1982, see note 137 above, p. 89, para. 128
205 Ibid, para. 129
Although the Tunisia -Libya case only involved the delimitation of the continental shelf, the general principles stated by the Court and its mode of analysis appear well suited to the delimitation of the exclusive economic zone and of unitary maritime boundaries marking the continental shelf and other maritime zones. The following rules and principles have been evolved in the decision of the Court.

1) The general rule that delimitation is to be effected in accordance with equitable principles, and taking account of all relevant circumstances, is a fundamental norm that is applicable to every maritime delimitation. Although this formula is too general in itself to provide much guidance for future cases, the Court has given other indications of the principles and circumstances that are relevant to maritime delimitation.

2) A delimitation in accordance with equitable principles will respect the extension (or natural prolongation) of the coastal fronts of the parties into and under the sea. Such a delimitation will correspond to the general geographic relationship of the coasts of the parties, and will not give such effect to particular features as will result in a line that cuts off the coast of a party from the maritime areas situated in front of that coast. The principle of non-encroachment appears relevant both to the shelf and to the superjacent waters.

3) The equitable character of a delimitation will be tested; by the principle of proportionality as stipulated by the Court in the North Sea Continental Shelf Cases 1969,
4) The Court will give considerable weight to the prior conduct of the parties where that conduct demonstrates that both parties accepted the same line as a boundary for significant purposes over a long period of time.

It is a trite statement that the area found to appertain to each coastal State concerned in the delimitation of a continental shelf does not necessarily have to be equal to be equitable. The Judgment seems to be the desire of the Court to reach a solution which places Tunisia and Libya in a position of equality. As per the remarks made by the Court in the North Sea Continental Shelf Cases 1969 that equity does not necessarily imply equality. There can never be any question of completely refashioning nature. The Court then must accept the natural inequalities of the coastline and other relevant geographic features as it finds them. A similar remark was made by the Court of Arbitration in the Franco-British Arbitration.

In seeking equality when Tunisia and Libya are not on an equal geographical footing by attributing insufficient weight to number of relevant geographical features, the Court failed to strike an equitable solution for both of them - it being necessary that a delimitation be equitable for both parties.

The Court in this case was requested by the parties to decide the matter of the continental shelf delimitation submitted to it in accordance with international law which requires the application of equitable principles. Equity in the view of the Court in North Sea Cases, was never intended to remedy natural inequalities by refashioning the geography of coastlines, and it is in this respect the Court in

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206 I.C.J. Reports, 1982, *see note 137 above, p.49, para.91*
this case applied equitable principles in a manner which is at Odds with the approach of the 1969 Court. Although the Court carefully pointed out that it was bound in reaching its decision to apply equitable principles as part of international law as opposed to adjudicating 'ex aequo et bono', the distinction between equitable principles infra legem and considerations ex aequo et bono has unfortunately been blurred by its pronouncements.

In light of the compelling dissenting opinions expressed in the Judgment of this case. It is difficult to predict with certainty the Judgment’s impact on future shelf delimitation, such as that pending before a specially constituted Chamber of the Court between Canada and the United States concerning the Gulf of Maine dispute.

4.2.2. The Case Concerning Gulf of Maine Seaward Boundary Dispute (Canada/U.S.A)- I.C.J. Rep. 1984

(Decision of October 12, 1984)

On October 12, 1984, a five-member Chamber of the International Court of Justice delivered its judgment in the case concerning the delimitation of the United States- Canadian maritime boundary in the Gulf of Maine and seaward over the rich fishing grounds known as Georges Bank. On 25 November 1981, Canada and the United States of America notified to the Court a special agreement. Whereby they referred to a Chamber of the Court the question of the delimitation of the maritime boundary dividing the continental shelf and

207 Delimitation of the maritime boundary in the Gulf of Maine area (Canada/ U.S.A) 1984 I.C.J. Reports 246 (Judgment of October, 12) The chamber was not unanimous in its decision. Judge Schwebel voted for the Chamber’s judgment and found the resulting line of delimitation to be equitable but not correctly adjusted to account for the Bay of Fundy’s legal status. Judge Gros. on the other hand, dissented from the Chamber’s Judgment. p.345, Para.243

208 Ibid, p.252, para.1
fisheries zone of the two parties in the Gulf of Maine area. This Chamber was constituted by an order dated 20 January 1982, and it was the first time that a case had been heard by a Special Chamber of the Court. The parties requested the Chamber to decide a question as to the course of the single maritime boundary that divides the continental shelf and fisheries zones of the two parties in the Gulf of Maine area.

4.2.2. (i). The Dispute as Articulated by the U.S.A. & Canada:

Before turning to the Chamber’s decision, it is instructive to gain some perspective on the general nature and significance of the case as seen by the parties. In Canada’s view:

The range of factors in issue gives this a case a unique human immediacy and economic importance. For the first time, the Court is asked to direct its attention to the full panoply of sovereign rights and jurisdiction that coastal States may now exercise in the area beyond and adjacent to the territorial sea with respect to the living and non living natural resources of the seabed and subsoil and the superjacent waters. The case thus brings together the promise of the continental shelf and the known abundance of the fishery: the economic prospects that the shelf may offer in years to come and present livelihood of coastal fishermen and the welfare of the communities they sustain.

In United States point of view:

209 Delimitation of the maritime boundary in the Gulf of Maine area (Canada/ U.S.A) 1984 I.C.J. Reports 246 (Judgment of October,12) p.252, para.3
210 Ibid.
211 Ibid, p.252, para.1
In the United States, the intense concern with this case stems largely from historical American links with Georges Bank. United States fishermen have fished significantly on Georges Bank since the 1820s. A rich folklore developed surrounding the exploit and the daring of these brave New Englanders. For almost a century and a half, it was, with few isolated exceptions, United States vessels alone that fished the waters over Georges Bank. During this period, especially in New England, the fisheries of Georges bank were, to use a rather common American metaphor, considered by many citizens to be as 'American as apple pie'. In brief, Georges Bank has been closely connected with the United States for a long time. As could be expected, Canada’s aspirations regarding the northeast portions of Georges Bank provoked a strong response not only in New England but also in the corridors of Washington.212

4.2.2.(ii). Delimitation Lines Proposed by the Parties:

In its Memorial, Canada proposed the application of the principle of equidistance to be appropriate in arriving at an equitable division of the disputed area. When it came to applying the equidistance method, however, Canada found Cape Cod and its off lying islands to be an "exceptional protrusion which when superadded to the general protrusion of the coast of Massachusetts, produced an inequitable effect on the delimitation. To remedy the ‘disproportionate influence’ of Cape Cod on the equidistance computation, the Canadians chose ‘an appropriate base point on Cape Cod’ and thus eliminated the effect of the Cape or Nantucket Island. In Canada’s view, the adjusted equidistance method produced

212 Verbatim Record for the delimitation of maritime in the Gulf of Main Area 9(Canada/U.S ) p. 7 (ICJ April 11, 1984)
an equitable solution that takes account of all relevant factors and meets the test of a reasonable degree of proportionality.

The Chamber examined the Canadian line and found it something less than equity. It pointed out that:

The Canadian line consists of a line constructed almost entirely from the nearest points of the baselines from which the breadth of the territorial sea is measured. In this instance, this means solely islands, rocks or low tide elevations. An exception is however made for the base points selected on the coast of Massachusetts, which have been transferred from the outer end of the peninsula of Cape Cod and Nantucket Islands, much further to the west, to the eastern end of Cape Cod Canal.  

The United States had proposed various delimitation lines in negotiations during the years preceding the adjudication by the Chamber. The final position of the line was derived from what the United States maintained was the general direction of the coastline facing Georges Bank and the disputed waters. On the central idea was based a set of assertions, which the Chamber summarised as follows:

a) recognition of the priority to be given, in all respects, to consideration of the general southwest and northeast direction of the eastern seaboard of the American Continent;

213 I.C.J. Reports 1984, see note 209 above, p.287, para. 77
b) a distinction between 'primary coasts' and 'secondary coasts', according as they follow the general direction of the coast or, on the contrary, deviate from it.

c) the classification, inter alia, of the Atlantic coast of Nova Scotia as one of the 'primary' coasts and of the coast of Nova Scotia abutting on the Gulf of Maine -like the coast of Massachusetts abutting on that Gulf - as 'secondary' coasts:

d) a finding that the coast of Maine abutting on the Gulf follows a direction corresponding to the 'general direction' and is, therefore, a 'primary' coast; and that Georges bank situated off and opposite the coast of Maine, is oriented in the same direction. 214

Thus, in the Chamber's view, the United States was arguing the concept of Natural Prolongation through the extension of its primary coastal front not in the geological or geomorphological sense, but in the geographical sense. 215 The configuration of the United States proposal for the delimitation of the single maritime boundary, in the view of the Chamber, was a compromise solution between two fundamentally different methods: the geometrical method of the perpendicular to the general direction of the coast and the ecological method of respect for the unity of the distinct ecosystems and distribution on that basis between the two neighbouring States. 216

214 I.C.J. Reports 1984, see note 209 above, p.318, para. 170
215 Ibid.
216 Ibid, p. 319, para. 173
In the opinion of the Chamber neither of the parties boundary lines had merit. In both cases, the majority of judges agreed, the outcome of the parties efforts can be said to have been preconceived assertions rather than any convincing demonstration of the existence of the rules that each had hoped to find established by international law. Clearly, the Chamber viewed the voluminous collections of legal and factual findings submitted by the parties flawed by the a priori nature of their underlying premises and deductions.

The Chamber was further critical of the parties 'false premise', which led them to search and employ international law for, as it were, a set of rules which (were) not there. Customary international law the Chamber averred comprises a limited set of norms for ensuring the co-existence and vital co-operation of the members of the international community. There does, in the Chamber’s opinion, exist a set of customary rules whose presence can be tested by induction based on the analysis of a sufficiently extensive and convincing practice, and not by deduction from preconceived ideas.

4.2.2.(iii) The Chamber’s Search for the Fundamental Norm of International Law: The Chamber’s search for the fundamental norm of customary international law governing maritime delimitation and a just delimitation line, whether effected by direct agreement or by the decision of a third party, must be based on the application of equitable criteria and the use of practical methods.

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217 I.C.J. Reports 1984, see note 209 above, p. 298, para. 109
218 Ibid.
219 Ibid, para. 110
220 Ibid.
221 Ibid, p. 299, para. 111
222 Ibid.
223 Ibid. p. 300, para. 113
capable of ensuring an equitable result. According to the parties, this fundamental norm must apply to any delimitation and, *a fortiori*, to the drawing of a single maritime boundary like that sought in the Gulf of Maine Area. As the Chamber began the discussion of its mandate and the ensuing search for the 'fundamental norm' of international law that should apply in delineating a boundary, it reminded the parties, that legal title to certain maritime or submarine areas is always and exclusively the effect of a legal operation. It was not correct, in the Chamber's opinion, to conclude that boundaries arose from any sort of intrinsic merit or physical characteristic. Rather, a boundary was nothing more or less than the limit of the extent of the title, as derived from law. It would not be correct to conclude that international law recognised the title conferred on the State by the adjacency of that shelf or that zone, as if the mere natural fact of adjacency produced legal consequences.

4.2.2.(iv) Equitable Criteria and Practical Methods for a Delimitation:

It was the Chamber's conclusion that the fundamental norm of international law governing maritime delimitation demanded that such delimitations be based on the application of equitable criteria and the use of practical methods capable of ensuring an equitable result. The Chamber stated that in reality a delimitation by a single line i.e., a delimitation which has to apply at one and the same time to the continental shelf and to the superjacent water column can only

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224 I.C.J. Reports 1984, see note 209 above, p. 300, para. 113
226 Ibid, p. 296. Para 103
227 Ibid.
228 Ibid.
229 Ibid.
230 Ibid, p. 300, para. 113
be carried out by the application of a criterion, or combination of criteria, which
does not give preferential treatment to one to the detriment of the other, and at the
same time is such as to be equally suitable to the division of either of them. 231

The criteria that the Chamber ultimately chose were derived from
geography. By geography the Chamber meant mainly the geography of coasts,
which has primarily a physical aspect, to which has primarily a physical aspect, to
which may be added, in the second place, a political aspect.232 With in such a
frame work, the Chamber favoured a criterion long held to be as equitable as it is
simple, namely that in principle one should aim at the equal division of areas
where the maritime projections of the coasts of the States converge and
overlap.233

The geographically complexities of the New England - Nova Scotia facade
fronting the Gulf of Maine would of course make necessary the like wise
auxiliary criterion whereby it is held equitable partially to correct any effect of
applying the basic criterion that would result in cutting one coast line. or part of it,
from its appropriate projection across the maritime expanses to be divided or then
again the criterion - it too being of an auxiliary nature - involving the necessity of
granting some effect, however limited, to the presence of a geographical feature
such as an island or group of small islands lying off a coast, when strict

231 I.C.J. Reports 1984, see note 209 above, p. 327, para. 194
232 Ibid, p. 327, para. 195
233 Ibid, p. 296, para. 103
application of the basic criterion might entail giving them full effect or, alternatively, no effect. 234

Once committed to this line of reasoning the Chamber found, not surprisingly, that geometrical methods would be suitable instruments for giving effect to their criteria for delimitation. In the words of its decision, the delimitation line to be drawn in a given area will depend on the coastal configuration. 235 Considered as a whole, the Chamber’s approach to the problem of deciding a single delimitation line for the continental shelf and waters above it could be said to subscribe to the adage land dominates the sea. 236

4.2.2.(v) Chamber’s Line and Subjective Perspective:

While it is probably incorrect to view the Chamber’s efforts in terms of winning or losing the Chamber’s efforts in terms of winning or losing, it is a fact that its line of delimitation confirmed to Canada a large portion of Georges Bank. In the words of the Chamber’s decision, this Bank is the real subject of the dispute between the United States and Canada in the present case, the principle stake in the proceedings, from the view point of the potential resources of the subsoil and also, in particular, that of fisheries that are of major economic importance. 237 Clearly the coastal geography / geometry methodology followed by the Chamber in its effort to articulate and implement the fundamental norm of customary international law governing maritime delimitation, had resulted in a division of

234 I.C.J. Reports 1984, see note 209 above, p. 328, para. 196
235 Ibid, p. 330, para. 205
236 Ibid, p. 338, para. 226
Georges Bank to radically different from the ‘equidistance’ division that had been argued by Canada.

In his separate opinion, the American member of the Chamber, Judge Schwebel, agreed with the essentials of analysis and reasoning, and found that the resultant line of delimitation was not inequitable. He did, however, disagree with the placement of the line of delimitation. In his comments, Judge Schwebel noted that the law is more plastic than formed in such matters. He also used the term subjective perspective, a term that, it could be argued, sums up a basic flaw in the Chamber’s whole attempt to move from the fundamental norm of international law to the practical task of fixing a single line of delimitation through the Gulf of Maine and across Georges Bank.

It will be recalled that the Chamber was critical of the imprecise definition of the term ‘Gulf of Maine area as it was employed by the parties in their Special Agreement and pleading. The Chamber considered it indispensable to achieve a greater degree of precision to the geographical concepts used in this context by way of basis for the operation which it has to perform. To satisfy this need for greater precision, the Chamber alluded to the maps included with their decision and stated that the Gulf of Maine is a broad oceanic indentation in the eastern coast of the North American Continent, having roughly the shape of an elongated

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238 I.C.J. Reports 1984, see note 209 above, Separate opinion of Judge Schebel p. 353
239 Ibid.
240 Ibid, p. 357
241 Ibid.
242 Ibid, p. 268. para. 28
rectangle.\textsuperscript{243} To echo a phrase used by the Chamber in another context, it is a far cry from this hypothesis to geographical reality.\textsuperscript{244}

In his dissenting opinion, Judge Gros was vigorous in criticizing the Chamber's subjective description of the Gulf of Maine as forming a rectangle. He wrote:

The idea that the Gulf (of Maine) is a rectangle has no other utility than to prepare the discovery that an angle in the north of the Gulf will enable a bisector to be drawn; the choice of some imaginary lines to compose certain sides of the mythical rectangle ending in an area outside the Chamber's competence is presented as a striking likeness of nature. The Gulf is not a rectangle in any exact description of the facts in this case, since, like any gulf, it has only three sides, but it is made out to be one simply because that enable it to be given a fourth side at its entrance which will prove an indispensable line for justifying the direction of the final segment of the boundary.\textsuperscript{245} In Judge Gros's view, a judge should not modify the geographical situation by a representation, be it aline, rectangle or angle, which is his own vision of the facts and alters those facts.\textsuperscript{246}

4.2.2. (vi). The Equitableness of the Chamber's Line:

It was not until page 99 of its 105-page decision document that the Chamber formally took up its last remaining task, which was to ascertain whether the result thus arrived at may be considered as intrinsically equitable, in the light

\textsuperscript{243} I.C.J. Reports 1984, see note 209 above, p. 268, para. 29
\textsuperscript{244} Ibid, p. 334, para. 218
\textsuperscript{245} Ibid, Dissenting opinion of Judge Gros pp. 379 & 380
\textsuperscript{246} Ibid, p. 380, para. 33
of all the circumstances which may be taken into account for the purpose of that decision. Such verification was not deemed necessary in the instance of the two segments of the delimitation line drawn inside the Gulf of Maine. Within the Gulf, the Chamber averred, it would scarcely be possible to assess the equitable character of the delimitation on the basis of any other than the dominant parameters provided by the physical and political geography of the area.

Outside the Gulf of Maine and over Georges Bank, the Chamber felt that the question of intrinsic equitableness might take on a something of a different complexion. As the Chamber saw the matter:

This Bank is the real subject of the dispute between the United States and Canada in the present case, the principal stake in the proceedings, from the viewpoint of the potential resources of the subsoil and also, in particular, that of fisheries that are of major economic importance. Some enquiry whether, in addition to the factors provided by the geography of the Gulf itself, there are no others that should be taken into account, is therefore an understandable step. It might well appear that other circumstances ought properly to be taken into consideration in assessing the equitable character of the result produced by this portion of the delimitation line, which is destined to divide the riches of the waters and shelf of this Bank between the two neighbouring countries.

The Chamber’s ‘other circumstances’ worthy of consideration were found to be summed up in the data from human and economic geography provided by

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248 Ibid, p. 340, para. 231
249 Ibid, p. 340, para 232
the parties. In the Chamber's opinion, these data were ineligible for consideration as criteria to be applied in the delimitation process itself.\textsuperscript{250} Economic and human geography might, however, be relevant to assessment of the equitable character of a delimitation first established on the basis of criteria borrowed from physical and political geography.\textsuperscript{251} Once again the Chamber exhibited its admitted 'land dominates sea' bias. The declaration is that a line of a delimitation the Chamber set in motion by means of its arguably subjective interpretation of the complexities of coastal configuration in the far corners of the Gulf of Maine would govern the division of the world's premier fishing ground with only the slightest heed being paid to the rich history of humankind's activities there over the centuries since discovery. While no disrespect is intended, it could be said that the Chamber was creating a situation in which a remote Gulf of Maine 'tail' was wagging a Georges Bank 'dog'.

4.2.2. (vii) Delimitation Line Determined by the Chamber:

The Chamber determined the single maritime boundary between Canada and the United State of America in three segments (the first two segments in the Gulf of Maine sector and the third segment in the Atlantic Ocean sector) as follows:

1) The Chamber drew two lines to form perpendiculars with the two basic coastal rectangle lines which formed a corner at the terminus of the international boundary. The reflex angle that the two perpendiculars formed was found to be

\textsuperscript{250} I.C.J. Reports 1984, see note 209 above, p. 340, para. 232
\textsuperscript{251} Ibid.
approximately 278 degrees. The bisector of this angle was taken as the course or azimuth for the first segment of the delimitation line.

2) The second segment of the delimitation line was the corrected median line between the coasts of Nova Scotia and that of Massachusetts. The Chambers considered that Seal Islands and Mud Island off the coast of Nova Scotia should have some influence in the calculation of the location of the second segment of the delimitation line. The Chamber noted:

that the meeting point of the first and second segments of the delimitation line, i.e., the pivotal point where this line changes direction, is located about as far into the Gulf as Chebogue point, a feature of the Nova Scotian coast which marks the transition from the part of this coast in an adjacency relationship with the coast of Maine to the part facing the Massachusetts coast in a relationship of oppositeness.252

3) The third segment of the delimitation line i.e., the longest portion of its entire course,253 would lie entirely seaward of the Gulf of Maine closing line. As a consequence of this fact, the Chamber reasoned that the most appropriate geometrical method for its determination would be the simple drawing of a perpendicular from the closing line at the point of intersection with the corrected median line and the line of delimitation was terminated where the perpendicular from the Gulf of Maine closing line reached the outermost extent of the disputed overlapping 200 mile claims of Canada and the United States.

252 I.C.J. Reports 1984, see note 209 above, p. 337, para. 223
253 Ibid, p. 337, para. 224
4.2.2. (viii). Assessment and Appraisal of the Decision:

By the way of assessment and appraisal of the judgment of the I.C.J. Chamber in the delimitation of the maritime boundary in the Gulf of Maine Area (Canada/U.S.A) of 12 October 1984, the following observations may be made:

1) This being the first case before an I.C.J. Chamber concerning a single carried maritime boundary extending up to 200 nautical miles in the sea, with emphasis on the fisheries aspects in the delimitation area, particularly in Georges Bank, and the first Judgment delivered after the opening for signature of the United Nations Convention on the Law of the Sea 1982, its contribution to the law on maritime delimitation and its importance to the world community of States as a whole can not be overemphasised. The trend towards a single maritime boundary is likely to be a global one, primarily for reasons of practical convenience and the avoidance of controversies, as contemplated in the present Judgment and as evidenced in increasing State practice.

2) As to the law applicable to the single maritime boundary, the Judgment has enunciated a flexible but hierarchical frame work, namely that such a boundary shall be determined by the States concerned; by agreement, failing which by reference to a third-party settlement, applying equitable criteria and an appropriate method relating thereto, taking account of relevant circumstances, and capable of ensuring an equitable result.

In the present case, the Judgment has applied the criteria of physical and political geography and supplemented them by the auxiliary criteria of proportionality of the length of the relevant coastlines and avoiding the distorting
effect of islands with a view to dividing equally the area of overlap. No other criteria, principles or special circumstances advanced by the parties have been accepted as relevant.

3) The practical method of delimitation is a geometrical one, which has been applied in all the three segments of the line, namely a bisector of the reflex angle at first segment, a corrected median line in the middle, and a perpendicular to the Gulf closing line for the Atlantic Ocean area. The preference was for a simple continuous lines rather than zig zag ones.

The resulting line has been tested by the Chamber with reference to the socio-economic arguments presented by the parties and its alignment in Georges Bank has been justified as equitable.

4) The resulting line of the single maritime boundary determined by the Chamber is equitable, and may therefore serve as an inspiration and a guidance to delimitations in State practice and in future decisions.

4.2.3. The Case Concerning the Delimitation of Continental Shelf (Libyan Arab Jamahiriya / Malta) I.C.J. Rep. 1985 (Judgment of 3 June 1985):

On June 23, 1985, the International Court of justice delivered its judgement in the case concerning the delimitation of continental shelf appertaining to the Socialist People’s Libyan Arab Jamahiriya (hereinafter called ‘Libya) and to the Republic of Malta (hereinafter called ‘Malta’).
4.2.3. (i). Brief Facts of the Case:

On July 26, 1982, Libya and Malta notified to the International Court of Justice a special agreement entered by them and which requested the Court to decide:

What principles and rules of international law are applicable to the delimitation of the area of the continental shelf which appertains to Republic of Malta and the area of continental shelf which appertains to the Libyan Arab Republic, and how in practice such principles and rules can be applied by the two parties in this particular case in order that they may without difficulty delimit such areas by an agreement. 254

The Court begins its proceedings with a general description of geographical area in which the continental shelf delimitation has to be effected. The Court made it clear that the purpose of the description was to outline the general background 255 but not to define in geographical terms the area which is relevant to the delimitation and the area in dispute between the parties. 256 The Republic of Malta is a State made up of a group of four inhabited islands, 257 and these islands are situated in the central Mediterranean, an area of the Mediterranean Sea. 258 Libya is a mainland State on the coast of North Africa covering a large area and on encompassing some 1,775,500 square kilometres. 259 Its coast consists of more

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254 Case concerning continental shelf (Libya / Malta) 68 I.C.J. Reports 1985, (Judgement of June 3) p. 16, para. 2
255 Ibid, p. 20, para. 14
256 Ibid.
257 Ibid, para. 15
258 Ibid,
259 Ibid,
than 1,700 Kilometres from Ras Ajdir in the west to near Port Bardia in the east.\footnote{I.C.J. Reports 1985, see note 254 above, p. 20 para. 14}

4.2.3. (ii) Question to be Decided by the Court:

The question which the Court was requested to decide in this case consists of two parts. In the first part, the Court’s task was to lay down the principles and rules of international law which would enable the parties to effect a delimitation of the areas of the continental shelf between Libya and Malta.\footnote{Ibid. p. 22, para. 18} In the second part the Court was asked to indicate how the applicable principles and rules can, in practice, be applied by the parties, in order that they may, without difficulty establish by an agreement the delimitation of their continental shelf.\footnote{Ibid.} Malta had further requested the Court to draw the delimitation line,\footnote{Ibid.} while Libya would not accept that the line itself should be drawn by the Court since in its view, it was preferable to draw that this be done by agreement between parties.\footnote{Ibid.} According to Malta, the matter should not be left to the parties since, the reference of the dispute to Court would then fail to achieve its main purpose.\footnote{Ibid.} While the special agreement as adopted by the parties did not request the Court to drew the line of delimitation, Malta supported its argument relying on the interpretation by the Court of the similarly worded special agreements in the case concerning the continental shelf (Tunisia/Libyan Arab Jamahiriya), contends that the Court should indicate the boundary which, in its view, would result from the
application of such method as the Court may choose for the Parties to achieve the relevant delimitation. In the opinion of the Court the Special Agreement, unlike that by which the Court was seized in the Tunisia/Libya case contains no reference to the indication of a method or methods of delimitation; but it does not in any event is debarred by the terms of the Special Agreement from indicating a line.

4.2.3. (iii). Basis of Title for Delimitation:

Both Parties agreed that whatever the status of Article 83 of the 1982 Convention which referred only to the ‘solution’ as being equitable, and did not specifically mention the application of equitable principles, both these requirements formed part of the law to be applied. Both parties in their submission to the Court agreed that law required that the delimitation is to be effected by the application of equitable principles and taking account of all relevant circumstances in order to achieve an equitable result. However, it was with regard to the legal; basis of title to continental shelf rights that the views of the Parties were irreconciable.

In Libya’s view, the rule of the natural prolongation of its land territory of a State into under the sea, referred to by the Court in the North Sea Continental Shelf Case (I.C.J Reports 1969, p. 31, para 43) was the fundamental basis of legal

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266 I.C.J. Reports 1985, see note 254 above, p. 23 para. 18
267 Ibid, pp. 23 & 24, para. 19
268 Ibid, p. 31, para. 29
269 Ibid.
270 Ibid, para. 30
title to continental shelf area. Malta, while agreeing the rule of natural prolongation argued that natural prolongation was no longer defined, after the 1982, Law of the Sea Convention, by reference to physical features, but by reference to certain distance from the coasts. According to Malta, Natural Prolongation had no physical significance except beyond 200 miles from the coast. For Malta, the principle was the application of the ‘distance criterion’ and which was a part of customary international law should be taken into account. In sum, whereas Libya’s argument was based on the principle of natural prolongation, Malta relied on the distance principle.

As to the sources of the law applicable in this case, both parties were broadly in agreement. In as much as Malta was a party and Libya was not, the 1958 Geneva Convention on the continental shelf and Article 6 of that Convention containing delimitation formula were not applicable; the 1982 Law of the Sea Convention though signed by both parties was not operative as a treaty law since it had not yet come into force; thus, in the absence of any other binding bilateral or multilateral treaties, both parties agreed that the disputes was to be governed by customary international law.

4.2.3. (iv). Equitable Principles: Referring to Article 83 of Law of the Sea Convention 1982, which excluded any criterion to achieve equitable solution, the Court stated that the Convention set a goal to be achieved and it set a standard, and it was left to States, or to Courts, to endow this standard with specific

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271 I.C.J. Reports 1985, see note 254 above, p. 31 para. 30
272 Ibid.
273 Ibid, para. 29
274 Ibid, para. 31
275 Ibid, p. 29, para. 26
content. Although Article 83 did not refer to the term in accordance with equitable principles, the Court said that it was bound to decide the case on the basis of equitable principles as well as that the result of the application of equitable principle must be equitable (I.C.J.Reports 1982 p. 59. para. 70.).

Referring to somewhat unsatisfactory dual character of the term equitable - characterizing both the result to be achieved and the means to be applied to reach the result, the Court remarked: it is however the goal - the equitable result - and not the means used to achieve, it, that must be the primary element in this duality of characterization. But the Court made it clear that application of equitable principles is to be distinguished from a decision 'ex aequo et bono'. It elaborated equity in terms of the following formulations:

1. The justice of which equity is an emanation, is not abstract justice, but justice according to the rule of law.

2) Application of equity should display consistency and degree of predictability.

3) Although equity looks particularly to the peculiar circumstances of an instant case, it also looks beyond it to principles of more general application - the legal concept of equity is a general principle directly applicable as law.

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276 I.C.J. Reports 1985, see note 254 above, p. 30 para. 28
277 Ibid.
278 Ibid, pp. 38 & 39, para. 45
279 Ibid.
280 Ibid.
Regarding the question of relationship between continental shelf and exclusive economic zone, the Court expressed its view that even though the present case relates only to the delimitation of the continental shelf and not to that of the exclusive economic zone, the principles and rules underlying the latter concept can not be left out of consideration. 281 Although the concepts of the continental shelf had not been absorbed by that of the exclusive economic zone, the two institutions, as the 1982 Law of the Sea Convention demonstrated, had been linked together in modern international law. According to the Court, one of the relevant circumstances to be taken into account for the delimitation of the continental shelf of a State is the legally permissible extent of the exclusive economic zone appertaining to the same State. 282 This reveals that greater importance must be attached to the element of distance which was common to both concept. 283 The Court thus rejected the Libyan contention that distance from the coast was not relevant to the delimitation in this case.

The Court then drew its attention to the argument of Libya based on the idea of natural prolongation. In this regard, the Court observed that for judicial and practical reasons, the distance criterion must now apply to the continental shelf as well as to the exclusive economic zone, but this did not lead to the proposition that the idea of natural prolongation was now superseded by that of distance. What is really meant was, the Court added, that where the continental margin does not extend as far as 200 miles from the shore, natural prolongation is in part defined by distance from the shore, irrespective of the physical nature of the

281 I.C.J. Reports 1985, see note 254 above, p. 33 para. 33
282 Ibid.
283 Ibid.
intervening sea-bed and subsoil. Libya argued that there was no problem of overlapping shelves, but that on the contrary, two distinct continental shelves were separated by what Libya calls the ‘rift zone’, which should be declared the boundary in the disputed area. The Court noted that since the development of the law allowed a state to claim that the continental shelf appertaining to it extends up to as far as 200 miles from its coast, whatever the geological characteristics of the corresponding sea-bed and subsoil, there is no reason to ascribe any role to geological or geophysical factors within that distance either in verifying the legal title of the States concerned or in proceeding to a delimitation as between their claims. Thus, geological and geomorphological characteristics are completely immaterial, in regard to verification of the validity of title at least in so far those area are situated at a distance of under 200 miles from the coast, as title depends solely on the distance from the coast. The Court also found no reason why a factor which had no part to play in the establishment of title should be taken into account as a relevant circumstances for the purpose of delimitation.

Thus, the Court seemed to have deviated, for good reasons, from its past jurisprudence where some relevance was attached to geophysical features of the area of delimitation if they assisted in identifying a line of separation between the continental shelves of the parties. The Court, in view of the above reasons, rejected the argument of Libya of ‘rift zone’ constituting a fundamental discontinuity since the distance between the coast of the parties was less than 400

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284 I.C.J. Reports 1985, see note 254 above, p. 33 para. 34
285 Ibid, p. 34, para. 36
286 Ibid, p. 35, para. 39
287 Ibid, p. 36, para. 40
miles and as such no geological feature could lie more than 200 miles from each coast. The Court also remained unconvicted that the ‘rift zone’ in reality reflected a clear cut ‘physical discontinuity’.288

The Court then proceeded to examine the contention of Malta demanding the application of the equidistance principle. Malta argued that the new importance of the idea of distance from the coast had, at any rate for delimitation between opposite coasts as in the present case, in turn conferred a primacy on the method of equidistance. Since there was not sufficient space between the coasts of Malta and Libya for each of them to enjoy continental shelf rights up to the full 200 miles recognised by international law, Malta claimed, the delimitation process must necessarily begin by taking into consideration an equidistance line between the two coasts. Denying that the equidistance method was fundamental, or inherent, or had a legally obligatory character, Malta nevertheless asserted that the distance principle required that as a starting point of the delimitation process consideration must be given to a line based on equidistance, though it was only to the extent that this primary delimitation produced an equitable result by balancing up of the relevant circumstances that the boundary coincided with the equidistance line. As a provisional point of departure, Malta urged, consideration of equidistance was required on the basis of the legal title.289

The Court was not convinced with these arguments. It was unable to accept that even as a preliminary and provisional step towards the drawing of a

288 I.C.J. Reports 1985, see note 254 above, p. 36 & 37 para. 41
289 Ibid, p. 37, para. 42
delimitation line, the equidistance method must be used. The Court reasoned that such a rule would come near to an espousal of the idea of ‘absolute proximity’ that had been rejected in the 1969 cases and at the Third U.N Conference on the Law of the Sea. Just because a coastal State may be entitled to continental shelf rights by reason of distance from the coast irrespective of the physical features of the intervening seabed and subsoil - it did not entail that equidistance was the sole appropriate method of delimitation, even between opposite or quasi-opposite coasts, nor even the only permissible point of departure. The Court ruled: The application of equitable principles in the particular relevant circumstances may still require the adoption of any method or combination of methods, of delimitation, even from the outset.

4.2.3 (v). Relevant Circumstances:

Libya argued that the relevant geographical considerations included the landmass behind the coast which provided the factual basis and the legal justification for State’s entitlement to continental shelf rights, as a State with a greater landmass having a more intense natural prolongation. The Court did not accept this argument and viewed that landmass had never been regarded as a basis of entitlement to continental shelf rights, and such a proposition found no support in the practice or States or in the work of UNCLOS III. The capacity to engender continental shelf rights derives not from the landmass, but from sovereignty over the landmass; and it is by means of the maritime front of this landmass. The juridical link between the State’s territorial sovereignty and its rights to certain

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290 I.C.J. Reports 1985, see note 254 above, p. 37 para. 43
291 Ibid, pp. 37 & 38, para. 43
adjacent maritime expanses is established by means of its coast. The concept of adjacency measured by distance is based entirely on that of the coastline and not on that of the landmass.\textsuperscript{292}

On other hand, Malta argued that the relevant equitable considerations included economic factors and security. The Court rejected this, and observed that delimitation could not be influenced by the relative economic position of the two States in question as such considerations were unrelated to the underlying intentions of the applicable rules of international law.\textsuperscript{293}

The Court also stated that security consideration were not unrelated to the concept of the continental shelf and the delimitation as ordered by it in this case, was not so near to the coast of either party as to make question of security a particular consideration in the present case.\textsuperscript{294} Malta also invoked the principles of sovereign equality of States as an argument in favour or the equidistance method pure and simple, and as an objection to any adjustment based on length of coasts or proportionality considerations, but it was rejected by the Court. The Court stated "The principle of equality of State has no particular role to play in the applicable law".\textsuperscript{295}

Libya laid great stress on the argument based on proportionality. As a general proposition, the Court referred to its statements in the 1969 North Sea cases and stated; what the Court intended was a means of identifying and then correcting the kind of distortion - disproportion - that could arise from the use of a

\textsuperscript{292} I.C.J. Reports 1985, \textit{see note 254 above}, p. 40 & 41, para. 49
\textsuperscript{293} Ibid, p. 41, para. 50
\textsuperscript{294} Ibid, p. 42, para. 51
\textsuperscript{295} Ibid, pp. 42 & 43, para. 54
method inapt to take adequate account of some kinds of coastal configuration. The Court agreed that proportionality was one possible relevant factor, among several other factors, but it could not be identified with a rule or principle of international law applicable to delimitation. The Court further laid down: The pertinent general principle, to the application of which the proportionality factor may be relevant, is that there can be no question of 'completely refashioning nature'; the method chosen and its results must be faithful to the actual geographical situation.

Both parties agreed with these general propositions of law, however, Libya's argument in effect went a good deal further. It contended that equitable principle did not require that a State possessing a restricted coastline be treated as if it possessed an extensive coastline and that the geographical situation of this case demanded that the delimitation should take account of the significant difference in lengths of the respective coastlines which face the area in which the delimitation is to be effected. The Court rejected the use of proportionality as a method in its own right: to use the ratio of coastal lengths as of itself determinative of the seaward reach and area of the continental shelf proper to each party, is to go far beyond the use of proportionality as a test of equity, and as a corrective of the unjustifiable difference of treatment resulting from some method of drawing the boundary line. However, the Court was quite willing to accept that significant difference in lengths of the respective coastline could be an

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296 I.C.J. Reports 1985, see note 254 above, p. 44 para. 56
297 Ibid, p. 45, para. 57
298 Ibid, p. 45, para 58
299 Ibid.
element which may be taken into account at a certain State in delimitation and it did apply this in this case also.  

The circumstances and factors that were taken into account in achieving an equitable delimitation in the present case were the following:

1. The general configuration of the coasts of the Parties, their oppositeness, and their relationship to each other within the general geographic context.

2. The disparity in the lengths of the relevant coasts of the Parties, and the distance between them.

3. The need to avoid in the delimitation any excessive disproportion between the extent of the continental shelf areas appertaining to the coastal State and the length of the relevant part of its coast, measured in the general direction of the coastlines.  

4.2.3(vi). Practical Method of Delimitation:

In applying the equitable principles and in the light of the relevant circumstances, as outlined by the Court above, and with a view to achieve equitable result, it proceeded to delimit the boundary in two stages. 1) provisional delimitation and 2) final delimitation.

The former was outlined as follows:

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300 I.C.J. Reports 1985, see note 254 above, p. 46, para. 58
301 Ibid, p. 57, para. 79 (B)
An equitable result may be arrived at by drawing a median line every point of which is equidistant from the low-water mark of the relevant coast of Malta (excluding the islet of Filfla), and the low-water mark of the relevant coast of Libya. 302

At the second stage, this provisional delimitation line was adjusted in the light of relevant circumstances, as mentioned above. The final delimitation line seemed to the Court to meet the requirements of the test of proportionality, and more generally to be equitable, taking account of all relevant circumstances. 303

4.2.3. (vii). Assessment and Appraisal of the Decision:

As far as the fundamental norm of delimitation was concerned, this Judgment only confirmed what had already been laid down in the two earlier cases (North Sea cases and Tunisia/Libya case). The Court reiterated the relevance of equitable principles, relevant circumstances and equitable result. As to identification of equitable principles, it provided an articulation of the relationship between the basis of title and delimitation of boundaries and their mutual complementarity. The Court also highlighted, the increasing importance of the notion of distance and its impact on the basis of title and the process of delimitation, in the light of new developments in the law of the sea and the 1982 Convention. Another important factor stated by the Court was that no criterion for delimitation of shelf areas could be derived from the principle of natural prolongation in the physical sense in respect of seaward area not extending more than 200 nautical miles from the coasts of the States in question. The Court once

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302 I.C.J. Reports 1985, see note 254 above, p. 79 (C)
303 Ibid, p. 56, para. 78
again reiterated its views, on the non obligatory character of the method of
equidistance, though it applied it in the case to draw the provisional line on the
basis of the principle of adjacency as measured by distance - the criterion of
distance. The provisional result was in accordance with the concepts underlying
the attribution of legal title. The principle of proportionality was applied not as a
matter of right, but as a measure of correcting the inequity caused by the
provisional result. Non geographical considerations were either rejected or
subordinated. This decision, like previous ones, was case specific and the law of
delimitation become a little more identifiable taking account of new developments
in the law of the sea, but still largely uncertain and vague.\textsuperscript{304}

Case concerning Territorial and Maritime Dispute between Nicaragua and
Honduras in the Caribbean Sea

4.2.4.CASE CONCERNING LAND, ISLAND AND MARITIME
FRONTIER DISPUTE (EL SALVADOR/HONDURAS: NICARAGUA

The Chamber constituted by the Court in the case concerning the Land, Island and
Maritime Frontier Dispute between El Salvador and Honduras, Nicaragua
intervening, first adopted the course of the boundary line in the disputed land
sections between El Salvador and Honduras. It then ruled on the legal status of the
islands of the Gulf of Fonseca, as well as on the legal situation of the maritime
spaces within and outside the closing line of that Gulf.

4.2.4.(i) Decision of the Chamber: The boundary line between the Republic of
El Salvador and the Republic of Honduras in the first sector of their common

\textsuperscript{304} Surya P. Sharma, "Delimitation of Land and Sea Boundaries between Neighbouring Countries" (New Delhi 1989), p. 84
The island of El Tigre is part of the sovereign territory of the Republic of Honduras and the island of Meanguera is part of the sovereign territory of the Republic of El Salvador. The legal situation of the waters of the Gulf of Fonseca is as follows:

The Gulf of Fonseca is an historic bay the waters whereof, having previously to 1821 been under the single control of Spain, and from 1821 to 1839 of the Federal Republic of Central America, were thereafter succeeded to and held in sovereignty by the Republic of El Salvador, the Republic of Honduras, and the Republic of Nicaragua, jointly, and continue to be so held, as defined in the present Judgment, but excluding a belt, as at present established, extending 3 miles (1 marine league) from the littoral of each of the three States, such belt being under the exclusive sovereignty of the coastal State, and subject to the delimitation between Honduras and Nicaragua effected in June 1900, and to the existing rights of innocent passage through the 3-mile belt and the waters held in sovereignty jointly; the waters at the central portion of the closing line of the Gulf, that is to say, between a point on that line 3 miles (1 marine league) from Punta Amapala and a point on that line 3 miles (1 marine league) from Punta Cosiguina, are subject to the joint entitlement of all three States of the Gulf unless and until a delimitation of the relevant maritime area be effected;

The legal situation of the waters outside the Gulf is that, the Gulf of Fonseca being an historic bay with three coastal States, the closing line of the
Gulf constitutes the baseline of the territorial sea; the territorial sea, continental shelf and exclusive economic zone of El Salvador and those of Nicaragua off the coasts of those two States are also to be measured outwards from a section of the closing line extending 3 miles (1 marine league) along that line from Punta Amapala (in El Salvador) and 3 miles (1 marine league) from Punta Cosigüina (in Nicaragua) respectively; but entitlement to territorial sea, continental shelf and exclusive economic zone seaward of the central portion of the closing line appertains to the three States of the Gulf, El Salvador, Honduras and Nicaragua; and that any delimitation of the relevant maritime areas is to be effected by agreement on the basis of international law.

The Chamber recapitulates the successive phases of the proceedings, namely: notification to the Registrar, on 11 December 1986, of the Special Agreement signed on 24 May 1986 (in force on 1 October 1986) for the submission to a Chamber of the Court of a dispute between the two States; formation by the Court, on 8 May 1987, of the Chamber to deal with the case; filing by Nicaragua, on 17 November 1989, of an Application for permission to intervene in the case; Order by the Court, of 28 February 1990, on the question whether Nicaragua's Application for permission to intervene was a matter within the competence of the full Court or of the Chamber; Judgment of the Chamber of 13 September 1990 acceding to Nicaragua's application for permission to intervene (but solely in respect of the question of the status of the waters of the Gulf of Fonseca); holding of oral proceedings.
Article 2 of the Special Agreement, which defines the subject of the dispute, reads, in an agreed English translation:

"The Parties request the Chamber:

1. To delimit the frontier line in the areas or sections not described in Article 16 of the General Peace Treaty of 30 October 1980.

2. To determine the legal situation of the islands and maritime spaces.

The Judgment then quotes the submissions of the Parties, and the "conclusions" of the intervening State, as formulated at the various stages of the proceedings.

4.2.4.(ii) Question involved:

The dispute before the Chamber has three elements: a dispute over the land boundary; a dispute over the legal situation of islands (in the Gulf of Fonseca); and a dispute over the legal situation of maritime spaces (within and outside the Gulf of Fonseca).

The two Parties (and the intervening State) came into being with the break-up of the Spanish Empire in Central America; their territories correspond to administrative sub-divisions of that Empire. It was from the outset accepted that the new international boundaries should, in accordance with the principle generally applied in Spanish America of the uti possidetis juris, follow the colonial administrative boundaries.
After the independence of Central America from Spain was proclaimed on 15 September 1821, Honduras and El Salvador first made up, together with Costa Rica, Guatemala and Nicaragua, the Federal Republic of Central America, corresponding to the former Captaincy-General of Guatemala or Kingdom of Guatemala. On the disintegration of that Republic in 1839, El Salvador and Honduras, along with the other component States, became separate States.

The Chamber outlines the development of the three elements of the dispute, beginning with the genesis of the island dispute in 1854 and of the land dispute in 1861. Border incidents led to tension and subsequently to armed conflict in 1969, but in 1972 El Salvador and Honduras were able to agree on the major part of their land boundary, which had not yet been delimited, leaving however six sectors to be settled. A mediation process begun in 1978 led to a General Treaty of Peace, signed and ratified in 1980 by the two Parties, which defined the agreed sections of the boundary.

The Treaty further provided that a Joint Frontier Commission should delimit the frontier in the remaining six sectors and "determine the legal situation of the islands and the maritime spaces". It provided that if within five years total agreement was not reached, the Parties would, within six months, negotiate and conclude a special agreement to submit any existing controversy to the International Court of Justice.

As the Commission did not accomplish its task within the time fixed, the Parties negotiated and concluded on 24 May 1986 the Special Agreement mentioned above.
4.2.4.(iii) Principles established for determining the boundary:

The Parties agree that the fundamental principle for determining the land frontier is the *uti possidetis juris*. The Chamber notes that the essence of the agreed principle is its primary aim of securing respect for the territorial boundaries at the time of independence, and its application has resulted in colonial administrative boundaries being transformed into international frontiers.

In Spanish Central America there were administrative boundaries of different kinds or degrees, and the jurisdictions of general administrative bodies did not necessarily coincide territorially with those of bodies possessing particular or special jurisdiction. In addition to the various civil jurisdictions there were ecclesiastical ones, which the main administrative units had to follow in principle.

The Parties have indicated to which colonial administrative divisions (provinces) they claim to have succeeded. The problem is to identify the areas, and the boundaries, which corresponded to these provinces, which in 1821 became respectively El Salvador and Honduras. No legislative or similar material indicating this has been produced, but the Parties have submitted, *inter alia*, documents referred to collectively as "titles" (*titulos*), concerning grants of land by the Spanish Crown in the disputed areas, from which, it is claimed, the provincial boundaries can be deduced.

The Chamber then analyses the various meanings of the term "title". It concludes that, reserving, for the present, the special status El Salvador attributes to "formal title deeds to commons", none of the titles produced recording grants of land to
individuals or Indian communities can be considered as "titles" in the same sense as, for example, a Spanish Royal Decree attributing certain areas to a particular administrative unit; they are rather comparable to "colonial effectivités" as defined in a previous case, i.e., "the conduct of the administrative authorities as proof of the effective exercise of territorial jurisdiction in the region during the colonial period" (I.C.J. Reports 1986, p. 586, para. 63). In some cases the grant of a title was not perfected, but the record, particularly of a survey, remains a "colonial effectivité" which may serve as evidence of the position of a provincial boundary.

Referring to the seven sectors of the boundary agreed in the General Treaty of Peace, the Chamber assumes that the agreed boundary was arrived at applying principles and processes similar to those urged upon the Chamber for the non-agreed sectors. Observing the predominance of local features, particularly rivers, in the definition of the agreed sectors, the Chamber has taken some account of the suitability of certain topographical features to provide an identifiable and convenient boundary. The Chamber is here appealing not so much to any concept of "natural frontiers", but rather to a presumption underlying the boundaries on which the uti possidetis juris operates.

Under Article 5 of the Special Agreement, the Chamber is to take into account the rules of international law applicable between the Parties, "including, where pertinent, the provisions of" the Treaty. This presumably means that the Chamber should also apply, where pertinent, even those Articles which in the Treaty are addressed specifically to the Joint Frontier Commission. One of these is Article 26 of the Treaty, to the effect that the Commission shall take as a basis for
delimitation the documents issued by the Spanish Crown or any other Spanish authority, secular or ecclesiastical, during the colonial period, and indicating the jurisdictions or limits of territories or settlements, as well as other evidence and arguments of a legal, historical, human or any other kind, brought before it by the Parties and admitted under international law.

Drawing attention to the difference between its task and that of the Commission, which had merely to propose a frontier line, the Chamber observes that Article 26 is not an applicable law clause, but rather a provision about evidence. In this light, the Chamber comments on one particular class of titles, referred to as the "formal title-deeds to commons", for which El Salvador has claimed a particular status in Spanish colonial law, that of acts of the Spanish Crown directly determining the extent of the territorial jurisdiction of an administrative division. These titles, the so-called títulos ejidales, are, according to El Salvador, the best possible evidence in relation to the application of the uti possidetis juris principle.

The Chamber does not accept any interpretation of Article 26 as signifying that the Parties have by treaty adopted a special rule or method of determination of the uti possidetis juris boundaries, on the basis of divisions between Indian poblaciones. It was the administrative boundaries between Spanish colonial administrative units, not the boundaries between Indian settlements as such, that were transformed into international boundaries in 1821.

El Salvador contends that the commons whose formal title-deeds it relies on were not private properties but belonged to the municipal councils of the corresponding poblaciones. Control over those communal lands being exercised by the
municipal authorities, and over and above them by those of the colonial province to which the commons had been declared to belong. El Salvador maintains that if such a grant of commons to a community in one province extended to lands situated within another, the administrative control of the province to which the community belonged was determinative for the application of the *uti possidetis juris*, i.e., that, on independence, the whole area of the commons appertained to the State within which the community was situated. The Chamber, which is faced with a situation of this kind in three of six disputed sectors, has however been able to resolve the issue without having to determine this particular question of Spanish colonial law, and therefore sees no reason to attempt to do so.

In the absence of legislative instruments formally defining provincial boundaries, not only land grants to Indian communities but also grants to private individuals afford some evidence as to the location of boundaries. There must be a presumption that such grants would normally avoid straddling a boundary between different administrative authorities, and where the provincial boundary location was doubtful the common boundaries of two grants by different provincial authorities could well have become the provincial boundary. The Chamber therefore considers the evidence of each of these grants on its merits and in relation to other arguments, but without treating them as necessarily conclusive.

With regard to the land that had not been the subject of grants of various kinds by the Spanish Crown, referred to as crown lands, *tierras realengas*, the Parties agree that such land was not unattributed but appertained to the one province or the
other and accordingly passed, on independence, into the sovereignty of the one State or the other.

With regard to post-independence grants or titles, the so-called "republican titles", the Chamber considers that they may well provide some evidence of the position in 1821 and both Parties have offered them as such.

El Salvador, while admitting that the \textit{uti possidetis juris} is the primary element for determining the land boundary, also puts forward, in reliance on the second part of Article 26, arguments referred to as either "arguments of a human nature" or arguments based on \textit{effectivités}. Honduras also recognizes a certain confirmatory role for \textit{effectivités} and has submitted evidence of acts of administration of its own for that purpose.

El Salvador has first advanced arguments and material relating to demographic pressures in El Salvador creating a need for territory, as compared with the relatively sparsely populated Honduras, and to the superior natural resources said to be enjoyed by Honduras. El Salvador, however, does not appear to claim that a frontier based on the principle of \textit{uti possidetis juris} could be adjusted subsequently (except by agreement) on the ground of unequal population density. The Chamber will not lose sight of this dimension of the matter, which is however without direct legal incidence.

El Salvador also relies on the alleged occupation of disputed areas by Salvadorians, their ownership of land in those areas, the supply by it of public services there and its exercise in the areas of government powers, and claims,
*inter alia,* that the practice of effective administrative control has demonstrated an "animus" to possess the territories. Honduras rejects any argument of "effective control", suggesting that the concept only refers to administrative control prior to independence. It considers that, at least since 1884, no acts of sovereignty in the disputed areas can be relied on in view of the duty to respect the status quo in a disputed area. It has however presented considerable material to show that Honduras can also rely on arguments of a human kind.

The Chamber considers that it may have regard, in certain instances, to documentary evidence of post-independence effectivités affording indications of the 1821 *uti possidetis juris* boundary, provided a relationship exists between the effectivités and the determination of that boundary.

El Salvador drew attention to difficulties in collecting evidence in certain areas owing to interference with governmental activities due to acts of violence. The Chamber, while appreciating these difficulties, cannot apply a presumption that evidence which is unavailable would, if produced, have supported a particular Party's case, still less a presumption of the existence of evidence not produced. In view of these difficulties, El Salvador requested the Chamber to consider exercising its functions under Article 66 of the Rules of Court to obtain evidence *in situ.* The Parties were however informed that the Chamber did not consider it necessary to exercise the functions in question, nor to exercise its power, under Article 50 of the Statute, to arrange for an inquiry or expert opinion in the case, as El Salvador had also requested it to do.
The Chamber will examine, in respect of each disputed sector, the evidence of post-colonial effectivités. Even when claims of effectivité are given their due weight, it may occur in some areas that, following the delimitation of the disputed sector, nationals of one Party will find themselves in the territory of the other. The Chamber has every confidence that the necessary measures to take account of this will be taken by the Parties.

In connection with the concept of the "critical date" the Chamber observes that there seems to be no reason why acquiescence or recognition should not operate where there is sufficient evidence to show that the Parties have in effect clearly accepted a variation or an interpretation of the uti possidetis juris position.

The Chamber considers that it is not required to resolve this question. All negotiations prior to 1972 over the dispute as to the location of the frontier in this sector were conducted on the basis, accepted by both sides, that it was the boundary between the ejidos of Citalá and Ocotepeque that defined the frontier. The frontier corresponding to Honduras's current interpretation of the legal effect of the 1776 Citalá title was first put forward in negotiations held in 1972. Moreover a title granted by Honduras in 1914, and the position taken by Honduras in the course of tripartite negotiations held between El Salvador, Guatemala and Honduras in 1934-1935, confirmed the agreement between the Parties that the boundary between Citalá and Ocotepeque defined the frontier between them. After recalling that the effect of the uti possidetis juris principle was not to freeze for all time the provincial boundaries, the Chamber finds that Honduras's conduct from 1881 to 1972 may be regarded as acquiescence in a
boundary corresponding to that between the Tepangūisir lands of Citalá and those of Ocotepeque.

The Chamber then turns to the question of a triangular area where, according to Honduras, the 1818 title of Ocotepeque penetrated the north-eastern boundary of Citalá, and to the disagreement between the Parties as to the interpretation of the Citalá survey as regards the north-western area.

With regard to the triangular area, the Chamber does not consider that such an overlapping would have been consciously made, and that it should only be concluded that an overlap came about by mistake if there is no doubt that the two titles are not compatible. The identification of the various relevant geographical locations cannot however be achieved with sufficient certainty to demonstrate an overlap.

With respect to the disagreement on the boundary of the Citalá title, the Chamber concludes that on this point the Honduran interpretation of the relevant survey record is to be preferred.

The Chamber then turns to the part of the disputed area lying between the lands comprised in the Citalá title and the international tripoint. Honduras contends that since, according to the survey, the land in this area was crown land (tierras realengas), and the survey was being effected in the province of Gracias a Dios, these must have been tierras realengas of that province and hence are now part of Honduras.
El Salvador however claims this area on the basis of *effectivité*, and points to a number of villages or hamlets belonging to the municipality of Citalá within the area. The Chamber notes however the absence of evidence that the area or its inhabitants were under the administration of that municipality. El Salvador also relies on a report by a Honduran Ambassador stating that the lands of the disputed area belonged to inhabitants of the municipality of Citalá in El Salvador. The Chamber however does not regard this as sufficient since to constitute an *effectivité* relevant to the delimitation of the frontier at least some recognition or evidence was required of the effective administration of the municipality of Citalá in the area, which, it notes, has not been proved.

El Salvador also contends that ownership of land by Salvadorians in the disputed area less than 40 kilometres from the line Honduras claims as the frontier shows that the area was not part of Honduras, as under the Constitution of Honduras land within 40 kilometres of the frontier may only be acquired or possessed by native Hondurans. The Chamber rejects this contention since at the very least some recognition by Honduras of the ownership of land by Salvadorians would have to be shown, which is not the case.

The Chamber observes that in the course of the 1934-1935 negotiations agreement was reached on a particular frontier line in this area. The agreement by the representatives of El Salvador was only *ad referendum*, but the Chamber notes that while the Government of El Salvador did not ratify the terms agreed upon *ad referendum*, neither did it denounce them; nor did Honduras retract its consent.
The Chamber considers that it can adopt the 1935 line, primarily since for the most part it follows the watersheds, which provide a clear and unambiguous boundary; it reiterates its view that the suitability of topographical features to provide a readily identifiable and convenient boundary is the material aspect where no conclusion unambiguously pointing to another boundary emerges from the documentary material.

As regards material put forward by Honduras concerning the settlement of Hondurans in the disputed areas and the exercise there of government functions by Honduras, the Chamber finds this material insufficient to affect the decision by way of effectivités.

4.2.5. CASE CONCERNING MARITIME DELIMITATION IN THE AREA BETWEEN GREENLAND AND JAN MAYEN (DENMARK v. NORWAY) I.C.J.Rep.1993 (Judgment of 14 June 1993)

This is a case concerning Maritime Delimitation in the Area between Greenland and Jan Mayen, the Court, by fourteen votes to one, fixed a delimitation line for both the continental shelf and the fishery zones of Denmark and of Norway in the area between Greenland and Jan Mayen.

4.2.5.(i) Review of the proceedings and summary of facts:

The Court outlines the successive stages of the proceedings as from the date the case was brought before it (paras. 1-8) and sets out the submissions of the Parties (paras. 9-10). It recalls that Denmark, instituting proceedings on 16 August 1988, had asked the Court
to decide, in accordance with international law, where a single line of delimitation shall be drawn between Denmark's and Norway's fishing zones and continental shelf areas in the waters between Greenland and Jan Mayen;

and had, in the course of the proceedings made the following submissions:

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

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

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

and that Norway had asked the Court to adjudge and declare that the median line constituted the boundary for the purposes of delimitation of the relevant areas of both the continental shelf and the fisheries zone between Norway and Denmark in
the region between Jan Mayen and Greenland. The Court then describes the maritime areas, which have featured in the arguments of the Parties.

4.2.5.(ii) The contention that a delimitation already exists:

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

4.2.5.(iii) The 1965 Agreement:

On 8 December 1965 Denmark and Norway concluded an Agreement concerning the delimitation of the continental shelf. Article 1 of that Agreement reads:

The boundary between those parts of the continental shelf over which Norway and Denmark respectively exercise sovereign rights shall be the median line which at every point is equidistant from the nearest points of the baselines from which the breadth of the territorial sea of each Contracting Party is measured.
Article 2 provides that in order that the principle set forth in Article 1 may be properly applied, the boundary shall consist of straight lines" which are then defined by eight points, enumerated with the relevant geodetic co-ordinates and as indicated on the chart thereto annexed; the lines so defined lie in the Skagerrak and part of the North Sea, between the mainland territories of Denmark and Norway. Norway contends that the text of Article 1 is general in scope, unqualified and without reservation, and that the natural meaning of that text must be to establish definitively the basis for all boundaries which would eventually fall to be demarcated between the Parties. In its view Article 2, which admittedly relates only to the continental shelves of the two mainlands, is concerned with *demarcation*. Norway deduces that the Parties are and remain committed to the median line principle of the 1965 Agreement. Denmark on the other hand argues that the Agreement is not of such general application and that its object and purpose is solely the delimitation in the Skagerrak and part of the North Sea on a median line basis.

The Court considers that the object and purpose of the 1965 Agreement was to provide simply for the question of the delimitation in the Skagerrak and part of the North Sea, where the whole seabed (with the exception of the Norwegian Trough) consists of continental shelf at a depth of less than 200 metres and that there is nothing to suggest that the Parties had in mind the possibility that a shelf boundary between Greenland and Jan Mayen might one day be required, or intended that their Agreement should apply to such a boundary.
After examining the Agreement in its context, in the light of its object and purpose, the Court also takes into account the subsequent practice of the Parties, especially a subsequent treaty in the same field concluded in 1979. It considers that if the intention of the 1965 Agreement had been to commit the Parties to the median line in all ensuing shelf delimitations, it would have been referred to in the 1979 Agreement. The Court is thus of the view that the 1965 Agreement did not result in a median line delimitation of the continental shelf between Greenland and Jan Mayen.

4.2.5(iv) The 1958 Geneva Convention on the Continental Shelf:

The validity of the argument that the 1958 Convention resulted in a median line continental shelf boundary already in place between Greenland and Jan Mayen is found to depend on whether the Court finds that there are special circumstances as contemplated by the Convention, a question to be dealt with later. The Court therefore turns to the arguments which Norway bases upon the conduct of the Parties and of Denmark in particular.

4.2.5.(v) Conduct of the Parties:

Norway contends that, up to some ten years ago at least, the Parties by their "conjoint conduct" had long recognized the applicability of median line delimitation in their mutual relations. The Court observes that it is the conduct of Denmark which has primarily to be examined in this connection.

The Court is not persuaded that a Danish Decree of 7 June 1963 concerning the Exercise of Danish Sovereignty over the Continental Shelf supports the argument
which Norway seeks to base on conduct. Nor do a Danish Act of 17 December 1976 or an Executive Order of 14 May 1980, issued pursuant to that Act, commit Denmark to acceptance of a median line boundary in the area. An Agreement of 15 June 1979 between the Parties concerning the delimitation between Norway and the Faroe Islands does not commit Denmark to a median line boundary in a quite different area. Danish statements made in the course of diplomatic contacts and during the Third United Nations Conference on the Law of the Sea had also not prejudiced Denmark's position.

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

4.2.5.(vi) The applicable law:
The Court notes that the Parties differ on the question whether what is required is one delimitation line or two lines, Denmark asking for a single line of delimitation of the fishery zone and continental shelf area, and Norway contending that the median line constitutes the boundary for delimitation of the continental shelf, and constitutes also the boundary for the delimitation of the fishery zone, i.e., that the two lines would coincide, but the two boundaries would remain conceptually distinct.

The Court refers to the Gulf of Maine case in which it was asked what was the course of the single maritime boundary that divides the continental shelf and fishery zones of Canada and the United States of America. It observes that in the present case it is not empowered - or constrained - by any agreement for a single dual-purpose boundary and that it has already found that there is not a continental shelf boundary already in place. It therefore goes on to examine separately the two strands of the applicable law: the effect of Article 6 of the 1958 Convention if applied at the present time to the delimitation of the continental shelf boundary, and then the effect of the application of the customary law which governs the fishery zone.

The Court further observes that the applicability of the 1958 Convention to the continental shelf delimitation in this case does not mean that Article 6 of that Convention can be interpreted and applied either without reference to customary law on the subject, or wholly independently of the fact that a fishery zone boundary is also in question in these waters. After examining the case-law in this field and the provisions of the 1982 United Nations Convention on the Law of the
Sea, the Court notes that the statement (in those provisions) of an equitable solution as the aim of any delimitation process reflects the requirements of customary law as regards the delimitation both of continental shelf and of exclusive economic zones.

4.2.5(vii) The provisional median line:

Turning first to the delimitation of the continental shelf the Court finds that it is appropriate, both on the basis of Article 6 of the 1958 Convention and on the basis of customary law concerning the continental shelf, to begin with the median line as a provisional line and then to ask whether "special circumstances" require any adjustment or shifting of that line. After subsequent examination of the relevant precedents with regard to the delimitation of the fishery zones, it appears to the Court that, both for the continental shelf and for the fishery zones in this case, it is proper to begin the process of delimitation by a median line provisionally drawn.

4.2.5(viii)"Special circumstances" and "relevant circumstances":

The Court then observes that it is called upon to examine every particular factor of the case which might suggest an adjustment or shifting of the median line provisionally drawn. The aim in each and every situation must be to achieve "an equitable result". From this standpoint, the 1958 Convention requires the investigation of any "special circumstances"; the customary law based upon equitable principles on the other hand requires the investigation of "relevant circumstances".
The concept of "special circumstances" was included in the 1958 Geneva Conventions on the Territorial Sea and the Contiguous Zone (Art. 12) and on the Continental Shelf (Art. 6, paras. 1 and 2). It was and remains linked to the equidistance method there contemplated. It is thus apparent that special circumstances are those circumstances which might distort the result produced by an unqualified application of the equidistance principle. General international law has employed the concept of "relevant circumstances". This concept can be defined as a fact necessary to be taken into account, in the delimitation process, to the extent that it affects the rights of the Parties over certain maritime areas. Although it is a matter of categories which are different in origin and in name, there is inevitably a tendency towards assimilation between the special circumstances of Article 6 of the 1958 Convention and the relevant circumstances under customary law, and this if only because they both are intended to enable the achievement of an equitable result. This must be especially true in the case of opposite coasts where, as has been seen, the tendency of customary law, like the terms of Article 6, has been to postulate the median line as leading prima facie to an equitable result.

The Court then turns to the question whether the circumstances of the present case require adjustment or shifting of that line, taking into account the arguments relied on by Norway to justify the median line, and the circumstances invoked by Denmark as justifying the 200-mile line.

4.2.5.(ix) Disparity of length of coasts:
A first factor of a geophysical character, and one which has featured most prominently in the argument of Denmark, in regard to both continental shelf and fishery zone, is the disparity or disproportion between the lengths of the "relevant coasts".

Prima facie, a median line delimitation between opposite coasts results in general in an equitable solution, particularly if the coasts in question are nearly parallel. There are however situations - and the present case is one such - in which the relationship between the length of the relevant coasts, and the maritime areas generated by them by application of the equidistance method, is so disproportionate that it has been found necessary to take this circumstance into account in order to ensure an equitable solution.

In the light of the existing case-law the Court comes to the conclusion that the striking difference in length of the relevant coasts in this case (which had been calculated as approximately 9 (for Greenland) to 1 (for Jan Mayen)) constitutes a special circumstance within the meaning of Article 6, paragraph 1, of the 1958 Convention. Similarly, as regards the fishery zones, the Court is of the opinion that the application of the median line leads to manifestly inequitable results.

It follows that, in the light of the disparity of coastal lengths, the median line should be adjusted or shifted in such a way as to effect a delimitation closer to the coast of Jan Mayen. It should, however, be made clear that taking account of the disparity of coastal lengths does not mean a direct and mathematical application of the relationship between the length of the coastal front of eastern Greenland and that of Jan Mayen. Nor do the circumstances require the Court to uphold the
claim of Denmark that the boundary line should be drawn 200 miles from the
baselines on the coast of eastern Greenland, i.e., a delimitation giving Denmark
maximum extension of its claim to continental shelf and fishery zone. The result
of such a delimitation would be to leave to Norway merely the residual part of the
"area relevant to the delimitation dispute" as defined by Denmark. The
delimitation according to the 200-mile line calculated from the coasts of eastern
Greenland may from a mathematical perspective seem more equitable than that
effected on the basis of the median line, regard being had to the disparity in
coastal lengths; but this does not mean that the result is equitable in itself, which
is the objective of every maritime delimitation based on law. The Court observes
in this respect that the coast of Jan Mayen, no less than that of eastern Greenland,
generates potential title to the maritime areas recognized by customary law, i.e., in
principle up to a limit of 200 miles from its baselines. To attribute to Norway
merely the residual area left after giving full effect to the eastern coast of
Greenland, would run wholly counter to the rights of Jan Mayen and also to the
demands of equity.

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

4.2.5.(x) Access to resources:

The Court then turns to the question whether access to the resources of the area of overlapping claims constitutes a factor relevant to the delimitation. The Parties are essentially in conflict over access to fishery resources; the principal exploited fishery resource being capelin. The Court has therefore to consider whether any shifting or adjustment of the median line, as fishery zone boundary, would be required to ensure equitable access to the capelin fishery resources.

It appears to the Court that the seasonal migration of the capelin presents a pattern which, north of the 200-mile line claimed by Iceland, may be said to centre on the southern part of the area of overlapping claims, approximately between that line and the parallel of 72° North latitude, and that the delimitation of the fishery zone should reflect this fact. It is clear that no delimitation in the area could guarantee to each Party the presence in every year of fishable quantities of capelin in the zone allotted to it by the line. It appears however to the Court that the median line is too far to the west for Denmark to be assured of an equitable access to the capelin stock, since it would attribute to Norway the whole of the area of overlapping claims. For this reason also the median line thus requires to be adjusted or shifted eastwards. The Court is further satisfied that while ice constitutes a considerable seasonal restriction of access to the waters, it does not materially affect access to migratory fishery resources in the southern part of the area of overlapping claims.
4.2.5.(xi) Population and economy:

Denmark considers as also relevant to the delimitation the major differences between Greenland and Jan Mayen as regards population and socio-economic factors.

The Court observes that the attribution of maritime areas to the territory of a State, which, by its nature, is destined to be permanent, is a legal process based solely on the possession by the territory concerned of a coastline. The Court recalls in the present dispute the observations it had occasion to make, concerning continental shelf delimitation, in the Continental Shelf (Libyan Arab Jamahiriya/Malta) case, namely that a delimitation should not be influenced by the relative economic position of the two States in question, in such a way that the area of continental shelf regarded as appertaining to the less rich of the two States would be somewhat increased in order to compensate for its inferiority in economic resources.

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

4.2.5.(xii) The definition of the delimitation line:

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

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

4.2.5.(xiii) Separate opinion of Judge Schwebel:

Judge Schwebel, in his separate opinion, maintains that the Court's Judgment is questionable with respect to the following three questions:

1. Should the law of maritime delimitation be revised to introduce and apply distributive justice?

2. Should the differing extent of the lengths of opposite coastlines determine the position of the line of delimitation?

3. Should maximalist claims be rewarded?

However, he concluded that, since what is equitable appears to be as variable as the climate of The Hague, ground for dissent from the Court's Judgment is lacking.

4.2.5.(xiv) Separate opinion of Judge Shahabuddeen:

In his separate opinion, Judge Shahabuddeen says that he understands the Judgment to be upholding Norway's view that the 1958 conventional delimitation formula means that, in the absence of agreement and of special circumstances, the boundary is the median line. He gives his reasons for agreeing with this view and for declining to accept that the conventional formula is to be equated with the
customary formula. He is not persuaded that the equation suggested by the 1977 Anglo-French arbitral decision should be followed.

He thinks that the concept of natural prolongation, considered in a physical sense, has placed limits on recourse to proportionality. In his view, the movement away from the physical aspect of natural prolongation should be followed by a relaxation of those limits.

Judge Shahabuddeen gives his reasons for holding that the decision of the Court is not *ex aequo et bono*. He has some doubts as to whether a single line is possible in the absence of agreement by the Parties to such a line being established. He agrees that in the state of the technical material before the Court, an actual delimitation line should not be drawn, but considers that, had the material been adequate, the Court could competently have drawn such a line notwithstanding Norway's non-consent to that being done.

Finally, in his view, where Parties have failed to agree on a boundary, the resulting dispute as to what is the boundary is susceptible of judicial settlement via a unilateral Application made under Article 36, paragraph 2, of the Statute of the Court.

4.2.5.(xv) Separate opinion of Judge Weeramantry:

Judge Weeramantry, in his separate opinion, expresses his agreement with the Judgment of the Court and examines the special role played by equity in the Court's reasoning and conclusions. As the use of equity in maritime delimitation is currently passing through a critical phase, the opinion studies its operation in
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4.2.5.(xvi) Separate opinion of Judge Ajibola:

In his separate opinion, Judge Ajibola, while strongly supporting the Court’s decision, considers that some areas of the Judgment should be elaborated. He first refers to some procedural issues relating to jurisdiction: Could the Court draw any line, and should the line have been a dual-purpose single line or two lines? Should only a declaratory judgment have been given? Can the Court engage in a
delimitation without the agreement of the Parties? However that might be, the Court, once convinced that there is an issue in dispute, ought to proceed to a decision on the merits.

As to the question of whether there should be one line or two, the development of the law of maritime delimitation and the relevant case-law supports the Court's conclusions.

Characterizing the Danish submissions as more a claim of entitlement than a call for delimitation, Judge Ajibola points out that, despite the disparity of size, the entitlement of Norway in respect of Jan Mayen is equally justifiable and recognized in international law.

He then examines the equitable principles in maritime boundary delimitation, coming to the conclusion that they are the fundamental principles which now apply to maritime delimitation in customary international law and that they can be expected to underlie its future development.

Finally Judge Ajibola examines the concepts of "special circumstances" under the 1958 Convention and of "relevant circumstances" under customary international law, concluding that there is effective equivalence between, on the one hand, the triad of agreement, special circumstances and equidistance and, on the other, that of agreement, relevant circumstances and equitable principles, with the last-mentioned constituting the ultimate rule under modern customary law.
This was one of the longest-running cases ever brought before the Court. On March 16, 2001 the International Court of Justice finally decided the merits of the case. It was first instituted by Qatar on July 8, 1991 and survived ten years on the Court’s docket. The dispute between the two Arab States in the Gulf of Arabia was centred more closely, in the self-conceived interests of the Parties, on the issue of sovereignty over the Hawar Islands than on the delimitation of their maritime boundary. The maritime part of the case was certainly overshadowed by other well known issues that arose during the life of the case. Nonetheless, the stakes at play in the maritime delimitation were perhaps of considerable long-term economic interest to the Parties.

4.2.6.(i) Facts of the Case:
There was an echo, in this Qatar v. Bahrain case, of the traditional Red Sea fishing regime that had been dealt with in the Eritrea/Yemen case. Bahrain claimed that its historical dominance over the pearling grounds in the Gulf of Arabia to the north of the Qatar peninsula constituted a special circumstance that warranted shifting the provisional equidistance boundary line further to the east. The Court rejected Bahrain’s arguments on the facts, but it did not reject the possibility of such a claim constituting a special circumstance. This is particularly interesting, of course, given the fact that the maritime boundary at issue was a multi-purpose boundary, not just an EEZ boundary.
4.2.6.(ii) Decision of the Court:

The Court held that

a) An island was capable of generating full maritime rights, regardless of its size. This was important in the context of a maritime feature called Qit'at Jaradah. Qit'at Jaradah is located in the Parties' overlapping territorial seas to the northeast of the main island of Bahrain and northwest of the Qatar peninsula. It had been referred to as an island in historical documents, but some more recent documents referred to it as a LTE. In 1986, Qatari armed forces took a Dutch construction crew working for Bahrain on a nearby maritime feature prisoner. Qatar then forced Qit'at Jaradah to be bulldozed into the sea. Bahrain claimed that in the years after 1986, Qit'at Jaradah had returned to its historical state (an island) through natural accretion. Before the Court, Bahrain established through satellite imagery and expert onsite examination that Qit'at Jaradah had become an island again: a very small portion of its surface remained above water at high tide. The fact that Qit'at Jaradah was found to be an island meant that the international law relating to title to territory applied. Bahrain's historical acts of sovereignty over Qit'at Jaradah resulted in its being recognised as Bahraini land territory. This in turn pushed the maritime boundary in that part of the dispute well to the east. However, despite having stated earlier in the Judgment that even a small island is capable of generating full maritime rights, the Court held that the maritime boundary line should pass just to the east of Qit'at Jaradah, giving it no effect.

b) The disproportion that would result from giving the island any effect, let alone partial or full effect, constituted a special circumstance that warranted this decision. One of the most perplexing parts of the Judgment was the Court's
conclusion in relation to Bahrain’s status as an archipelago. Bahrain is indisputably an archipelago, in geographical terms. Its land territory is made up of a collection of over 30 islands situated in the Gulf of Bahrain, off the Gulf of Arabia. Bahrain had never claimed archipelagic status under UNCLOS, but before the Court it claimed to be a de facto archipelago.

c) The Court refused to recognise Bahrain’s archipelagic status and held that Bahrain’s coast was not one of straight or archipelagic baselines. It almost appeared as if the Court desired to avoid the characterisation of Bahrain as an archipelago in order to avoid the result that Bahrain’s coastline for delimitation purposes would be a line linking its outermost islands. If the Court had not, as it did, simultaneously ignored both its own jurisprudence and geography, it would have been left with very little room to engage in creative delimitation. The Court drew attention to the fact that the process of delimitation found in Article 15 of UNCLOS was “closely interrelated” to the process of delimitation found in Articles 74 and 83.28 This underscored the Court’s endorsement of its previous view expressed in Jan Mayen on the appropriate methodology of delimitation.

d) The Court interpreted the development of the law in the relevant cases to have been that the appropriate methodology of delimitation was to:

...first provisionally draw an equidistance line and then consider whether there are circumstances which must lead to an adjustment of that line. In the northern sector of the boundary, the Court equated the geographical situation of the Parties to adjacent coasts abutting on the same maritime areas extending seaward into the Gulf of Arabia. Nonetheless, it still took the same methodological approach to delimiting that maritime area as it did for the coastally opposite sector of the line.
Also in the northern sector, the Court decided to give no effect to a large LTE that was partly in Bahrain's territorial sea that would have shifted the northern part of the line significantly to the east. In doing so, the Court gave no specific reasons for its decision other than that to do otherwise would be inequitable.


On 8 October 2007, the International Court of Justice delivered its judgment in the Case Concerning Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea.

4.2.7.(i) Facts of the case: The Case involved a dispute between Nicaragua and Honduras over the delimitation of their maritime boundary, as well as a sovereignty dispute over certain islands and cays adjacent to their coasts. The case was brought to the Court by Nicaragua in December 1999 on the basis of the American Treaty of Pacific Settlement (the Pact of Bogotá) and the so-called optional clause in Article 36(2) of the ICJ Statute.

In its Application, Nicaragua asked the Court to determine the course of the single maritime boundary between the areas of territorial sea, continental shelf and exclusive economic zone appertaining respectively to Nicaragua and Honduras, in accordance with equitable principles and relevant circumstances recognized by general international law as applicable to such a delimitation of a single maritime boundary. It is notable that the Application did not refer to any
questions of sovereignty over islands or cays in the Caribbean Sea. From a formal point of view, this was a new claim introduced in the course of the proceedings.

4.2.7.(ii) Decision of the Court:

The Court held that it was necessary to decide the sovereignty dispute in order to delimit the maritime boundary. The Court held that the Nicaraguan claim relating to sovereignty over the islands in the maritime area in dispute is admissible as it is inherent in the original claim relating to the maritime delimitation between Nicaragua and Honduras in the Caribbean Sea (para. 115 of the Judgment). It is interesting to note that the name of the Case has in fact changed. Throughout the proceedings, the case was referred to as the Case Concerning the Maritime Delimitation between Nicaragua and Honduras. The title of the final judgment, however, reflects the wider issues dealt with by the Court.

Proceeding to the merits, the Court first considered the various claims to sovereignty over Bobel Cay, South Cay, Savanna Cay and Port Royal Cay as well as other islands, rocks, banks and reefs in the disputed maritime area. The Court found that the doctrine of uti possidetis, although potentially applicable to the dispute, did not afford adequate assistance in determining sovereignty over the islands. It then considered the doctrine of effectivités and decided that Honduras had shown a sufficient overall pattern of conduct to demonstrate its intention to act as sovereign over the islands (see para. 208 of the Judgment).

The Court then went on to delimit the maritime boundary between the two States. The Court noted that the UN Convention on the Law of the Sea (LOS
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Convention) was applicable to both parties to the dispute and it bases much of its reasoning on the relevant provisions of the Convention. It summarily dismisses the fact that the Convention was not binding on Nicaragua when the case was submitted to the Court and the fact that the Application asked for the Court to delimit the boundary on the basis of general international law (see para. 261 of the Judgment). It may be that the LOS Convention largely reflects general international law, but the Court does not address the issue in any detail.

A wider question raised by the dispute is whether or not the Court would have been able to settle the dispute if it had been raised under the dispute settlement clauses of the LOS Convention. The jurisdiction of a court or tribunal seised under the LOS Convention is limited to any dispute concerning the interpretation and application of the Convention which is submitted to it in accordance with this Part (see Article 288(1) of the Convention). Whilst maritime delimitation is undoubtedly within the scope of the LOS Convention – albeit subject to optional exclusions in Article 298 – sovereignty over land territory is not. In these circumstances, would a court or tribunal acting under the LOS Convention be able to settle the dispute? Is it possible to separate the maritime delimitation dispute from the sovereignty dispute in this case? Does Article 293 of the LOS Convention allow a court or tribunal to settle territorial sovereignty claims which are inherently related to disputes over maritime delimitation?

4.3. Conclusions:

Similar issues were raised in the recent award by an arbitral tribunal seised of a dispute between Guyana and Suriname under Part XV of the LOS Convention.
Suriname objected to the jurisdiction of the Tribunal as there was a disagreement over the terminus of the land boundary. In that case, the Tribunal side-stepped the objections of Suriname by finding that the Tribunal’s findings have no consequence for any land boundary between the Parties (see para. 308 of the Award). However, that approach may not always be available to a court or tribunal and it is necessary to face the question of whether or not a mixed territorial-maritime dispute can be solved under Part XV of the LOS Convention.