CHAPTER- V

The Contribution of International Court of Justice (I. C. J) to the development of the Law of Maritime Delimitation
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Introduction:

On the basis of the analysis of the cases decided by International Courts and Tribunals in Chapter IV, how the ICJ, besides finding the law in the settlement of disputes in the above cases, contributed for clarification, systematization and development of law of maritime delimitation has been studied in this chapter.

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.

5.1 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.\(^1\)

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 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.\(^2\) 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.\(^3\)

### 5.2. Court's clarification about the meaning of 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

\(^1\) *North Sea Continental Shelf Cases (Federal Republic of Germany (FRG)/Denmark; FRG/Netherlands)* 1969 I.C.J. Reports, (Judgment of 20 February) para. 19.

\(^2\) Ibid, para. 43 & 96.

\(^3\) Prosper Weill, "*The Law of Maritime Delimitation Reflections*" (Cambridge 1989) p. 22
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.

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.

5.3. Meaning of Maritime Delimitation under Natural Prolongation theory:

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.

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4 I.C.J. Reports 1969, see note 1 above, paras. 18 & 20.
6 Prosper Weil, see note 3 above, p. 23
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.

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.

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.

5.4. The Inexorable Decline of the Natural Prolongation Principle:

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8 I.C.J. Reports 1969, see note 1 above, p. 31, para 44.  
9 Proper Weil, see note 3 above, p. 24  
10 Ibid.
The natural prolongation idea which predominated in the North Sea cases, underwent a gradual erosion before being abandoned in 1985 in Libya / Malta case. The natural prolongation concept is based on the idea that, since the legal solution is to be found in the facts of nature, the act of delimitation is limited to listening carefully to what nature has to say. Once the natural limits have been discovered by means of an appropriate scientific investigation, there remains nothing more to be done except to draw the demarcation line between the continental Shelves of the two countries at the point where nature has placed the limits of their respective natural prolongations. In the end, the only rule of law governing delimitation is that which requires it to conform with nature. Facts dictate the law. The maritime boundary is a natural boundary.\footnote{Prosper Weil, see note 3 above, p. 26}

The idea of natural maritime boundary as stated above proved inapplicable whenever it was a case of a single, continuous shelf on which nature had not drawn any precise line of separation. In such a situation it was necessary to turn to a legal test. Experience has shown that far from being exceptional, this situation crops up frequently.

It was the case in the North Sea, where the seabed has no natural divisions. It was also the case in the Channel and in the Atlantic region, where delimitation had to be effected in the marginal areas where their respective continental shelves converge. In such a situation, the Court of Arbitration noted, delimitation can not be determined exclusively by the physical facts of geography, but also by legal rules. In 1982, in Tunisia / Libya, the International Court of Justice found itself
once more faced with a natural prolongation common to both territories and again
drew the conclusion that in such a situation delimitation must be governed by
criteria of international law other than those taken from physical features. In 1984,
in the Gulf of Maine case, the Chamber again had to draw the boundary without
reference to any real factor of natural separation of the continental shelf of the two
countries, because no such factors are discernible. The same situation in 1985, in
the Guinea/Guinea Bissau case, drew the same answer: the rule of natural
prolongation can be effectively invoked for purposes of delimitation only where
there is a separation of continental shelves.\footnote{Prosper Weil, see note 3 above, p. 26}

But the theory of the natural submarine boundary was not applicable in
those cases where nature has not provided any seabed boundary. The natural
concept is more ambivalent than it seems. In Tunisia/Libya, different concepts
were expressed about the meaning of nature. According to Tunisia one should
stick to the facts of geomorphology, that is, the discontinuities in the surface or
relief, the depressions and escarpments of the seabed. The Libya suggested that
one should look to the geology i.e. the underlying structure of the marine depths.
In Libya V Malta, an even more formidable problem was raised.

The natural delimitation Libya asked the Court to make was along a "rift
zone" said either to mark geologically the boundary between two tectonic plates
or to be an important geomorphological feature, in any case a clear physical
separation between Libya's natural prolongation and that of Malta. However, it
was difficult to see whether, in the Libyan view, the natural boundary followed a
line of the rift zone, or whether this whole zone, about a hundred kilometres in
width, was a sort of legal no-man’s-land between the Maltese and the Libyan
shelves. In the latter case, the two shelves would not touch one another and there
would be no need for a demarcation line. But the former interpretation, given the
indeterminate nature of such a large area, lending itself to dozens of possible
demarcation lines, would exacerbate the difficulty still further. And there would
be another difficulty. Would the natural boundary the Court called on to decide
divide the continental shelves, the continental margins or the tectonic plates? This
brought into the full light of day the ambivalence in the concepts of a natural
prolongation and a natural boundary.\textsuperscript{13}

Another difficulty is that the slightest geological irregularity or the smallest
wrinkle on the seabed could not be regarded as interrupting the continuity of shelf
to the point of constituting a natural boundary between two clearly separate
prolongations. The natural prolongation doctrine could cope with true breaks or
fundamental interruptions on the seabed but not simple discontinuities based on
geological irregularity.

Nature and equity are not synonymous. There is no logical reason why a
maritime delimitation based on physical factors of geology or geomorphology
should be equitable except by the happy accident of coincidence or chance. If the
'physical feature' lies very close to the coasts of one State and very far from those
of the other, a natural boundary which followed this natural separation would not
satisfy the demands of equity since it would cut off the first of these States from

\textsuperscript{13} Prosper Weil, see note 3 above, p. 27
its right to maritime areas adjacent to its coasts. The principle of equity, of equality of States and of non-encroachment would be compromised if the whims of nature were allowed to dictate maritime boundaries to governments and International tribunals. 14

Due to the unfairness of the natural prolongation concept, the States have almost never resorted to this type of delimitation. Thus even before 1969 the agreement between the United Kingdom and Norway adopted the median line, taking no account of the Norwegian Trough, which meant giving to Norway large stretches of continental shelf which cannot in any physical sense be said to be adjacent to it, nor to be its natural prolongation. 15 Since then, there have been many delimitation agreements ignoring the declaratory concept based on geology and geomorphology.

The exclusive economic zone concept does not rest in any way on the theory of natural boundary but deriving entirely from the political will. In Gulf of Maine case the United States maintained that the North East Channel marked not only the physical boundary between its own natural prolongation and that of Canada in respect of the seabed, but also constituted a natural boundary between distinct oceanic and ecological regimes. 16 The United States' request to extend the declaratory concept to the exclusive economic zone by considering the North East Channel as a buffer zone, was rejected by the Court. The natural prolongation concept formulated in 1969 could be applied to the delimitation of the continental shelf but could certainly not have governed exclusive economic zone delimitation.

14 Prosper Weil, see note 3 above, pp. 28 & 29.
15 Ibid.
16 Ibid, p. 30
As Judge Jimenez de Arechaga pointed out in Tunisia / Libya, it was inconceivable that one would return in the maritime delimitation context to that doctrine of ‘natural frontiers,’ which Rousseau demolished when he observed ‘qu'elles aboutissaient à faire de l’ordre politique l’ouvrage de la nature.’

Subsequent to the North Sea cases, the Courts were reluctant to adopt the natural prolongation concept. In Anglo-French case (1977), the Tribunal pointed out that, in the present case there were merely discontinuities in the seabed and subsoil which do not disrupt the essential unity of the continental shelf and so implying that, had there been a clear break in the shelf and not just a discontinuity, the declaratory concept would have made applicable.

In Tunisia / Libya, the Court expressed the view by abandoning the natural prolongation theory that mere geomorphological discontinuities could always be taken into account as one of several circumstances considered to be the elements of an equitable solution. The Gulf of Maine judgment took the same attitude. The Court refused to regard the North East Channel as other than a mere ‘natural feature of the area’ unsuitable for inclusion among the factors to be used to determine the method of delimitation.

From one case to the next, the conditions for recognising the existence of two physically distinct natural prolongations seemed more and more difficult to meet and the scope for practical implementation of the declaratory theory of

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Prosper Weil, see note 3 above, p. 30.
Delimitation seemed increasingly deemed to become no more than a matter of form, preserved for the sake of it, pour memoire, one might say.\textsuperscript{18} 

Over the years, from one judgment to the next, the evolution of legal title to the continental shelf from natural prolongation to distance took place. This development, recounted by the Court in Tunisia/Libya was foreseen even before the North Sea judgment. As early as 1953, the International Law Commission’s attention had been drawn by some of its members to the case of States which had little or no continental shelf in the physical sense and which might be disadvantaged by a purely physical concept of the shelf. It was then, that it was suggested that the continental shelf should be defined in terms of distance.\textsuperscript{19}

It was at this time, that the physical criterion of depth was reinforced by the non-physical one of exploitability, thus permitting the continental shelf to be extended further and further into the open sea, pari passu with technological progress. The endorsement of this criterion of exploitability in the 1958 Geneva Convention shows that even before 1969 there was a lack of identity between the legal concept of the continental shelf and the physical phenomenon known to geographers by that name.

The evolution of distance criteria was speeded up by the work of UNCLOS III. The inequality suffered, as a result of the natural physical prolongation concept, by those States which nature had endowed with only a narrow continental shelf was acknowledged, and consideration given to the possibility of granting every coastal State rights over the soil and subsoil of maritime areas adjacent to its

\textsuperscript{18} Prosper Weil, see note 3 above, pp. 33 & 34
\textsuperscript{19} ibid.
coasts up to a distance of 200 miles, regardless of the physical make-up of the seabed.\textsuperscript{20}

Thus the distance criterion would have replaced the depth and exploitability criterion of the 1958 Convention. This criteria secured the equality of coastal States regardless of the physical features of the seabed. The continental shelf concept would be fused with that of the exclusive economic zone. Upto 200 miles, it would have been part of the international zone, the common heritage of mankind.

However, fixing a 200 miles limit for the rights of all coastal States over the seabed would have been to the disadvantage of those few States whose continental shelf, in the physical sense of the word, stretches more than 200 miles into the open sea. In the name of rights allegedly acquired under the regime of the old theory and basing themselves on supposed scientific criteria, a small group of influential States sought to preserve the advantage of the natural prolongation and even took the opportunity of securing an enlarged definition to replace the classical concept of 'continental shelf' with that of continental margin which includes, in addition to the shelf in the strict sense, the continental slope and the continental rise.\textsuperscript{21}

It is set out in the various provisions of Article 76 of the Montego Bay Convention, continental shelf rights throughout the natural prolongation of its land territory to the outer edge of the continental margins when this edge lies

\textsuperscript{20} Prosper Weil, \textit{see note 3 above}, p. 35.
\textsuperscript{21} \textit{Ibid.}
beyond 200 miles; continental shelf rights up to at least 200 miles even when the outer edge of the continental margin lies within 200 miles.

In Libya / Malta (1985) the Court was seised with the full ramifications of the survival of the declaratory concept. Libya maintained that the delimitation line should follow the rift zone which, it claimed, physically separated the shelves of the two countries. Malta did not limit itself to denying the existence or importance of the rift zone; it argued that legal title to the continental shelf was no longer based on physical facts, but rested on the legal criterion of distance which nowadays brought together the continental shelf and exclusive economic zone.

According to Libya, development in the law of the sea had not affected the principle that natural prolongation in the physical sense is the basis of legal title to the continental shelf. It argued that Article 76 of the Montego Bay Convention had acquired the force of customary international law only in respect of its reference to natural prolongation. For Malta, it was quite the opposite.

The Courts took no position on the legal force of the various elements in Article 76 or the new definition of the continental shelf but expressed that the institution of the exclusive economic zone, with its rule on entitlement by reason of distance, is shown by the practice of States to have become a part of customary law. This shows that the term ‘natural prolongation’ has not been banished from the law of maritime delimitation but has merely changed its meaning and now has a legal connotation, separate from physical considerations, except in the case where the continental shelf passes beyond the 200 mile mark.

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22 Prosper Weil, see note 3 above, p. 39.
In Libya / Malta, the Court drew the logical conclusion from its innovatory analysis of the legal title to the continental shelf and the correlation between title and delimitation, and served the death warrant on the declaratory concept of delimitation.

5.5 Development of the new concept of Maritime Delimitation:

According to new concept, instead of attributing to each State what nature has 'already given it, delimitation takes the opposite course of assuming that there is an area of overlap, i.e. an area over which both States have legal title. Unless there are overlapping titles, there is nothing to delimit the areas. The concept and term 'overlapping' regarded in the North Sea case 1969 as an overlapping of natural prolongations in the physical meaning of the term, has in the course of series of judgment, become an overlapping of legal titles.

Now the delimitation aspires to be a definition de novo of the area which is henceforth to belong to each of the States and not the determination of what 'already' belongs to them.

Delimitation means amputation. While the declaratory concept sought 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, the constitutive concept implies that each of the parties is to be deprived of part of the area to which it has legal title. Instead of trying to give effect to both titles, delimitation consists in reducing the extent of each. Delimitation is no longer 'suum cuique tribuere' but to decide what each must agree to be deprived of for the other's benefit. In the declaratory concept, it is a matter of recognising what
is; in the constitutive, it is a case of granting by taking away. Encroachment and amputation are an inherent part of delimitation. 23

5.6. Title Governs Delimitation:

The concepts title and delimitation are not identical. Title is concerned with fixing the outer seaward limits. It means title is to do with defining the criteria on the basis of which a State is legally empowered to exercise rights and jurisdiction over the maritime areas adjacent to its coasts. Whereas delimitation consists in drawing a demarcation line, a boundary, between two neighbouring States when the geographical situation does not allow both the parties concerned to enjoy their title to its full extent. Delimitation can not be understood without title, which lies at its very heart. To answer the question, by what criterion are overlapping areas to be divided? international law has turned to considerations relating to the legal basis of title, and has decided the criteria and methods for delimitation by reference to the legal concepts governing maritime jurisdictions. Thus delimitation law has not been cut off from its legal environment and does not find itself condemned to a stagnation incompatible with the development of the law of the sea. As we have seen, this is the approach the Court adopted in Libya/Malta, in both a negative and a positive sense: negatively, in rejecting all criteria for division of the continental shelf deriving from physical considerations which had lost all connection with title; positively, when it undertook an assessment of the impact of distance considerations on the actual delimiting. 24

23 Prosper Weil, see note 3 above, p. 48.
24 Ibid., pp. 48 & 49.
Though the basis of title may be decisive factor in the delimitation process but not to the total exclusion of all else. Another element ‘equitable solution’ is one of the most important aspects of the law of maritime delimitation. As per the currant trends of international law, delimitation must at one and the same time be rooted in legal considerations of title and arrive at an equitable solution. Both conditions must simultaneously be fulfilled; neither of them is sufficient on its own. An equitable division of the area of overlap would not meet the requirements of international law if it were not at the same time rooted in legal title; and a division rooted in legal title would not do so if it did not also produce on equitable solution.\textsuperscript{25}

It is the need for legal title which comes first. Equity comes next in order to correct the possible inequitable results relating to title to a given situation. This approach governs the relations between equity and the law and determines the structure of the delimitation process. It became clear that the criteria and methods for delimitation can not be justified solely \textit{ex post facto} by the equitable nature of the result. \textit{Ex ante} objective legal considerations must also be taken into account. The logical sequence cannot begin with an equitable line; it must achieve such a line having started from the legal title. The criteria and methods of delimitation provide a bridge between legal considerations relating to title and the equitable line which completes the delimitation process.\textsuperscript{26}

\textsuperscript{25} \textit{Prosper Weil}, \textit{see note 3 above}, pp. 48 & 49.
\textsuperscript{26} \textit{Ibid P. 50.}
5.7. Delimitation and the Basis of Title:

Title to the continental shelf, which once rested on natural prolongation, is now based on distance and that the principle of distance is also the basis for title to the territorial sea and the exclusive economic zone.

Strictly speaking, neither distance nor natural prolongation forms the basis of a coastal State's legal title. It will be seen in a moment that the basis is to be found in the principle that the land dominates the sea through the intermediary of the coasts, in other words, in the principle of adjacency. Distance, as 'natural prolongation' used to be in the case of the continental shelf, is only a means of expressing this basis, a way of measuring and putting it into practical effect. Until recently, adjacency was expressed by the concept of natural prolongation for the continental shelf and distance for the territorial sea. Now a days, the concept of distance is the translation of adjacency not only for the territorial sea and the exclusive economic zone but also for the continental shelf.27

Maritime rights derive from Statehood. They are its 'prolongations', 'extension,' 'emanation,' 'automatic adjunct.' They adhere to Statehood as his shadow does to man. Although they are an automatic adjunct of territorial sovereignty, they are just an adjunct. They are not primary, autonomous rights. They have no independent existence. They are subsidiary, derived rights. Since all States are equal before the law and are entitled to equal treatment, they are all in the same position as far as the theory of coastal projections is concerned. Two hundred years ago Vattel wrote: A dwarf is no less of a man than a giant. A

27 Prosper Weil, see note 3 above, p. 51
small Republic is no less of a State than the most powerful Kingdom. Whether it is large or small, whether it endowed with a long coast and a small hinterland or an extensive territory with a short coastline, whether it is a large continental State or a small island State, in every case its statehood gives it the same potential for generating maritime projections under the conditions laid down by International law.28

5.8. The Coastal Front: Maritime Rights:

In order to benefit from maritime rights it is not enough to be a State unless it has a coast. It is only to States with access to the sea and to them alone that international law has accorded sovereign rights over areas of the sea. Having a coastline is an essential element in every State projection seawards. This is illuminated by the Court in Tunisia / Libya (1982 ICJ) in the following words:

The exclusive rights over submarine areas belong to the coastal State. The geographic correlation between coast and submerged areas off the coast is the basis of the coastal State’s legal title, the coast of territory of the State is the decisive factor for title to submarine areas adjacent to it.29

A State with much land territory but no coast will not have any maritime jurisdiction. A State with little territory but with a long coastal opening will have maritime jurisdiction. ... On the other hand, even though only coastal States are entitled to maritime jurisdiction. It has not been shared equally between them. . . .

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28 Prosper Weil, see note 3 above, p. 52
29 Case concerning the Continental Shelf (Tunisia / Libyan Arab Jamahiriya) 1982 I.C.J. Reports (Judgement of 24 February) p. 61, para. 73.
As a result, the coastline determines not only the existence of maritime rights but also their extent and outer shape.\(^{30}\)

In the opinion of the judges in Libya/Malta, sovereignty creates the legal entitlement of maritime rights but a State can get these rights by way of the Court as 'medium', it is this medium which becomes decisive for the concretization of the area of shelf attributed. In the words of the Judges:

The rights which a State may claim to have over the sea are not related to the extent of the territory behind its coasts, but to the coasts themselves and to the manner in which they border this territory. A State with a fairly small land area may well be justified in claiming a much more extensive maritime territory than a larger country. Everything depends on their respective maritime facades and their formations.\(^{31}\)

Landmass has never been regarded as a basis of entitlement to continental shelf rights the concept of adjacency measured by distance is based entirely on that of the coastline and not on that of the landmass.\(^{32}\)

State practice shows that the rules are not bent according to the respective size of the parties. Neither the Soviet Union in its agreements with Finland, Poland and Norway, nor the United States in its agreements with Mexico and Cuba secured as adjustment of the delimitation line because of its size. In Libya/Malta, Libya stressed the enormous disparity of landmass between itself and

\(^{30}\) Prosper Weil, see note 3 above, p. 54
\(^{31}\) Prosper Weil, see note 3 above, p. 54
\(^{32}\) *Case Concerning the Continental Shelf (Libya/Malta)*, I.C.J. Reports 1985, (judgment of June 3) p. 41, para. 49.
Malta, claiming that this gave it a more intense power to generate maritime projections. The Court rejected sharply. Since landmass does not enter into the basis of title it can not enter into delimitation.\[33\]

5.9. Principle of Adjacency : Maritime Rights:

**Adjacency :**

The concept of adjacency is found for all coastal States for the purpose of appropriation of the sea: the security of close-at-hand protection gave birth to the territorial sea; exploration and exploitation of the resources of the sea near the coast and desire of every State not to allow third States to explore and exploit resources too near to its shore area at the origin of the emergence of the continental shelf theory as well as that of exclusive economic zone. Legally also adjacency of the seabed to the territory of the coastal State has been the paramount criterion for determining the legal status of the submerged areas.

It is hardly necessary to point out that it is not the physical fact of adjacency of the sea areas to the shore which creates title or constitutes the legal basis for it. It is by virtue of the law that one of the attributes of a State is the power to generate, through the medium of its coastline, title to maritime areas adjacent to its coasts, and it is only 'legally' that maritime rights have been defined by the Court as an emanation and adjunct of State sovereignty.\[34\]

The judgement given by the Court in Gulf of Maine case states that-

\[33\] Prosper Weil, *see note 3 above*, p. 54
\[34\] Ibid, p. 56.
It is correct to say that international law confers on the coastal State a legal title to an adjacent continental shelf or to a maritime zone adjacent to its coasts; it would not be correct to say that international law recognises the title conferred on the State by the adjacency of that shelf or that zone, as if the mere natural fact of the adjacency produced legal consequences.\(^\text{35}\)

5.10. Exercise of Title and Delimitation:

Once the legal basis of a State’s title to areas of the sea has been defined by the concept of adjacency, it remains to specify how and how far this title is exercised. International law gave different answers to this question depending on whether it was the continental shelf or the territorial sea at issue. Regarding continental shelf, title was exercised in the direction and over an area determined by the physical configuration of the seabed. Regarding territorial sea, title was exercised in all directions up to a certain distance from the shore. Regarding exclusive economic zone, it had not yet emerged from the embryonic stage. Now all maritime jurisdictions are today exercised in all directions over a distance determined by the law.

Distance Criteria and Maritime Delimitation:

Adjacency which is the basis of coastal State's title is liable to differences of substance and interpretation. The distance criterion is now the common denominator of all the rights and jurisdictions of coastal States over maritime

\(^{35}\) Case Concerning the delimitation of Maritime Boundary in the Gulf of Maine Area (Canada/U.S.A.), 1984 I.C.J. Reports (judgment of 12 October), para. 103.
areas. It is hardly necessary to point out that the concept of distance is a quantitative one. The figure varies from one maritime jurisdiction to another, although nowadays the picture is dominated by the 12 miles of the territorial sea and the 200 miles of the exclusive economic zone and the continental shelf. These figures certainly have a different impact from one area to another; the 12 miles of the territorial sea, the 24 miles of the contiguous zone and the 200 miles of the exclusive economic zone are the maximum which a coastal State may, but need not, claim, while the 200 miles of the continental shelf must be seen as an inherent right, independent of any occupation, proclamation or other constitutive act.  

5.11. The Spatial Character of Delimitation:

If there were just one coast, its projection would extend as far as permitted by international law; 12 miles for the territorial sea, 24 miles for the contiguous zone, 200 miles for the exclusive economic zone and the continental shelf. But when the space is too small and the projection of the two coasts cross and overlap, an appropriate criterion is needed and a suitable method must be applied in order to avoid the cut-off operating to the benefit of one at the expense of the other.  

The only best method of dividing overlapping areas of maritime projections of the coasts of two neighbouring countries is to do so equally. As the Gulf of Maine Chamber said, this is a criterion which need only be stated to be seen as intrinsically equitable and the Court advocated it from the start. In the words of the Frontier Disputes (Burkina Faso/Mali) case, although equity does not

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36 Prosper Weil, see note 3 above, p. 57
37 Ibid, p. 58.
necessarily imply equality where there are no special circumstances the latter is
generally the best expression of the former. It must be emphasized that the
equality sought is an equality of spatial amputation. It is not an equality of the
extent of maritime areas which will accrue, after the delimitation, to each of the
States outside as well as within the area of overlap. It is the sectors of overlap,
over which the two states have concurrent title, which have to be divided equally,
and not all the areas appurtenant to them. Nor is it a question of dividing equally
the areas claimed by the two sides i.e. of splitting the difference. Such an
approach would risk provoking the systematic maximization or the parties' claims
and lead to a shift from the judicial task towards conciliation and compromise.\footnote{Prosper Weil, see note 3 above, p. 58}

To achieve a balanced spatial reduction of the two overlapping areas, the
most appropriate method is that of equidistance. Of all methods, equidistance
would seem to come closest to achieving the objective of an equal division of the
overlapping area. It should not, however, be overlooked that a more or less equal
division of the overlapping area can be obtained by other methods, differing from
it in varying degree even while prompted by similar considerations, for example,
the perpendicular or the bisector of the angle formed by the two coast lines. In
some respects, these are just variations on the equidistance theme. This is
particularly the case with the perpendicular to the general line of the coast, a
method recommended in the past for delimiting the territorial sea because, when
used between adjacent straight coasts, it achieves the same equal division of the
overlapping area as does the median line between opposite coasts. It is clear,
however that none of these various methods, even if justifiable in certain
geographical situations, would be appropriate for the general application of the spatial criterion. The bisector method is possible only where two clearly distinguished coastlines form a sharply defined angle; otherwise it rests on artificially reconstructed coastal directions. And the perpendicular method is too unsophisticated to achieve the desired goal of an equal division of overlapping areas when the coastline is not straight and it is difficult to identify its general direction. The development, thanks in particular to the work of Boggs, of the more sophisticated scientific technique of equidistance, made it possible to substitute this for the perpendicular in the delimitation of the territorial sea, and it is against this background that the Committee of Experts consulted by the International Law Commission in 1953 rejected the perpendicular as such in favour of the median line drawn according to the distance principle. The Commission and the 1958 Law of the Sea Conference followed suit; UNCLOS III and the 1982 Convention would do the same.\(^\text{39}\)

\section*{5.12. The principle of non-encroachment:}

In Libya / Malta, the Court ruled that, distance from the coast is a "relevant element" in delimitation, and equidistance is, "the result to which the distance criterion leads.\(^\text{40}\)

When maritime areas to which two States have title overlap, the equidistance method allows each to them to exercise sovereign rights up to a certain distance from its coasts wherever these rights come up against the equivalent rights of the other State. At the same time the principle of non-

\footnotesize\(^\text{39}\) Prosper Weil, \textit{see note 3 above}, pp. 59-60.
\footnotesize\(^\text{40}\) I.C.J. Reports 1985, \textit{see note 32 above}, paras. 34 & 63.
encroachment is safeguarded since, except for a few special situations, which then require correction, equidistance allows the boundary to be fixed at the maximum distance from both States and so avoids any excessive amputation of their maritime projections.\(^{41}\)

The non-encroachment principle was formulated as a principle according to which an equitable delimitation line was not to cut off one of the States from part of its maritime projection. This principle was used by the Court in the North Sea cases for rejection of the equidistance line in situations where the configuration of the coasts - concavities, salients or islets- causes the equidistance line to deviate and bite into areas forming the natural prolongation of one of the parties. In the words of the Court in North Sea cases, 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 the front. \(^{42}\)

The non-encroachment principle has a spatial character. What equity requires to be rejected is essentially a delimitation line passing too close to one of the coasts. The non-encroachment also envisages that the line will be sufficiently far from the coasts. Here, too, the main concern is spatial. Historically and politically these two aspects have always been linked. The institution of the continental shelf and later of the exclusive economic zone was due, as previously pointed out, to the desire of coastal States both to secure for themselves exclusive

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\(^{41}\) Prosper Weil, see note 3 above, p. 60.

\(^{42}\) *North Sea Continental Shelf Cases (Federal Republic of Germany (FRG)/Denmark; FRG/Netherlands)* 1969. I.C.J. Reports (judgment of 20 February). Para. 44.
rights to natural resources over a sufficiently large area in front of their coasts and
to prevent third States coming to explore or exploit natural resources too near to
their coasts.\footnote{Prosper Weil, see note 3 above, p. 61.}

In fact, the non-encroachment principle lies at the very heart of the
delimitation process. One can not repeat too often that delimitation is a matter of
amputating the projections of the two States by comparison with what each of
them would be legally entitled to if the other did not exist. In this sense, as
pointed out previously, encroachment and cut-off are inherent in the whole idea of
delimitation. In the final analysis, the choice of criteria and methods for
delimitation is none other than the choice of criteria and methods suitable for the
drawing of what one might call the line of amputation, the line of sacrifice, i.e., to
determine the distance at which each State must agree to halt projections which
otherwise it would have been able to extend to the full distance and in all the
directions permitted by international law. But, at the same time, a balance must be
struck between the right and the sacrifice of the one and the sacrifice and right of
the other. A’s projection must not unreasonably encroach on that of B since B is
entitled to the enjoyment, if not total at least reasonable, of its own projection;
but, conversely, no more may B’s projection encroach unreasonably on that of A,
since A also has the right to the enjoyment, if not total at least reasonable, of its
own projection. The non-encroachment principle must not be approached from
the point of view of just one of the States concerned; it must be understood in its
totality as dominating the whole concept of delimitation.\footnote{Ibid, p. 62.}
In maritime delimitation, one party's projection into the sea must stop when it would run the risk of impinging on that of the other. At one and the same time, delimitation must be a line of amputation and encroachment and a line of non-amputation and non-encroachment. To tackle this balancing trick, the purpose of which is to reconcile the conflicting and contradictory demands of the two parties, only a spatial criterion will do. In order to meet this criterion, the appropriate method is that of equidistance which, according to the Court's definition in the North Sea cases, leaves to each of the parties concerned all those portions (of the continental shelf) that are nearer to a point on its own coast than they are to any point on the coast of the other party.\(^4^5\)

5.13. Theory of Radial Projection:

Territorial sovereignty across the coastal span projects in all directions. The land dominates the sea and does so in all directions. By definition, the projection of coast is omni-directional, that is to say, radial. These propositions might seem too obvious even to discuss, and there would indeed be no need to linger over them were it not for the controversies to which they have given rise in two cases. Set out for the first time by Canada in Gulf of Maine and then taken out again by Malta in Libya / Malta, the radial projection theory was contested by the otherside, not so much the idea itself at the level of legal title, as its application to delimitation. As for the Court, it remained silent.\(^4^6\)

The idea conceived by the phrase ‘radial projection’ is that when one uses a fixed distance in order to define a coastal State’s projection into the sea, the

\[^{45}\] I.C.J. Reports 1969, see note 42 above, para. 6.
\[^{46}\] Prosper Weil, see note 3 above, p. 63.
maritime area which accrues to it extends in all directions over the prescribed distance. No direction is more important than another. One may not be favoured by another. Though the word is a new one, but the idea behind it, traces back to be beginning of the law of the sea. By definition, the range of gunfire - the famous Cannon shot rule - which inspired and for so long dominated the theory of the territorial sea, had a radical character. A cannon shoots in all directions, whence the idea that, to draw the outer, seaward limit of the territorial sea, it was enough to draw arcs of a circle, starting from points on the coast. This envelope of arcs of circles technique (also known as the tangential curve technique) method illustrated in graph form by Boggs in 1930 and Munch and Gidel in 1934, consists in defining the outer limit of the territorial sea as the curve tangential to the arcs of circles of a radius equal to the width of the territorial sea, drawn from every point on the coast.

The envelope of arcs of circles idea was thought up by technicians and proposed to the 1930 Hague Codification Conference by the United States delegation. The International Court of Justice described it in 1951 in the Fisheries Case, saying that it was not obligatory by law. During the 1950’s the Committee of Experts and the International Law Commission recommended its use. It ended up becoming the legally required method for fixing the outer limit of the territorial sea, and contiguous zone, and Article 4 of the 1982 Law of the Sea Convention. Directly echoing Boggs, these provisions describe this method as producing a line every point of which is at a distance from the nearest point of the
baseline equal to the breadth of the territorial sea.\textsuperscript{47} The link between the envelope of arcs of circles method and radial projection is obvious. The arcs of circles method simply translates the principle of omni directional projection into technical terms. The arcs of circles method conceived and legally sanctioned for the purpose of establishing the outer limit of the territorial sea, is appropriate whenever the outer limit of a maritime jurisdiction is defined in terms of distance from the coast. Although the 1982 Convention on the Law of the Sea did not refer to this methods for fixing the outer limit of exclusive economic zone, many States have in fact used it. But the arcs of circles method was out of the question so long as the width of the continental shelf was defined according to the criteria of depth, exploitability and natural prolongation.

One consequence of radial projection is that there is no fixed relationship between the extent of the maritime rights generated by a coast and its length, any more than there is a fixed relationship between the extent of the maritime rights generated by a coast and the size of its hinterland.\textsuperscript{48}

Because of the advantage as referred at foot note 26, all States have intense interest to have in the least stretch of maritime front the smallest island, over which they can claim sovereignty.

\footnote{Prosper Weil, see note 3 above, p. 64.}
\footnote{Prosper Weil, see note 3 above, p. 65. With a 12 mile territorial Sea, for example, a tiny island 1 mile across (and so with an area of 0.78 square miles) would generate, thanks to its coastal opening of 3.14 miles, at territorial sea of 490 square miles. To generate the same area of territorial sea, a mainland territory would need of coastline 41 miles in length, in other words, 13 times the length of Small Island. Another example: a circular island with a coastal land of 1 mile (which means a diameter of 0.32 miles) generate a territorial sea of 464 square miles, while a mainland territory with the same length of coast generates only 12 square miles of territorial sea, almost 40 times less; ibid., p. 65.}
The Contribution of I.C.J. to the development of the Law of Maritime Delimitation

Chapter V

By creating an economic zone of 200 miles, France has managed to become the third world power in terms of the size of the maritime areas under its jurisdiction despite the fact that it does not occupy third place according to the length of its coastline and even less so in respect of the size of its land territory. The size of the exclusive economic zone proclaimed by the United States in 1983 is equally eloquent. These facts, with no one disputes, are none other than the application of the theory of coastal projections and an illustration of the principle that the land projects legally towards the sea in all directions, assuming, of course, that this projection does not run into a projection coming from a neighbouring territory, in which case the problem of delimitation will arise.49

5.14. Theory of Omni-directional Delimitation:

If a coast radiates in all directions when it is on its own, why should it cease to do so when its projection enters into competition with that of the coast of another State? The reduction of the distance to which it can project is the result of the cut-off effect inherent in delimitation, but there is no reason why the directions in which it projects should themselves be restricted. If there is radial projection seaward, then there must be radial projection in delimitation. In Gulf of Maine, the United States maintained that its coastal front at far end of the Gulf and the coastal front of Canada which borders the Gulf to the east both project into the sea in a direction at right angles to the coast; but, added the United States, the American coastal front at the far end of the Gulf, for reasons it is not necessary to dwell on here, must be regarded as the ‘primary’ and as such be

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49 Prosper Weil, see note 3 above, pp. 65 & 66.
given more weight than the Canadian coastal front, considered to be ‘secondary’. In countering this argument, Canada did not limit itself to rejecting any coastal hierarchy but also put forward the radial projection theory. It argued that the American coast does not, any more than the Canadian, project into the sea at right angles to the general direction of the coast.\footnote{Prosper Weil, see note 3 above, p. 66.}

In Gulf of Maine case, the Court in its judgment rejected the American argument as implying a hierarchy between natural phenomena which did not admit of value judgments. It did not refer to the radial projection theory. The controversy sketched out in Gulf of Maine case regarding radial projection was to reach new dimensions in Libya/Malta case. Libya did not deny that an isolated island in the ocean could radiate 360° degrees around its coasts, but it contested the use of radial projection for delimitation purposes. Libya argued that the only relevant segments are those which face one another, and all that matters is the projection of each of these segments in the direction of the one facing it. In this case, all that needed to be taken into account was the segments of the Maltese coast and of the Libyan coast which directly face one another. The Maltese segment was projecting only in a southern direction and the Libyan only in a northern. The purpose of this ‘ascertainment’ was to deny to Malta all rights over the seabed to the east and south-east of the Maltese islands. Malta protested against this resurgence of the frontal projection theory, arguing that its coasts give rise to rights in all directions. In this case discussion of radial projection came, once again, as a reaction to frontal projection arguments. The Court in its judgment in Libya/Malta limited the east ward limitation to a meridian passing
approximately at right angles to the two coastal segment facing one another, in
order to protect the interest of Italy. The radial projection theory may not have
been endorsed by the Court, but neither was it rejected by it.

In truth there is no reason why a coast should project in all directions if it
faces the ocean on its own, but only frontally when faced with a parallel coast so
that its projection intersects that of another coast. This is fully borne out by the
practice in delimitation agreements. There are many examples where sometimes
very short coasts have radiated in all directions and created for one or other (or
perhaps both) of the parties maritime jurisdictions stretching in all directions and
overflowing, on both sides, a so-called face to face relationship. In the same way,
the delimitation line drawn by the Court of Arbitration between France and
United Kingdom in the Atlantic region would make no sense if the Court had
thought that the Scilly Isles and Ushant projected only frontally towards one
another and had not taken the normal view that they project in all directions.\(^{51}\)

The radial projection inherent in the theory of maritime projections, governs
delimitation. The arcs of circles will be drawn starting from the two coasts, in all
directions, and delimitation will take place wherever the arcs emanating from one
coast cross with those emanating from the other. In this respect, there is an
obvious relationship between equidistance as a method of delimiting overlapping
maritime areas and the arcs of circles technique as a means of establishing the
outer limit of a maritime jurisdiction defined by distance. The basic elements of
the arcs of circles method, provided that the boundary of the territorial sea

\(^{51}\) Prosper Weil, see note 3 above, p. 68.
between neighbouring States be fixed according to a line each point of which would be at an equal distance from the nearest point on each of the coasts. Just as with the arcs of circles method, the equidistance method meant giving effect, in constructing the line, only to certain points on the coast, others having no influence. The equidistance method is to delimitation what the arcs of circles method is to the determination of the outer limits, the most developed technical expression of the distance criterion and of multi directional projection. They are like twins: there can not be one without the other.

The extent and shape of a State's maritime projection defined in terms of distance and governed by the radial projection concept will be determined by the pattern of its coastal opening, hence the crucial importance of the geographical configuration of the coastline. With the method known as the 'trace parallele' (which according to the Court in the description it gives for the territorial sea, consists of drawing the outer limit of the belt of territorial waters by following the coast in all its sinuosities) the line of the outer limit faithfully reflects the shape of the maritime front in its every detail, whether it is a matter of the territorial sea or of any other jurisdiction measured by distance. With this method, coastal geography exercises the maximum influence. But as the Court pointed out, although this method may be applied without difficulty to an ordinary coasts, which is not too broken, it can not be applied to a coast deeply indented and cut into or rugged. In these cases, it is necessary to turn to the arcs of circles methods mentioned above or the straight baselines methods which consists of selecting appropriate points on the low-water mark and drawing straight lines between
them. Like the arcs of circles method, the straight baselines method has become customary international law and found expression in the 1982 Convention.  

5.15. Conclusion:

Though States sovereignty protects itself seawards by means of maritime front, the law looks to it not the actual coastline in all its minutest detail and every irregularity, but a stylized coast determined by baselines and points deemed to be representative. Nowadays, international law considers baselines and base points a valid legal expression of the coastline for all maritime jurisdictions, not just the territorial sea.

Maritime jurisdictions are not measured by the length of the coast, and two coasts similar in length may, because of other coastal characteristics, generate maritime areas very different in size. It is the coastal opening which radiates seaward, not just the length of the coastline as measured by the surveyor. For example, if a mile of coast of one State gives rise to a certain area of territorial sea, continental shelf or exclusive economic zone, this does not mean that a mile of another State’s coast must produce the same area of territorial sea, continental shelf or exclusive economic zone. In addition, the number of base points determining the outer limit varies according to the configuration of the coast. The further from the coast the arcs of circles method is applied, the fewer the base points, and the greater the length of the outer limit determined by each.  

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52 Prosper Weil, see note 3 above, pp. 69 & 70.
53 Ibid, pp. 70-71.
There is no doubt that of all methods available, equidistance is the best way
of ensuring that the coastal configuration is reflected in the delimitation. An
equidistance line is not constructed on the basis of a general direction established
in a debatable manner. It takes account of the successive changes in the direction
of each of the coast concerned and thus is an objective reflection of the
complexity of the Coastal configurations.

It goes without saying that, just as in the case in implementing the arcs of
circles method in such a way as to reflect the coastline for purpose of title, the
implementation of the equidistance method so as to reflect the coastline for
purposes of delimitation presupposes that the baselines and basepoints fulfil
certain conditions. In the majority of cases, it is again geography which decides
the basepoints. They are geometrically determined, not artificially picked up, as
the drawing of the delimitation line progresses. In this sense, it is clear that any
cartographer can de facto trace such a boundary on the appropriate maps and
charts, and those traced by competent cartographers will for all practical purposes
agree. In some cases, a choice will still have to be made, for example, between a
line drawn on the basis of salient points on the continental coast and one drawn on
the basis of salient points on the islands, islets or rocks lying off the coast. The
real problem of equidistance will then be not so much its intrinsic value as the
question: equidistance between what and what? In Gulf of Maine, for example,
the Chamber pointed out the possible inconvenience of taking as base points tiny
islands, uninhabited rocks or low tide elevations, sometimes lying at a
considerable distance from terra firma and is objected to the equidistance method
proposed by Canada in that it would mean, in the inner section of the Gulf, the

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adoption of a line all of whose basepoints would be located on a handful of isolated rocks, some very distant from the coast, or on a few low-tide elevations.\textsuperscript{54}

5.15.(i) Coastal Length and Delimitation, The So-Called Principle of Proportionality:

In almost every case brought before the judges the party with the longest coastal front argues that this gives it the right to a greater area of maritime jurisdiction. According to this theory, the extent of maritime rights accruing to each State should be more or less in the same ratio as the length of the maritime fronts. In Libya/Malta, however, once the rift zone theory was put aside, the argument of proportionality appeared in all its purity.

The theory of the comparison of coastal lengths was considered in greatest depth in the joint opinion of judges, Bedjaoui, Ruda and Jimenez de Arechage in Libya/Malta. It may be true, the three judges noted, that maritime rights are an emanation of statehood, but nonetheless the extent and limits of those rights are given concrete form by the coastal front, and as a function of its geography, which comprises all its physical characteristics, length included. The shore, they observe, is a more or less important, more or less extensive, means of access to the sea, a parameter expressed in units of measurement. Since a great variety of elements in the coastal configuration are taken into account - orientation, curvature, opposite or adjacent relationship, general direction - it would appear striking and unusual, unjustifiable and unwarranted, not to deal likewise with the length of the coasts. In short because it is access to the sea which gives title to maritime jurisdiction.

\textsuperscript{54} Prosper Weil, see note 3 above, pp. 74 & 75.
jurisdiction, the breadth of contact with the sea, can not but govern the delimitation.\textsuperscript{55}

5.15.(ii) Equidistance, a Method Inherent in the Concept of Delimitation:

Whether one starts from the basis of title or its exercise, from the principle of adjacency or the criterion of distance, from the idea of coasts or of radial projection, all roads eventually lead to equidistance. Though this method has practical advantages, convenience and simplicity, its \textit{prima facie} equitable character.

According to well established case law, equidistance is not a method having some privileged status in relation to other methods,\textsuperscript{56} that it has no "intrinsic merits", which could make it the preferred method;\textsuperscript{57} that the equidistance method is just one among many and there is no obligation to use it or give it priority;\textsuperscript{58} that it is not the only appropriate method of delimitation nor even the only permissible point of departure, and that it can not be regarded as a general rule, or an obligatory method of delimitation, or a priority method, to be tested in every case.\textsuperscript{59}

Closer inspection may show this insistence that equidistance has no intrinsic merit to be less of an impregnable judicial constant than might seem at first sight. The refusal in the earlier judgments to accord equidistance any special legal function, was part and parcel of the ideas then prevailing in respect of the

\textsuperscript{55} Prosper Weil, \textit{see note 3 above}, pp. 76 & 77
\textsuperscript{56} I.C.J. \textit{Reports} 1982, \textit{see note 29 above}, para. 110
\textsuperscript{57} I.C.J. \textit{Reports} 1984, \textit{see note 35 above}, para. 110
\textsuperscript{58} Prosper Weil, \textit{see note 3 above}, p. 80
\textsuperscript{59} I.C.J. \textit{Reports} 1985, \textit{see note 32 above}, paras. 43 & 79
continental shelf. At a time when the continental shelf was linked to natural prolongation and when there was no principle of proximity inherent in the whole concept of continental shelf appurtenance, it was obviously impossible to see equidistance as part of the natural law of the continental shelf i.e. to treat it as logically necessary in the sense of being an inescapable a priori accompaniment of basic continental shelf doctrine. But the theory of the continental shelf today is no longer that of 1969, and the refusal to allow that equidistance has any fundamentalist character or juristic inevitability, has lost raison d'être. The language of 1969 has lapsed from grace. Reversing the order of the words, proximity (which is but another way of saying distance) is nowadays a fundamental part of the concept of the continental shelf, as well as the territorial sea, the contiguous zone and the exclusive economic zone. Equidistance flows from the ‘natural law’ of each of these jurisdictions. It is logically necessary and has a character of so to speak juristic inevitability. True enough, the Courts continue to repeat the traditional formulae about the absence of any intrinsic merit in equidistance, or any quality of privilege or precedence, but this is a hangover from the past, a survival of ideas no longer valid. Just as the light of a dead star still reaches us years later, out of date, judicial ideas take time to die out. So it was with the theory of natural physical prolongation and the declaratory concept of the delimitation of the continental shelf, the death of which, though it took place several years earlier, was pronounced only in 1985. So it is with the anti-fundamentalist statements about equidistance, still with us even though they are no more than the echo of doctrine belonging to history.  

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Prosper Weil, see note 3 above, pp. 80 & 81

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5.15.(iii). Libya / Malta - A Transitional Judgment:

The 1985 Judgment in Libya/Malta is significant as the Court recognises after so many years - and judgments - of hesitation, the primacy of distance in respect of title and, simultaneously, in the delimitation of maritime areas, including the continental shelf. From this primacy, the Court draws the inevitable negative conclusion that the physical facts of natural prolongation are irrelevant. However, it shrinks from following its logic through, and rejects the equally inevitable, positive result of the concept it has just adopted, equidistance as a provisional point of departure in the delimitation process.

The Court is unable to accept that, even as a preliminary and provisional step towards the drawing of a delimitation line, the equidistance method is one which must be used. The application of equitable principles in the particular relevant circumstances may still require the adoption of another method, or combination of methods, of delimitation, even from the outset.61

Just as in 1982 in the case of Tunisia/ Libya, the court half opened the door on the distance principle, so in 1985 in the case of Libya/Malta, the court half opened the door on equidistance as a first step but without immediately opening it wide. It is to be hoped that the Court will take the next opportunity to do so. The completion of the process initiates by Libya/Malta is insight.

5.15(iv). Equidistance not an Obligatory Method:

61 I.C.J. Reports 1985, see note 32 above, para.42
Let there be no misunderstanding. This plea for the recognition of the fundamental and inherent character of equidistance does not mean that every maritime delimitation should legally be equidistant. It is no more true today than in 1969 that there is a rule of law requiring every maritime boundary to be drawn according to the equidistance method and prescribing every other method. Otherwise, the decision would be legally predetermined and there would be no point in going to law. The rejection of the Danish and Dutch contentions on this point is decisive, and the main conclusion of the 1969 decision - the use of equidistance method of delimitation is not obligatory, remains as true as ever.62

The real reason for the non-obligatory nature of equidistance is no longer to be found in the non-fundamental character of this method but in the fact mentioned already, that although international law requires delimitation to be rooted in title, it also insists on an equitable outcome. Both conditions must be fulfilled. One alone is not sufficient. That is why under existing law the equidistance line is only provisional. This result of the distance criterion, the equidistance line, must at a second stage be tested, as a matter of equality, against the relevant circumstances. This dual nature of delimitation is a translation of the principle stated in the North Sea cases and repeated in all judgment since, including Libya / Malta, that equidistance is not a legally obligatory method.

62 Prosper Weil, see note 3 above, pp.82&83