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LAW OF THE SEA
MS. MARIA TELALIAN

Codification Division of the United Nations Office of Legal Affairs
LAW OF THE SEA
MS. MARIA TELALIAN

Outline

REQUIRED READINGS (printed format)

Legal instruments and documents

Case law
5. Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982, paras. 48, 66, 70, 71, 74, 79, 110, 128
8. Delimitation of the Maritime Boundary between Guinea and Guinea-Bissau, Arbitral Award of 14 February 1985, I.L.M, vol. XXV, No. 2, March 1986 (see esp. paras. 95, 103, 111) [not reproduced in electronic version]

12. *Award of the Arbitral Tribunal in the Second Stage of the Proceedings between Eritrea and Yemen (Maritime Delimitation), Decision of 17 December 1999, R.I.A.A*, vol. XXII, paras. 131-132, 155-156, 159


17. *Arbitration between Barbados and the Republic of Trinidad and Tobago, relating to the delimitation of the exclusive economic zone and the continental shelf between them, Decision of 11 April 2006, R.I.A.A*, vol. XXVII, paras. 221, 230-231, 244, 334-338, 350, 371-379


22. *Dispute Concerning Delimitation of the Maritime Boundary Between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar), Judgment of 14 March 2012, ITLOS Reports*, vol. 12 (2012), paras. 225-297, 316-322


26. Maritime Dispute (Peru v. Chile), Judgment, I.C.J. Reports 2014, paras. 177-186

**RECOMMENDED READINGS**

**Legal writings (not reproduced)**


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Course Outline

Territorial Sea, Straits and Archipelagic States
- 1982 Convention, articles 2-33, 34-45, 46-54

Exclusive Economic Zone Regime
- 1982 Convention, articles 55-75

Continental Shelf Regime
- 1982 Convention, articles 76-85

Marine Science Regimes
- 1982 Convention, arts.19(2)(j), 21(1)(g), 40, 54, 56(1)(b)(ii), 58(1), 77, 87(1)(f), 143, 238-65

The Regime of Islands
- 1982 Convention, article 121
- Clive Schofield, The Trouble with Islands: The Definition and Role of Islands in Maritime Boundary Delimitation, in: Maritime Boundary Disputes, Settlement Processes, and the Law of the Sea, Edited by Seoung-Yong Hong and Jon M. Van Dyke

**Baselines and State Practice**

- 1982 Convention, articles 3-16, 47 and 121

**Maritime Delimitation**

- 1982 Convention, articles 15, 74, 83
- Malcolm D. Evans, Relevant Circumstances and Maritime Delimitation, Oxford Monographs in International Law, 1989

**Delimitation Jurisprudence**

- North Sea Continental Shelf Cases (Denmark/Germany; The Netherlands/Germany), ICJ Judgment of February 1969, paragraphs 70-101
- Case concerning the Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic (Arbitral Award of 1977), paras 68, 97, 174,199, 238, 249
- Case Concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya) Judgment of the ICJ of 1982, paras 48, 66, 70, 71, 74, 79, 110, 128-128. See also the dissent of Judge Oda paras. 179, 183-184, 187
- Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America), ICJ Judgment of 1984, paras 124-5, 157, 194-199, 222
- Guinea/Guinea /Bissau Maritime Delimitation Case, Court of Arbitration constituted under an Agreement of 18 February 1985, paras 95, 103, 111
- Case Concerning the Continental Shelf (Libya Arab Jamahiriya/Malta), ICJ Judgment of 1985, paras 29, 33, 43, 52, 58, 61- 63, 73
- Case Concerning the Delimitation of Maritime Areas between Canada and the French Republic, Arbitral Award of 1992, paras 38, 40-47, 49, 68-69-74. See also the Dissenting Opinion of Prosper Weil (paras 1-15, 48)
- In the Matter of an Arbitration pursuant to an Agreement to Arbitrate dated 3 October 1996 between the State of Eritrea and the Government of the Republic of Yemen, Award of the Arbitral Tribunal in the Second Stage of the Proceedings (Maritime Delimitation), 17 December 1999, paras 131-132, 155-156, 159
- Case Concerning Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway), ICJ Judgment of 1993, paras 44-56, 68. See also the Separate Opinions of Judge Oda and Judge Stephen M. Schwebel, p. 126, 128-129

- Arbitration between Barbados and the Republic of Trinidad and Tobago, Arbitral Award of 11 April 2006, paras 221, 230-231, 244, 334-338, 350, 371-379

- Territorial and Maritime Dispute in the Caribbean Sea case, (Nicaragua v. Honduras), ICJ judgment of 8 October 2007, paras 272-287, 304. See also the Separate Opinion of Judge Ranjeva at para 10 and the Dissenting Opinion of Judge Torres Bernárdez at para 128

- Maritime Delimitation in the Black Sea (Romania v. Ukraine), ICJ Judgment of 2009, paras. 77-219

- Dispute Concerning Delimitation of the Maritime Boundary Between Bangladesh and Myanmar, in the Bay of Bengal (Bangladesh/Myanmar), ITLOS Judgment of 14 March 2012, paras. 225-240, 238-297, 316-22. See also Joint Declaration of Judges Ad hoc Mensah and Oxman as well as Nelson, Chandrasekhar Rao and Cot


- Peru v. Chile Maritime Dispute, Judgment of the ICJ of 27 January 2014, paras 177-186
International Court of Justice

North Sea Continental Shelf
(Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)
Judgment

_I.C.J. Reports 1969_, paras. 70-101
CONTINENTAL SHELF (JUDGMENT)

68. Secondly, it must be observed that no valid conclusions can be drawn from the fact that the faculty of entering reservations to Article 6 has been exercised only sparingly and within certain limits. This is the affair exclusively of those States which have not wished to exercise the faculty, or which have been content to do so only to a limited extent. Their action or inaction cannot affect the right of other States to enter reservations to whatever is the legitimate extent of the right.

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

70. The Court must now proceed to the last stage in the argument put forward on behalf of Denmark and the Netherlands. This is to the effect that if there was at the date of the Geneva Convention no rule of customary international law in favour of the equidistance principle, and no such rule was crystallized in Article 6 of the Convention, nevertheless such a rule has come into being since the Convention, partly because of its own impact, partly on the basis of subsequent State practice, and that this rule, being now a rule of customary international law binding on all States, including therefore the Federal Republic, should be declared applicable to the delimitation of the boundaries between the Parties respective continental shelf areas in the North Sea.

71. In so far as this contention is based on the view that Article 6 of the Convention has had the influence, and has produced the effect, described, it clearly involves treating that Article as a norm-creating provision which has constituted the foundation of, or has generated a rule which, while only conventional or contractual in its origin, has since passed into the general corpus of international law, and is now accepted as such by opinio juris, so as to have become binding even for countries which have never, and do not, become parties to the Convention. There is no doubt that this process is a perfectly possible one and does from time to time occur: it constitutes indeed one of the recognized methods by which new rules of customary international law may be formed. At the same time this result is not lightly to be regarded as having been attained.

72. It would in the first place be necessary that the provision con-
74. As regards the time element, the Court notes that it is over ten years since the Convention was signed, but that it is even now less than five since it came into force in June 1964, and that when the present proceedings were brought it was less than three years, while less than one had elapsed at the time when the respective negotiations between the Federal Republic and the other two Parties for a complete delimitation broke down on the question of the application of the equidistance principle. Although the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule, an indispensable requirement would be that within the period in question, short though it might be, 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 moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved.

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75. The Court must now consider whether State practice in the matter of continental shelf delimitation has, subsequent to the Geneva Convention, been of such a kind as to satisfy this requirement. Leaving aside cases which, for various reasons, the Court does not consider to be reliable guides as precedents, such as delimitations effected between the present Parties themselves, or not relating to international boundaries, some fifteen cases have been cited in the course of the present proceedings, occurring mostly since the signature of the 1958 Geneva Convention, in which continental shelf boundaries have been delimited according to the equidistance principle—in the majority of the cases by agreement, in a few others unilaterally—or else the delimitation was foreshadowed but has not yet been carried out. Amongst these fifteen are the four North Sea delimitations United Kingdom/Norway/Denmark-Netherlands, and Norway/Denmark already mentioned in paragraph 4 of this Judgment. But even if these various cases constituted more than a very small proportion of those potentially calling for delimitation in the world as a whole, the Court would not think it necessary to enumerate or evaluate them separately, since there are, a priori, several grounds which deprive them of weight as precedents in the present context.

76. To begin with, over half the States concerned, whether acting unilaterally or conjointly, were or shortly became parties to the Geneva Convention, and were therefore presumably, so far as they were concerned, acting actually or potentially in the application of the Convention. From their action no inference could legitimately be drawn as to the existence of a rule of customary international law in favour of the equidistance principle. As regards those States, on the other hand, which were not, and have not become parties to the Convention, the basis of their action can only be problematical and must remain entirely speculative. Clearly, they were not applying the Convention. But from that no inference could justifiably be drawn that they believed themselves to be applying a mandatory rule of customary international law. There is not a shred of evidence that they did and, as has been seen (paragraphs 22 and 23), there is no lack of other reasons for using the equidistance method, so that acting, or agreeing to act in a certain way, does not of itself demonstrate anything of a juridical nature.

77. 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 opinio juris:—for, in order to achieve this result, two conditions must be fulfilled. Not only must the acts concerned amount to a settled 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 opinio juris sive necessitatis. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts is not in itself enough. There are many international acts, e.g., in the field of ceremonial and protocol, which are performed almost invariably, but which are motivated only by considerations of courtesy, convenience or tradition, and not by any sense of legal duty.

78. In this respect the Court follows the view adopted by the Permanent Court of International Justice in the Lotus case, as stated in the following passage, the principle of which is, by analogy, applicable almost word for word, mutatis mutandis, to the present case (P.C.I.J., Series A, No. 10, 1927, at p. 28):

"Even if the rarity of the judicial decisions to be found . . . were sufficient to prove . . . the circumstance alleged . . . it would merely show that States had often, in practice, abstained from instituting criminal proceedings, and not that they recognized themselves as being obliged to do so; for only if such abstention were based on their being conscious of having a duty to abstain would it be possible to speak of an international custom. The alleged fact does not allow one to infer that States have been conscious of having such a duty; on the other hand, . . . there are other circumstances calculated to show that the contrary is true."

Applying this dictum to the present case, the position is simply that in certain cases—not a great number—the States concerned agreed to draw or did draw the boundaries concerned according to the principle of equidistance. There is no evidence that they so acted because they felt
legally compelled to draw them in this way by reason of a rule of customary law obliging them to do so—especially considering that they might have been motivated by other obvious factors.

79. Finally, it appears that in almost all of the cases cited, the delimitations concerned were median-line delimitations between opposite States, not lateral delimitations between adjacent States. For reasons which have already been given (paragraph 57) the Court regards the case of median-line delimitations between opposite States as different in various respects, and as being sufficiently distinct not to constitute a precedent for the delimitation of lateral boundaries. In only one situation discussed by the Parties does there appear to have been a geographical configuration which to some extent resembles the present one, in the sense that a number of States on the same coastline are grouped around a sharp curve or bend of it. No complete delimitation in this area has however yet been carried out. But the Court is not concerned to deny to this case, or any other of those cited, all evidential value in favour of the thesis of Denmark and the Netherlands. It simply considers that they are inconclusive, and insufficient to bear the weight sought to be put upon them as evidence of such a settled practice, manifested in such circumstances, as would justify the inference that delimitation according to the principle of equidistance amounts to a mandatory rule of customary international law,—more particularly where lateral delimitations are concerned.

80. There are of course plenty of cases (and a considerable number were cited) of delimitations of waters, as opposed to seabed, being carried out on the basis of equidistance—mostly of internal waters (lakes, rivers, etc.), and mostly median-line cases. The nearest analogy is that of adjacent territorial waters, but as already explained (paragraph 59) the Court does not consider this case to be analogous to that of the continental shelf.

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81. The Court accordingly concludes 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.

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82. The immediately foregoing conclusion, coupled with that reached earlier (paragraph 56) to the effect that the equidistance principle could not be regarded as being a rule of law on any a priori basis of logical necessity deriving from the fundamental theory of the continental shelf, leads to the final conclusion on this part of the case that the use of the equidistance method is not obligatory for the delimitation of the areas concerned in the present proceedings. In these circumstances, it becomes unnecessary for the Court to determine whether or not the configuration of the German North Sea coast constitutes a "special circumstance" for the purposes either of Article 6 of the Geneva Convention or of any rule of customary international law,—since once the use of the equidistance method of delimitation is determined not to be obligatory in any event, it ceases to be legally necessary to prove the existence of special circumstances in order to justify not using that method.

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83. The legal situation therefore is that the Parties are under no obligation to apply either the 1958 Convention, which is not opposable to the Federal Republic, or the equidistance method as a mandatory rule of customary law, which it is not. But as between States faced with an issue concerning the lateral delimitation of adjacent continental shelves, there are still rules and principles of law to be applied; and in the present case it is not the fact either that rules are lacking, or that the situation is one for the unfettered appreciation of the Parties. Equally, it is not the case that if the equidistance principle is not a rule of law, there has to be as an alternative some other single equivalent rule.

84. As already indicated, the Court is not called upon itself to delimit the areas of continental shelf appertaining respectively to each Party, and in consequence is not bound to prescribe the methods to be employed for the purposes of such a delimitation. The Court has to indicate to the Parties the principles and rules of law in the light of which the methods for eventually effecting the delimitation will have to be chosen. The Court will discharge this task in such a way as to provide the Parties with the requisite directions, without substituting itself for them by means of a detailed indication of the methods to be followed and the factors to be taken into account for the purposes of a delimitation the carrying out of which the Parties have expressly reserved to themselves.

85. It emerges from the history of the development of the legal régime of the continental shelf, which has been reviewed earlier, that the essential reason why the equidistance method is not to be regarded as a rule of law is that, if it were to be compulsorily applied in all situations, this would not be consonant with certain basic legal notions which, as has been observed in paragraphs 48 and 55, have from the beginning reflected the opinio juris in the matter of delimitation; those principles being 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. On a foundation of very general precepts of justice and good faith, actual rules of law are here involved which govern the
delimitation of adjacent continental shelves—that is to say, rules binding upon States for all delimitations;—in short, 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, in accordance with the ideas which have always underlain the development of the legal régime of the continental shelf in this field, namely:

(a) 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;

(b) 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 exist and may be employed, alone or in combination, according to the areas involved;

(c) for the reasons given in paragraphs 43 and 44, 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.

* * *

86. It is now necessary to examine these rules more closely, as also certain problems relative to their application. So far as the first rule is concerned, the Court would recall not only that the obligation to negotiate which the Parties assumed by Article 1, paragraph 2, of the Special Agreements arises out of the Truman Proclamation, which, for the reasons given in paragraph 47, must be considered as having propounded the rules of law in this field, but also that this obligation merely constitutes a special application of a principle which underlies all international relations, and which is moreover recognized in Article 33 of the Charter of the United Nations as one of the methods for the peaceful settlement of international disputes. There is no need to insist upon the fundamental character of this method of settlement, except to point out that it is emphasized by the observable fact that judicial or arbitral settlement is not universally accepted.

87. As the Permanent Court of International Justice said in its Order of 19 August 1929 in the case of the Free Zones of Upper Savoy and the District of Gex, the judicial settlement of international disputes "is simply an alternative to the direct and friendly settlement of such disputes between the parties" (P.C.I.J., Series A, No. 22, at p. 13). Defining the content of the obligation to negotiate, the Permanent Court, in its

Advisory Opinion in the case of Railway Traffic between Lithuania and Poland, said that the obligation was "not only to enter into negotiations but also to pursue them as far as possible with a view to concluding agreements", even if an obligation to negotiate did not imply an obligation to reach agreement (P.C.I.J., Series A/B, No. 42, 1931, at p. 116). In the present case, it needs to be observed that whatever the details of the negotiations carried on in 1965 and 1966, they failed of their purpose because the Kingdoms of Denmark and the Netherlands, convinced that the equidistance principle alone was applicable, in consequence of a rule binding upon the Federal Republic, saw no reason to depart from that rule; and equally, given the geographical considerations stated in the last sentence of paragraph 7 above, the Federal Republic could not accept the situation resulting from the application of that rule. So far therefore the negotiations have not satisfied the conditions indicated in paragraph 85 (a), but fresh negotiations are to take place on the basis of the present Judgment.

* * *

88. The Court comes next to the rule of equity. The legal basis of that rule in the particular case of the delimitation of the continental shelf as between adjoining States has already been stated. It must however be noted that the rule rests also on a broader basis. Whatever the legal reasoning of a court of justice, its decisions must, by definition be just, and therefore in that sense equitable. Nevertheless, when mention is made of a court dispensing justice or declaring the law, what is meant is that the decision finds its objective justification in considerations lying not outside but within the rules, and in this field it is precisely a rule of law that calls for the application of equitable principles. There is consequently no question in this case of any decision ex aequo et bono, such as would only be possible under the conditions prescribed by Article 38, paragraph 2, of the Court's Statute. Nor would this be the first time that the Court has adopted such an attitude, as is shown by the following passage from the Advisory Opinion given in the case of Judgments of the Administrative Tribunal of the I.I.O. upon Complaints Made against Unesco (I.C.J. Reports 1956, at p. 100):

"In view of this the Court need not examine the allegation that the validity of the judgments of the Tribunal is vitiated by excess of jurisdiction on the ground that it awarded compensation ex aequo et bono. It will confine itself to stating that, in the reasons given by the Tribunal in support of its decision on the merits, the Tribunal said: 'That redress will be ensured ex aequo et bono by the granting to the complainant of the sum set forth below.' It does not appear from the context of the judgment that the Tribunal thereby intended to depart from principles of law. The apparent intention was to say
that, as the precise determination of the actual amount to be awarded could not be based on any specific rule of law, the Tribunal fixed what the Court, in other circumstances, has described as the true measure of compensation and the reasonable figure of such compensation (Corfu Channel case, Judgment of December 15th, 1949, I.C.J. Reports 1949, p. 249)."

89. It must next be observed that, in certain geographical circumstances which are quite frequently met with, the equidistance method, despite its known advantages, leads unquestionably to inequity, in the following sense:

(a) The slightest irregularity in a coastline is automatically magnified by the equidistance line as regards the consequences for the delimitation of the continental shelf. Thus it has been seen in the case of concave or convex coastlines that if the equidistance method is employed, then the greater the irregularity and the further from the coastline the area to be delimited, the more unreasonable are the results produced. So great an exaggeration of the consequences of a natural geographical feature must be remedied or compensated for as far as possible, being of itself creative of inequity.

(b) In the case of the North Sea in particular, where there is no outer boundary to the continental shelf, it happens that the claims of several States converge, meet and intercross in localities where, despite their distance from the coast, the bed of the sea still unnervingly consists of continental shelf. A study of these convergences, as revealed by the maps, shows how inequitable would be the apparent simplification brought about by a delimitation which, ignoring such geographical circumstances, was based solely on the equidistance method.

90. If for the above reasons equity excludes the use of the equidistance method in the present instance, as the sole method of delimitation, the question arises whether there is any necessity to employ only one method for the purposes of a given delimitation. There is no logical basis for this, and no objection need be felt to the idea of effecting a delimitation of adjoining continental shelf areas by the concurrent use of various methods. The Court has already stated why it considers that the international law of continental shelf delimitation does not involve any imperative rule and permits resort to various principles or methods, as may be appropriate, or a combination of them, provided that, by the application of equitable principles, a reasonable result is arrived at.

91. 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 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 the 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.

92. It has however been maintained that no one method of delimitation can prevent such results and that all can lead to relative injustices. This argument has in effect already been dealt with. It can only strengthen the view that it is necessary to seek not one method of delimitation but one goal. It is in this spirit that the Court must examine the question of how the continental shelf can be delimited when it is in fact the case that the equidistance principle does not provide an equitable solution. As the operation of delimiting is a matter of determining areas appertaining to different jurisdictions, it is a truism to say that the determination must be equitable; rather is the problem above all one of defining the means whereby the delimitation can be carried out in such a way as to be recognized as equitable. Although the Parties have made it known that they intend to reserve for themselves the application of the principles and rules laid down by the Court, it would, even so, be insufficient simply to rely on the rule of equity without giving some degree of indication as to the possible ways in which it might be applied in the present case, it being understood that the Parties will be free to agree upon one method rather than another, or different methods if they so prefer.

93. In fact, there is no legal limit to the considerations which States 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.

94. In balancing the factors in question it would appear that various aspects must be taken into account. Some are related to the geological, others to the geographical aspect of the situation, others again to the
idea of the unity of any deposits. These criteria, though not entirely precise, can provide adequate bases for decision adapted to the factual situation.

95. The institution of the continental shelf has arisen out of the recognition of a physical fact; and the link between this fact and the law, without which that institution would never have existed, remains an important element for the application of its legal régime. The continental shelf is, by definition, an area physically extending the territory of most coastal States into a species of platform which has attracted the attention first of geographers and hydrographers and then of jurists. The importance of the geological aspect is emphasized by the care which, at the beginning of its investigation, the International Law Commission took to acquire exact information as to its characteristics, as can be seen in particular from the definitions to be found on page 131 of Volume 1 of the Yearbook of the International Law Commission for 1956. The apportionment of the shelf to the countries in front of whose coastlines it lies, is therefore a fact, and it can be useful to consider the geology of that shelf in order to find out whether the direction taken by certain configurational features should influence delimitation because, in certain localities, they point-up the whole notion of the apportionment of the continental shelf to the State whose territory it does in fact prolong.

96. The doctrine of the continental shelf is a recent instance of encroachment on maritime expanses which, during the greater part of history, appertained to no-one. The contiguous zone and the continental shelf are in this respect concepts of the same kind. In both instances the principle is applied that the land dominates the sea: it is consequently necessary to examine closely the geographical configuration of the coastlines of the countries whose continental shelves are to be delimited. This is one of the reasons why the Court does not consider that markedly pronounced configurations can be ignored; for, since the land is the legal source of the power which a State may exercise over territorial extensions to seaward, it must be clearly established what features do in fact constitute such extensions. Above all is this the case when what is involved is no longer areas of sea, such as the contiguous zone, but stretches of submerged land; for the legal régime of the continental shelf is that of soil and a subsoil, two words evocative of the land and not of the sea.

97. Another factor to be taken into consideration in the delimitation of areas of continental shelf as between adjacent States is the unity of any deposits. The natural resources of the subsoil of the sea in those parts which consist of continental shelf are the very object of the legal régime established subsequent to the Truman Proclamation. Yet it frequently occurs that the same deposit lies on both sides of the line dividing a continental shelf between two States, and since it is possible to exploit such a deposit from either side, a problem immediately arises on account of the risk of prejudicial or wasteful exploitation by one or other of the States concerned. To look no farther than the North Sea, the practice of States shows how this problem has been dealt with, and all that is needed is to refer to the undertakings entered into by the coastal States of that sea with a view to ensuring the most efficient exploitation or the apportionment of the products extracted—(see in particular the agreement of 10 March 1965 between the United Kingdom and Norway, Article 4; the agreement of 6 October 1965 between the Netherlands and the United Kingdom relating to "the exploitation of single geological structures extending across the dividing line on the continental shelf under the North Sea"; and the agreement of 14 May 1962 between the Federal Republic and the Netherlands concerning a joint plan for exploiting the natural resources underlying the area of the Ems Estuary where the frontier between the two States has not been finally delimited.) The Court does not consider that unity of deposit constitutes anything more than a factual element which it is reasonable to take into consideration in the course of the negotiations for a delimitation. The Parties are fully aware of the existence of the problem as also of the possible ways of solving it.

98. A final factor to be taken account of is the element of a reasonable degree of proportionality which a delimitation effected according to equitable principles ought to bring about between the extent of the continental shelf appertaining to the States concerned and the lengths of their respective coastlines,—these being measured according to their general direction in order to establish the necessary balance between States with straight, and those with markedly concave or convex coasts, or to reduce very irregular coastlines to their truer proportions. The choice and application of the appropriate technical methods would be a matter for the parties. One method discussed in the course of the proceedings, under the name of the principle of the coastal front, consists 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.

99. In a sea with the particular configuration of the North Sea, and in view of the particular geographical situation of the Parties' coastlines upon that sea, the methods chosen by them for the purpose of fixing the delimitation of their respective areas may happen in certain localities to lead to an overlapping of the areas appertaining to them. The Court considers that such a situation must be accepted as a given fact and resolved either by an agreed, or failing that by an equal division of the overlapping areas, or by agreements for joint exploitation, the latter solution appearing particularly appropriate when it is a question of preserving the unity of a deposit.

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100. The Court has examined the problems raised by the present case in its own context, which is strictly that of delimitation. Other questions relating to the general legal régime of the continental shelf, have been examined for that purpose only. This régime furnishes an example of a legal theory derived from a particular source that has secured a general following. As the Court has recalled in the first part of its Judgment, it was the Truman Proclamation of 28 September 1945 which was at the origin of the theory, whose special features reflect that origin. It would therefore not be in harmony with this history to over-systematize a pragmatic construct the developments of which have occurred within a relatively short space of time.

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101. For these reasons,

THE COURT,

by eleven votes to six,

finds 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, without encroachment on the natural prolongation of the land territory of the other;

(2) if, in the application of the preceding sub-paragraph, 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 régime of joint jurisdiction, user, or exploitation for the zones of overlap or any part of them;

(D) in the course of the 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 effects, actual or prospective, of any other continental shelf delimitations between adjacent States in the same region.

Done in English and in French, the English text being authoritative at the Peace Palace, The Hague, this twentieth day of February, one thousand nine hundred and sixty-nine, in four copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Federal Republic of Germany, to the Government of the Kingdom of Denmark and to the Government of the Kingdom of the Netherlands, respectively.

(Signed) J. L. BUSTAMANTE R.,
President.

(Signed) S. AQUARONE,
Registrar.

Judge Sir Muhammad ZAFRULLA KHAN makes the following declaration:

I am in agreement with the Judgment throughout but would wish to add the following observations.

The essence of the dispute between the Parties is that the two Kingdoms claim that the delimitation effected between them under the Agreement of 31 March 1966 is binding upon the Federal Republic and that the Federal Republic is bound to accept the situation resulting therefrom, which would confine its continental shelf to the triangle formed by lines A-B-E and C-D-E in Map 3. The Federal Republic stoutly resists that claim.

Not only is Article 6 of the Geneva Convention of 1958 not opposable to the Federal Republic but the delimitation effected under the Agreement of 31 March 1966 does not derive from the provisions of that Article as Denmark and the Netherlands are neither States "whose coasts are opposite each other" within the meaning of the first paragraph of that Article nor are they "two adjacent States" within the meaning of the
Arbitral Court

Delimitation of the continental shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic
Decision of 30 June 1977

Reports of International Arbitral Awards, vol. XVIII, paras. 68, 97, 174, 199, 238, 249
6 in the present proceedings is very small. This is because, as stated in paragraph 61, the combined effect of the reservations and of the United Kingdom’s rejection of them is to render the rules of customary law applicable where application of the equidistance principle under Article 6 is excluded by one of the French reservations and because, in the circumstances of the present case, the rules of customary law lead to much the same result as the provisions of Article 6. In deference to the very full arguments of the Parties addressed to it concerning the applicability of the 1958 Convention in the present proceedings, the Court has examined in detail each aspect of that question. However, as will now be explained, the effect of applying or of not applying the provisions of the Convention, and in particular of Article 6, will make not much practical difference, if any, to the actual course of the boundary in the arbitration area.

66. Article 6, paragraphs 1 and 2, provides:

  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 shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary is the median line, every point of which is equidistant from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured.

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

The case with which the Court is here concerned is one where, after negotiations for the determination of the boundary by agreement, the States concerned failed to reach agreement, and it is therefore the provisions of these paragraphs applicable in the absence of agreement which come under consideration in the present proceedings. The arguments addressed to the Court by the Parties concerning the applicability or non-applicability of these provisions are directed, on the one side, to accentuate, on the other, to minimise the rôles of the equidistance method as a legal criterion for the delimitation of continental shelf boundaries.

67. Thus, in invoking the application of Article 6, paragraph 1, the United Kingdom claims that this paragraph places an onus of proof upon the French Republic to show the existence of any "special circumstances" on which it relies and to show that these circumstances justify a boundary other than the median line as defined by the paragraph. The French Republic, on the other hand, in contesting the applicability of Article 6 and invoking the rules of customary law, claims the governing principle to be that the delimitation must be equitable and the equidistance principle to be merely one of numerous "methods" which may in certain circumstances be used to produce an equitable delimitation. Neither of these views of the equidistance "principle" or "method", however, appears to the Court to place it in its true perspective.

68. 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 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, proprio motu, take cognisance when applying Article 6.

69. It also follows that the relevance of "special circumstances" in the application of Article 6 does not depend on a claim to invoke special circumstances having been advanced by the interested State when ratifying or acceding to the Convention. That this is the legal position under Article 6 is fully recognised by the United Kingdom, which concedes that the French Republic may put forward a claim to "special circumstances" in these proceedings, whether or not in 1965 it made a reservation with regard to those special circumstances. Clearly, this feature of Article 6 further underlines the full liberty of the Court in appreciating the geographical and other circumstances relevant to the determination of the continental shelf boundary, and at the same time reduces the possibility of any difference in the appreciation of these circumstances under Article 6 and customary law.

70. The Court does not overlook that under Article 6 the equidistance principle ultimately possesses an obligatory force which it does not have in the same measure under the rules of customary law: for Article 6 makes the application of the equidistance principle a matter of treaty obligation for Parties to the Convention. But the combined character of the equidistance-special circumstances rule means that the obligation to apply the equidistance principle is always one qualified by the condition "unless another boundary line is justified by special circumstances". Moreover, the travaux préparatoires of Article 6, in the International Law Commission and at the Geneva Conference of 1958, show that this condition was introduced into paragraphs 1 and 2 of the Article because it was recognised that, owing to particular geographical features or configurations, application of the equidistance principle might not infrequently result in an unreasonable or inequitable delimitation of the continental shelf. In short, the rôle of the "special circumstances" condition in Article 6 is to ensure an equitable delimitation; and the combined "equidistance-special circumstances rule", in effect, gives particular expression to a general norm that, failing agreement, the boundary between States abutting on the same continental shelf is to be determined on equitable principles. In addition, Article 6 neither defines "special circumstances" nor lays down the criterion by which it is to be assessed whether any given circumstances justify a boundary line other than the equidistance line. Consequently, even under Article 6 the question whether the use of the equidistance principle or some other method is appropriate for achieving an equitable delimitation is very much a matter of appreciation in the light of the geographical and other circumstances. In other words, even under Article 6 it is the geographical and other circumstances of any given of the equidistance or any other method of delimitation in any given case, the Revised Single Negotiating Text would not appear to visualise the solution of cases like the present one on principles materially different from those applicable under the 1958 Convention or under general international law. What the Court thinks evident, however, is that the extension seawards of the maritime zones of States, for which the Revised Single Negotiating Text provides, cannot fail to increase the significance of the effects of individual geographical features in deflecting the course of a lateral equidistance boundary between "adjacent" States.

97. In short, this Court considers 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 methods of delimitation in any given case, whether under the 1958 Convention or customary law, has therefore 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 difference between a "lateral" boundary between "adjacent" States and a "median" boundary between "opposite" States.

98. The French Republic, in its account of the principles and rules applicable in the delimitation of the continental shelf, also invoked two further principles as specific rules of customary law, namely, "proportionality" and the "reasonable evaluation of the effects of natural features". These concepts are clearly inherent in the notion of a delimitation in accordance with equitable principles, and thus form an element in the appreciation of the appropriateness of the equidistance or any other method of delimitation. They hardly seem, however, to have the character of specific principles or rules of delimitation assigned to them by the French Republic.

99. In particular, this Court does not consider that the adoption in the North Sea Continental Shelf cases of the criterion of a reasonable degree of proportionality between the areas of continental shelf and the lengths of the coastlines means that this criterion is one for application in all cases. On the contrary, it was the particular geographical situation of three adjoining States situated on a concave coast which gave relevance to that criterion in those cases. In the present case, the rôle of proportionality in the delimitation of the continental shelf is, in the view of this Court, a broader one, not linked to any specific geographical feature. It is rather a factor to be taken into account in appreciating the effects of geographical features on the equitable or inequitable character of a delimitation, and in particular of a delimitation by application of the equidistance method.

100. A State's continental shelf, being the natural prolongation under the sea of its territory, must in large measure reflect the configuration of its coasts. Similarly, when two "opposite" or "adjacent" States abut on the same continental shelf, their continental shelf boundary must in large measure reflect the respective configurations of their two coasts. But particular
side of the median line”, the United Kingdom accepts that this may in some cases be material to the delimitation of a boundary between “opposite” States. “Doubtless it may be possible”, it concedes, “to plead as special circumstances justifying a boundary other than the median line the presence of islets or small islands belonging to one country but nearer the coast of an opposite country, when those islets or islands are not of sufficient importance as to warrant the influence they bear upon the course of the median line merely by their presence in a particular location.” In its view, however, the matter is quite different when the islands in question are of such political and economic importance as clearly to warrant the influence they have upon the course of the boundary. This, the United Kingdom maintains, is precisely the case of the Channel Islands, having regard to the historical, political and economic position of these island communities.

174. The United Kingdom contests the French Government’s thesis that the whole Channel Islands region forms part of the natural prolongation of the land mass of France. That thesis, according to the United Kingdom, confuses the geological with the juridical concept of the continental shelf. It refers to a statement in the Judgment in the North Sea Continental Shelf cases (paragraph 95) in which, after observing that the institution of the continental shelf “has arisen out of the recognition of a physical fact”, the Court continued: “and the link between this fact and the law, without which that institution would never have existed, remains an important element for the application of its legal regime”. This means, the United Kingdom says, that the principle of natural prolongation is not of a prolongation under the sea of a continent or geographical land mass but of the land territory of a particular State. The limits of that territory, it adds, are not a product of natural but of political history. Again, when the Judgment in those cases states that there can be no question of totally refashioning nature, the United Kingdom maintains that what it means is that there can be no refashioning of a particular State’s geographical situation within its particular boundaries. In short, argues the United Kingdom, “the continental shelf of a State in the juridical sense is—and can only be—that which constitutes a natural prolongation of its land territory such as it has been fashioned by its history.”

175. As to the security, defence and navigational considerations invoked by the French Republic, the United Kingdom objects that these considerations may equally be urged in favour of a continuous continental shelf between its mainland and the Channel Islands for the defence of which the United Kingdom is responsible. The French Republic’s reference to defence arrangements made between the competent French and British authorities, delimiting their respective zones of responsibility in the Channel, it considers to be without any pertinence. Zonal defence arrangements, it insists, have little or nothing to do with national frontiers, and much less with continental shelf boundaries. Similarly, it insists that dividing lines of responsibility in the Channel adopted in a recent plan for pollution control and in other arrangements for air traffic control and sea rescue are purely for administrative convenience and are irrelevant to the matter before the Court.

176. The United Kingdom maintains that for a number of reasons the specific features of the Channel Islands region call for an intermediate solution that effects a more appropriate and a more equitable balance between the respective claims and interests of the Parties.

199. The Court considers that the primary element in the present problem is the fact that the Channel Islands region forms part of the English Channel, throughout the whole length of which the Parties face each other as opposite States having almost equal coastlines. The problem of the Channel Islands apart, the continental shelf boundary in the Channel indicated by both customary law and Article 6, as the Court has previously stated, is a median line running from end to end of the Channel. The existence of the Channel Islands close to the French coast, if permitted to divert the course of that mid-Channel median line, effects a radical distortion of the boundary creative of inequity. The case is quite different from that of small islands on the right side of or close to the median line, and it is also quite different from the case where numerous islands stretch out one after another long distances from the mainland. The precedents of semi-enclaves, arising out of such cases, which are invoked by the United Kingdom, do not, therefore, seem to the Court to be in point. The Channel Islands are not only “on the wrong side” of the mid-Channel median line but wholly detached geographically from the United Kingdom.

200. The case of St. Pierre et Miquelon, although it clearly presents some analogies with the present case, also differs from it in important respects. First, that case is not one of islands situated in a channel between the coasts of opposite States, so that no question arises there of a delimitation between States, whose coastlines are in an approximately equal relation to the continental shelf to be delimited. Secondly, there being nothing to the east of St. Pierre et Miquelon except the open waters of the Atlantic Ocean, there is more scope for redressing inequities than in the narrow waters of the English Channel. Even so, it appears from the Relevé des Conclusions that a delimitation according no more than a 12-mile zone of territorial sea to St. Pierre et Miquelon has been agreed between the French Republic and Canada. True, it also appears that this agreement includes a reservation of certain special privileges for St. Pierre et Miquelon; but for these special privileges there is a counterpart in the considerable extent of continental shelf left to Canada in the Atlantic to seawards of the islands.

201. In the actual circumstances of the Channel Islands region, where the extent of the continental shelf is comparatively modest and the scope for adjusting the equities correspondingly small, the Court considers that the situation demands a twofold solution. First, in order to maintain the appropriate balance between the two States in relation to the continental shelf as riparian States of the Channel with approximately equal coastlines, the Court decides that the primary boundary between them shall be a median line, linking Point D of the agreed eastern segment to Point E of the western agreed segment. In the light of the Court’s previous decisions regarding the course of the boundary in the English Channel, this means that throughout the whole length of the Channel comprised within the arbitration area the primary boundary of the continental shelf will be a mid-Channel median
boundary in the Atlantic region, having regard to the various features of the situation in the region to which the Court has drawn attention. The Court has already held both that Article 6 governs the delimitation in the Atlantic region and that there is no question of any casus omissus which does not fall within the scope of either paragraph 1 or paragraph 2 of the Article. The question, therefore, is whether it is paragraph 1, dealing with "opposite" States, or paragraph 2, dealing with "adjacent" States, which is applicable. In the pleadings both Parties have taken it for granted that, owing to the wide expanse of sea separating the two coasts at the entrance to the Channel, the situation cannot be considered one of "adjacent" States within the meaning of paragraph 2 of Article 6. The controversy between them has been as to whether the "opposite" States relationship, which certainly exists within the entrances to the Channel, should be considered as continuing into the Atlantic region or whether, owing to the cessation of the "opposing" coasts of the entrances to the Channel, the situation should be considered to fall outside paragraph 1, as well as paragraph 2, of Article 6. The United Kingdom assumes that, if the situation is legally one of "opposite" States governed by paragraph 1, the pronouncement in the North Sea Continental Shelf cases that the shelf can only be delimited by means of a median line automatically applies; and that "ignoring the presence of islets, rocks and minor coastal projections, the disproportionately distorting effect of which can be eliminated by other means, such a line must effect an equal division of the particular area involved" (I.C.J. Reports 1969, paragraph 57). The French Republic assumes that, in the absence of coasts beyond Ushant and the Scilly Isles, the method of delimitation by equidistance from the baselines of the coasts of the two countries loses all its validity. Both these assumptions appear to the Court to oversimplify the legal situation.

238. The rules of delimitation laid down in the two paragraphs of Article 6 are essentially the same. In the absence of agreement, and unless another boundary is justified by special circumstances, the boundary is to be the line which is equidistant from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured. In paragraph 1 the line is designated "the median line every point of which is equidistant from the nearest points of the baselines" etc.; in paragraph 2 it is simply referred to as the boundary "determined by application of the principle of equidistance from the nearest points of the baselines" etc. But both the legal rule and the method of delimitation prescribed in the two paragraphs are precisely the same. Consequently, there is nothing in the language of Article 6 to imply that in situations falling under paragraph 1 the virtues of the equidistance principle as a method of effecting an equitable delimitation are in any way superior to those which it possesses in situations falling under paragraph 2. The emphasis placed in the North Sea Continental Shelf cases on the difference between the situations of "opposite" and "adjacent" States reflects not a difference in the legal régime applicable to the two situations but a difference in the geographical conditions in which the applicable legal régime operates.

239. As this Court of Arbitration has already pointed out in paragraphs 81-94, the appropriateness of the equidistance or any other method French Republic in 1964. The Scilly Isles likewise form part of the land mass of the United Kingdom and, although some 21 miles distant from the mainland, they are unquestionably islands offshore of the United Kingdom which, both geographically and politically, form part of its territory. In fact, the existing 12-mile fishery zones of the mainland and of the Scilly Isles merge into one and, if the United Kingdom exercises the right which it claims to establish a 12-mile territorial sea, the same will be the case with their territorial sea. Both Ushant and the Scilly Isles are, moreover, islands of a certain size and populated; and, in the view of the Court, they both constitute natural geographical facts of the Atlantic region which cannot be disregarded in delimiting the continental shelf boundary without "refashioning geography". The problem therefore is, without disregarding Ushant and the Scillies, to find a method of remediying in an appropriate measure the distorting effect on the course of the boundary of the more westerly position of the Scillies and the disproportion which it produces in the areas of continental shelf accruing to the French Republic and the United Kingdom.

249. The Court notes that in a large proportion of the delimitations known to it, where a particular geographical feature has influenced the course of a continental shelf boundary, the method of delimitation adopted has been some modification or variant of the equidistance principle rather than its total rejection. In the present instance, the problem also arises precisely from the distorting effect of a geographical feature in circumstances in which the line equidistant from the coasts of the two States would otherwise constitute the appropriate boundary. Consequently, it seems to the Court to be in accord not only with the legal rules governing the continental shelf but also with State practice to seek the solution in a method modifying or varying the equidistance method rather than to have recourse to a wholly different criterion of delimitation. The appropriate method, in the opinion of the Court, is to take account of the Scilly Isles as part of the coastline of the United Kingdom but to give them less than their full effect in applying the equidistance method. Just as it is not the function of equity in the delimitation of the continental shelf completely to refashion geography, so it is also not the function of equity to create a situation of complete equity where nature and geography have established an inequity. Equity does not, therefore, call for coasts, the relation of which to the continental shelf is not equal, to be treated as having completely equal effects. What equity calls for is an appropriate abatement of the disproportionate effects of a considerable projection on to the Atlantic continental shelf of a somewhat attenuated portion of the coast of the United Kingdom.

250. The abatement of these disproportionate effects, as previously indicated in paragraph 27, does not entail any nice calculations of proportionality in regard to the total areas of continental shelf accruing to the Parties in the Atlantic region. This is because, as pointed out in paragraphs 99-101, the element of "proportionality" in the delimitation of the continental shelf does not relate to the total partition of the area of shelf among the coastal States concerned, its rôle being rather that of a criterion to assess the distorting effects of particular geographical features and the extent of the resulting inequity. In the present instance, "proportionality" comes into ac-
International Court of Justice

Continental Shelf
(Tunisia/Libyan Arab Jamahiriya)
Judgment

I.C.J. Reports 1982, paras. 48, 66, 70, 71, 74, 79, 110, 128
dure laid down in United Nations document A/CONF.62/62 of 14 April 1978 which defines, in paragraphs 10 and 11, the conditions which have to be fulfilled in order to introduce provisions into the ICNT and, since it changed its name, into the draft convention.

47. Article 76 and Article 83 of the draft convention are the provisions of the draft convention prepared by the Conference which may be relevant as incorporating new accepted trends to be taken into account in the present case. According to Article 76, paragraph 1,

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

Paragraphs 2 to 9 of the Article, which deal with details of the outer limits of the continental shelf, can be disregarded for the purposes of the present Judgment. While paragraph 10 states that the provisions of the Article "are without prejudice to the question of delimitation of the continental shelf between States with opposite or adjacent coasts", the definition given in paragraph 1 cannot be ignored. That definition consists of two parts, employing different criteria. According to the first part of paragraph 1 the natural prolongation of the land territory is the main criterion. In the second part of the paragraph, the distance of 200 nautical miles is in certain circumstances the basis of the title of a coastal State. The legal concept of the continental shelf as based on the "species of platform" has thus been modified by this criterion. The definition in Article 76, paragraph 1, also discards the exploitability test which is an element in the definition of the Geneva Convention of 1958.

48. The principle that the natural prolongation of the coastal State is a basis of its legal title to continental shelf rights does not in the present case, as explained above, necessarily provide criteria applicable to the delimitation of the areas appertaining to adjacent States. In so far as Article 76, paragraph 1, of the draft convention repeats this principle, it introduces no new element and does not therefore call for further consideration. In so far however as the paragraph provides that in certain circumstances the distance from the baseline, measured on the surface of the sea, is the basis for the title of the coastal State, it departs from the principle that natural prolongation is the sole basis of the title. The question therefore arises whether the concept of the continental shelf as contained in the second part of the definition is relevant to the decision of the present case. It is only the legal basis of the title to continental shelf rights - the mere distance from the coast - which can be taken into account as possibly having consequences for the claims of the Parties. Both Parties rely on the principle of natural prolongation: they have not advanced any argument based on the trend” towards the distance principle. The definition in Article 76, paragraph 1, therefore affords no criterion for delimitation in the present case.

* * *

49. With regard to the delimitation of the continental shelf between States with opposite or adjacent coasts, Article 83, paragraph 1, of the Informal Composite Negotiating Text of the Third United Nations Conference on the Law of the Sea (A/CONF.62/WP.10/Rev.2) provided that:

"The delimitation of the continental shelf between States with opposite or adjacent coasts shall be effected by agreement in conformity with international law. Such an agreement shall be in accordance with equitable principles, employing the median or equidistance line, where appropriate, and taking account of all circumstances prevailing in the area concerned."

But, on 28 August 1981, the President of the Conference presented to the Conference in Geneva the following proposal to replace Article 83, paragraph 1:

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

In accordance with the decision taken by the Conference, this proposal has now acquired the status of part of the official draft convention before the Conference.

50. In the new text, any indication of a specific criterion which could give guidance to the interested States in their effort to achieve an equitable solution has been excluded. Emphasis is placed on the equitable solution which has to be achieved. The principles and rules applicable to the delimitation of continental shelf areas are those which are appropriate to bring about an equitable result; this is a matter which the Court will have to consider further at a later stage. For the present, the Court notes that the new text does not affect the role of the concept of natural prolongation in this domain.

* * *

51. Having thus set the concept of delimitation by identification of natural prolongation in what the Court considers to be its proper perspective, the Court will proceed to examine the contentions of the Parties as to its application in the present case. In view of the emphasis placed upon it, the Court will first examine the contentions of the Parties as to the con-
It has been contended that the “Malta-Misratah Escarpment” or “Ionian Flexure” constitutes the slope and the rise forming the continental margin of Tunisia, and that the Ionian Abyssal Plain beyond it, a roughly triangular area of greater sea-depth (about 4,000 metres) south-east of Sicily is the area to which the continental margins of all the surrounding coastal States converge. Thus in Tunisia’s view, it is possible to define the orientation of each State’s continental margin by a line drawn from its coast to the centre of the Ionian Abyssal Plain. Libya rejects this argument, observing that there is no necessary correlation between an abyssal plain and the progression of shelf, slope and rise, and showing that sedimentological data point to that progression being oriented northwards rather than eastwards.

66. Since the Court is here dealing only with the question of geomorphological features from the viewpoint of their relevance to determine the division between the natural prolongations of the two States, and not with regard to their more general significance as potentially relevant circumstances affecting for other reasons the course of the delimitation, its conclusion can be briefly expressed. The Court has carefully examined the evidence and arguments put forward concerning the existence and importance of the submarine features invoked as relevant for delimitation purposes. Those relied on by Libya in support of its principal contention as to the geologically determined “northward thrust” do not seem to the Court to such sufficient weight to that contention to cause it to prevail over the rival geological contentions of Tunisia; nor do they amount independently to a means of identifying distinct natural prolongations, which would in fact be contrary to Libya’s assertion of the unity of the Pelagian Block. As for the features relied on by Tunisia, the Court, while not accepting that the relative size and importance of these features can be reduced to such insubstantial proportions as counsel for Libya suggest, is unable to find that any of them involve 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. As was noted in argument, so substantial a feature as the Hurd Deep was not attributed such a significance in the Franco-British Arbitration of 1977 concerning the Delimitation of the Continental Shelf. The only feature of any substantial relevance is the Tripolitaniah Furrow; but that submarine valley does not display any really marked relief until it has run considerably further to the east than the area relevant to the delimitation (see further paragraph 75 below). Nor does any geographical evidence as to the direction of any “natural prolongation” assist in determining the boundaries thereof, however relevant it may be as a circumstance to be taken into account from the viewpoint of equity.

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70. Since the Court considers that it is bound to decide the case on the basis of equitable principles, it must first examine what such principles entail, divorced from the concept of natural prolongation which has been found not to be applied for purposes of delimitation in this case. The result of the application of equitable principles must be equitable. This terminology, which is generally used, is not entirely satisfactory because it employs the term equitable to characterize both the result to be achieved and the means to be applied to reach this result. It is, however, the result which is predominant; the principles are subordinate to the goal. The equitableness of a principle must be assessed in the light of its usefulness for the purpose of arriving at an equitable result. It is not every such principle which is in itself equitable; it may acquire this quality by reference to the equitableness of the solution. The principles to be indicated by the Court have to be selected according to their appropriateness for reaching an equitable result. From this consideration it follows that the term “equitable principles” cannot be interpreted in the abstract; it refers back to the principles and rules which may be appropriate in order to achieve an equitable result. This was the view of the Court when it said, in its Judgment of 1969:

“it is a truism to say that the determination must be equitable, rather is the problem above all one of defining the means whereby the delimi-
tation can be carried out in such a way as to be recognized as equitable” (I.C.J. Reports 1969, p. 50, para. 92).

71. Equity as a legal concept is a direct emanation of the idea of justice. The Court whose task is by definition to administer justice is bound to apply it. In the course of the history of legal systems the term “equity” has been used to define various legal concepts. It was often contrasted with the rigid rules of positive law, the severity of which had to be mitigated in order to do justice. In general, this contrast has no parallel in the development of international law; the legal concept of equity is a general principle directly applicable as law. Moreover, when applying positive international law, a court may choose among several possible interpretations of the law the one which appears, in the light of the circumstances of the case, to be closest to the requirements of justice. Application of equitable principles is to be distinguished from a decision ex aequo et bono. The Court can take such a decision only on condition that the Parties agree (Art. 38, para. 2, of the Statute), and the Court is then freed from the strict application of legal rules in order to bring about an appropriate settlement. The task of the Court in the present case is quite different: it is bound to apply equitable principles as part of international law, and to balance up the various considerations which it regards as relevant in order to produce an equitable result. While it is clear that no 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.

72. The Court has thus examined the question of equitable principles, which, besides being mentioned in the Special Agreement as the first of the three factors to be taken into account, are, as the Court has emphasized, of primordial importance in the delimitation of the continental shelf; it has also dealt with the third of the factors mentioned in the Special Agreement, the “new accepted trends” in the Third Conference on the Law of the Sea. The second factor must now be considered, that of the “relevant circumstances which characterize the area”; and again, it is not merely because they are mentioned in the Special Agreement that the Court must have regard to them. It is clear that what is reasonable and equitable in any given case must depend on its particular circumstances. There can be no doubt that it is virtually impossible to achieve an equitable solution in any delimitation without taking into account the particular relevant circumstances of the area. Both Parties recognize that equitable principles dictate that “the relevant circumstances which characterize the area” be taken into account, but differ as to what they are. The Special Agreement moreover confers on the Court the task of ascertaining what are the relevant circumstances and assessing their relative weight for the purpose of achieving an equitable result. It is evident that the first and most essential step in this respect is to determine with greater precision what is the area in dispute between the Parties and what is the area which is relevant to the delimitation.

73. It should first be recalled that 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. As the Court explained in the North Sea Continental Shelf cases the continental shelf is a legal concept in which “the principle is applied that the land dominates the sea” (I.C.J. Reports 1969, p. 51, para. 96). In the Aegean Sea Continental Shelf case the Court emphasized that

“it is solely by virtue of the coastal State’s sovereignty over the land that rights of exploration and exploitation in the continental shelf can attach to it, ipso jure, under international law. In short, continental shelf rights are legally both an emanation from and an automatic adjunct of the territorial sovereignty of the coastal State.” (I.C.J. Reports 1978, p. 36, para. 86.)

As has been explained in connection with the concept of natural prolongation, the coast of the territory of the State is the decisive factor for title to submarine areas adjacent to it. Adjacency of the sea-bed to the territory of the coastal State has been the paramount criterion for determining the legal status of the submerged areas, as distinct from their delimitation, without regard to the various elements which have become significant for the extension of these areas in the process of the legal evolution of the rules of international law.

74. The coast of each of the Parties, therefore, constitutes the starting line from which one has to set out in order to ascertain how far the submarine areas appertaining to each of them extend in a seaward direction, as well as in relation to neighbouring States situated either in an adjacent or opposite position. The only areas which can be relevant for the determination of the claims of Libya and Tunisia to the continental shelf in front of their respective coasts are those which can be considered as lying either off the Tunisian or off the Libyan coast. These areas form together the area which is relevant to the decision of the dispute. The area in dispute, where one claim encroaches on the other, is that part of this whole area which can be considered as lying both off the Libyan coast and off the Tunisian coast.

75. Nevertheless, for the purpose of shelf delimitation between the Parties, it is not the whole of the coast of each Party which can be taken into account; the submarine extension of any part of the coast of one Party which, because of its geographic situation, cannot overlap with the extension of the coast of the other, is to be excluded from further consideration by the Court. It is clear from the map that there comes a point on the coast of each of the two Parties beyond which the coast in question no longer has
by the Court, and the equidistance method is, as will be explained, also not applicable in this case, the “cut-off effect” is not here a relevant circumstance.

77. On the other hand, Libya’s conception of the relevant circumstances is stated in more restricted terms: those circumstances are primarily twofold, namely the geological structure of the shelf and its relation to the adjoining landmass, and the geographic configuration of the coasts. During the oral proceedings counsel for Libya also mentioned a number of particularly relevant circumstances or factors, divided into six categories: the fact that the two States are adjacent, separated by a generally north-south land frontier; the fact that the shelf area is continuous, with an essentially homogeneous character; the general configuration of the coasts of the Parties; the existence of segments of coasts which are not relevant; and, as a related factor, the existence of actual or prospective delimitations with third States in the region; the existence of a number of legislative acts by both Parties, relating to fishing, the territorial sea, and petroleum concessions; and the existence of petroleum fields or wells within the relevant area.

78. While the initial part of the Tunisian coast, westwards from Ras Ajdir, runs for some distance in approximately the same direction as the Libyan coast, the most marked characteristic of the coast, discussed at length by the Parties, is that it subsequently changes direction, so as to run roughly southwest-northeast. This aspect of the geographical situation as it exists in the area relevant to the decision is legally significant, in the context of the present examination of the application of equitable principles, as one of the relevant circumstances which characterize the area. The change in direction may be said to modify the situation of lateral adjacency of the two States, even though it clearly does not go so far as to place them in a position of legally opposite States.

79. The body of “islands, islets and low-tide elevations which form a constituent part of the Tunisian littoral”, referred to in the Tunisian Submissions, is a feature closely related to the claim of Tunisia to historic rights in connection with the fixed and sedentary fisheries in this area, to be dealt with below. Independently of that question, however, the presence of the island of Jerba and of the Kerkenah Islands and the surrounding low-tide elevations is a circumstance which clearly calls for consideration. Libya has contended that

“in arriving at the general direction of the coasts, the Island of Djerba invites omission, since it is clearly an exceptional feature and its inclusion would introduce irrelevant complications. Similarly, the Kerkenah Islands should be excluded since they occupy little more than 180 square kilometres”.

This observation is made in a section of the argument devoted to the question, first raised in fact by Tunisia, of whether the one State or the other is favoured by nature, or the reverse, as regards its coastline; an argument which the Court does not consider to be relevant since, even accepting the idea of natural advantages or disadvantages, “it is not such natural inequalities as these that equity could remedy” (I.C.J. Reports 1969, p. 50, para. 91). However that may be, the Court cannot accept the exclusion in principle of the island of Jerba and the Kerkenah Islands from consideration. The practical method for the delimitation to be expounded by the Court hereafter is in fact such that, in the part of the area to be delimit in which the island of Jerba would be relevant, there are other considerations which prevail over the effect of its presence; the existence and position of the Kerkenah Islands and surrounding low-tide elevations, on the other hand, are material.

80. The Court has already (paragraph 68 above) alluded to the possibility that certain geomorphological configurations of the sea-bed, which do not amount to an interruption of the natural prolongation of one Party with regard to that of the other, may be taken into account as a circumstance relevant for an equitable delimitation, and the Court has thus to re-examine, from this standpoint, the sea-bed features discussed between the Parties such as the Zira and Zuwarah Ridges, the Tripolitanian Furrow, and the Malta-Misratah Escarpment (see paragraphs 32 and 66). The principal feature which could, in the Court’s view, be taken into account as a relevant circumstance is the Tripolitanian Furrow. As has been shown, it is not such a significant feature that it interrupts the continuity of the Pelagian Block as the common natural prolongation of the territory of both Parties, so as to amount to a “natural submarine frontier”. The greater part of it, and the most significant from a geomorphological aspect, lies beyond Ras Tajoura, which was indicated above as the bound of the area relevant for the delimitation. It is a feature of such a kind, and so positioned — comparatively near, and running roughly parallel to, the Libyan coast — that unless it were such as to disrupt the essential unity of the continental shelf so as to justify a delimitation on the basis of its identification as the division between areas of natural prolongation, it would be an element inappropriate for inclusion among the factors to be balanced up with a view to equitable delimitation.

81. The “relevant circumstances which characterize the area” are not limited to the facts of geography or geomorphology, either as a matter of interpretation of the Special Agreement or in application of the equitable principle requiring all relevant circumstances to be taken into account. Apart from the circumstance of the existence and interests of other States in the area, and the existing or potential delimitations between each of the Parties and such States, there is also the position of the land frontier, or more precisely the position of its intersection with the coastline, to be taken into account. In that connection, the Court must in the present case consider a number of alleged maritime limits resulting from the conduct of
Continental Shelf cases, which also concerned adjacent States, that the equidistance method of delimitation of the continental shelf is not proscribed by a mandatory rule of customary law (I.C.J. Reports 1969, p. 46, para. 83; p. 53, para. 101). On the other hand it emphasized the merits of this rule in cases in which its application leads to an equitable solution. The subsequent practice of States, as is apparent from treaties on continental shelf boundaries, shows that the equidistance method has been employed in a number of cases. But it also shows that States may deviate from an equidistance line, and have made use of other criteria for the delimitation, whenever they found this a better way to arrive at an agreement. One solution may be a combination of an equidistance line in some parts of the area with a line of some other kind in other parts, as dictated by the relevant circumstances. Examples of this kind are provided by the 1977 arbitration on the Delimitation of the Continental Shelf between France and the United Kingdom, and by the Convention between France and Spain on the Delimitation of the Continental Shelves of the two States in the Bay of Biscay of 29 January 1974. Treaty practice, as well as the history of Article 83 of the draft convention on the Law of the Sea, leads to the conclusion that equidistance may be applied if it leads to an equitable solution; if not, other methods should be employed.

110. Nor does the Court consider that it is in the present case required, as a first step, to examine the effects of a delimitation by application of the equidistance method, and to reject that method in favour of some other only if it considers the results of an equidistance line to be inequitable. A finding by the Court in favour of a delimitation by an equidistance line could only be based on considerations derived from an evaluation and balancing up of all relevant circumstances, since equidistance is not, in the view of the Court, either a mandatory legal principle, or a method having some privileged status in relation to other methods. It is to be noted that in the present case Tunisia, having previously argued in favour of a delimitation by the equidistance method for at least some of the area in dispute, contended in its Memorial that the result of using that method would be inequitable to Tunisia; and that Libya has made a formal submission to the effect that in the present case the equidistance method would result in an inequitable delimitation. The Court must take this firmly expressed view of the Parties into account. If however the Court were to arrive at the conclusion, after having evaluated all relevant circumstances, that an equidistance line would bring about an equitable solution of the dispute, there would be nothing to prevent it from so finding even though the Parties have discarded the equidistance method. But if that evaluation leads the Court to an equitable delimitation on a different basis, there is no need for it to give any further consideration to equidistance.

111. The Parties recognize that in international law there is no single obligatory method of delimitation and that several methods may be applied to one and the same delimitation. Each of the Parties has indicated, perpendicular to the coast becomes, generally speaking, the less suitable as a line of delimitation the further it extends from the coast.

126. The Court has been informed, in the context of the Parties’ explanations of the history of the dispute, of the course of the equidistance line which was at one time advocated by Tunisia. While that line was calculated by reference to the baselines unilaterally declared by Tunisia for the measurement of the breadth of the territorial sea, the Court takes note that, as a result of the presence of the island of Jerba and the Kerkennah Islands, an equidistance line drawn without reference to these baselines is similar in effect to the Tunisian line. An equidistance line drawn on either basis, in the sector now under consideration, runs at a general angulation markedly more east of north than 26°, and this is of material significance. While, as the Court has already explained (paragraphs 109-110), there is no mandatory rule of customary international law requiring delimitation to be on an equidistance basis, it should be recognized that it is the virtue — though it may also be the weakness — of the equidistance method to take full account of almost all variations in the relevant coastlines. Furthermore, the Court in its 1969 Judgment recognized that there was much less difficulty entailed in a general application of the equidistance method in the case of coasts opposite to one another, when the equidistance line becomes a median line, than in the case of adjacent States (I.C.J. Reports 1969, pp. 36-37, para. 57). The major change in direction undergone by the coast of Tunisia seems to the Court to go some way, though not the whole way, towards transforming the relationship of Libya and Tunisia from that of adjacent States to that of opposite States, and thus to produce a situation in which the position of an equidistance line becomes a factor to be given more weight in the balancing of equitable considerations than would otherwise be the case.

127. In the view of the Court, the relevant circumstances of the area which would not be attributed sufficient weight if the 26° line were prolonged seaward much beyond the 54° parallel of latitude are, first, the general change in the direction of the Tunisian coast already mentioned; and secondly, the existence and position of the Kerkennah Islands. The method of delimitation appropriate to the first sector has been found by the Court to be the drawing of a straight line at a defined inclination to the meridian; and the Court considers that a reasonable and equitable result will be achieved by the drawing of a straight line also, though at a different angle, throughout the second sector of the delimitation. The only question to be determined is thus the angle at which that line should run in the light of the relevant circumstances which characterize the second sector of the area.

128. The general change in direction of the Tunisian coast may, in the view of the Court, be regarded as expressed in a line drawn from the most westerly point of the Gulf of Gabes, already described, to Ras Kaboudia, and the Court notes that the bearing of this line is approximately 42° to the meridian. To the east of this line, however, lie the Kerkennah Islands, surrounded by islets and low-tide elevations, and constituting by their size
and position a circumstance relevant for the delimitation, and to which the Court must therefore attribute some effect. The area of the islands is some 180 square kilometres; they lie some 11 miles east of the town of Sfax, separated from the mainland by an area in which the water reaches a depth of more than four metres only in certain channels and trenches. Shoals and low-tide elevations also extend on the seaward side of the islands themselves, which are surrounded by a belt of them varying from 9 to 27 kilometres in width. In these geographical circumstances, the Court has to take into account not only the islands, but also the low-tide elevations which, while they do not, as do islands, have any continental shelf of their own, do enjoy some recognition in international law for certain purposes, as is shown by the 1958 Geneva Conventions as well as the draft convention on the Law of the Sea. It is not easy to define what would be the inclination of a line drawn from the most westerly point of the Gulf of Gabes to seaward of the Kerkennah Islands so as to take account of the low-tide elevations to seaward of them; but a line drawn from that point along the seaward coast of the actual islands would clearly run at a bearing of approximately 62° to the meridian. However, the Court considers that to cause the delimitation line to veer even as far as to 62°, to run parallel to the island coastline, would, in the circumstances of the case, amount to giving excessive weight to the Kerkennahs.

129. The Court would recall however that a number of examples are to be found in State practice of delimitations in which only partial effect has been given to islands situated close to the coast; the method adopted has varied in response to the varying geographical and other circumstances of the particular case. One possible technique for this purpose, in the context of a geometrical method of delimitation, is that of the "half-effect" or "half-angle". Briefly, the technique involves drawing two delimitation lines, one giving to the island the full effect attributed to it by the delimitation method in use, and the other disregarding the island totally, as though it did not exist. The delimitation line actually adopted is then drawn between the first two lines, either in such a way as to divide equally the area between them, or as bisector of the angle which they make with each other, or possibly by treating the island as displaced toward the mainland by half its actual distance therefrom. Taking into account the position of the Kerkennah Islands, and the low-tide elevations around them, the Court considers that it should go so far as to attribute to the islands a "half-effect" of a similar kind. On this basis the delimitation line, seawards of the parallel of the most westerly point of the Gulf of Gabes, is to be parallel to a line drawn from that point bisecting the angle between the line of the Tunisian coast (42°) and the line along the seaward coast of the Kerkennah Islands (62°), that is to say at an angle of 52° to the meridian. For illustrative purposes only, and without prejudice to the role of the experts in determining the line with exactness, Map No. 3 is attached, which reflects the Court's approach.

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International Court of Justice

Dissenting Opinion of Judge Oda, Continental Shelf (Tunisia/Libyan Arab Jamahiriya) Judgment

I.C.J. Reports 1982, paras. 179, 183-184, 187
CHAPTER VIII. PRACTICAL METHOD SUGGESTED

I. Suggested Method

177. I regret that I can neither share, nor even understand, the view which the majority of the Court, in describing the practical method to be employed for the delimitation between the Parties, has expressed to the effect that the delimitation line should be composed of two segments. The Court suggests, for its first segment, a straight line drawn from Ras Ajdir, at an angle corresponding to the western boundary of the Libyan concessions, to the point of intersection with a parallel passing through the most westerly point of the Tunisian coastline in the Gulf of Gabes. What justification can there be for prescribing a delimitation identified with a line already emplaced by one Party, even if the other Party subsequently granted some concessions in such a way as not to encroach upon it? Is it not a fact that the present case was brought to the Court by the Parties because this line was not mutually satisfactory?

178. What significance, moreover, from any objective viewpoint, has the point of intersection of this line with the parallel passing through the most westerly point of the Gulf of Gabes? Why should that point be of any special importance in the delimitation of the area concerned? I realize that a connection has been made between a change in the general direction of the Tunisian coastline and the alleged necessity of "veering" the line, but the translation of this connection into terms of a parallel of latitude can only result from an optical illusion in which a conventional lattice of cartography is treated as part of the natural configuration. This is the more disconcerting in that the Court has rightly resisted the Parties' efforts to persuade it to view the area as imprinted with a north-south or west-east orientation, as the case may be. I suggest that, if the configuration of the area is looked at from a position and angle different from the traditional north-south/west-east view, it will immediately be apparent that the suggested veering point has no special relationship with the most westerly point in the Gulf of Gabes. Unless there is specific agreement between the Parties to attach special significance to parallels or meridians, it is surely a serious error in delimitation to treat them as anything more than convenient lines of reference for descriptive purposes. A companion error is to attach special significance to the cardinal points of the compass, and here I am thinking of the possibility that the "most westerly" point of the Gulf of Gabes may not be the geometrically correct point from which to consider that a change of general direction occurs.

179. For the second segment of the line the Court suggests a bearing of 52°. Is it possible to find any principle or rule of international law which will provide a ground for this inclination? Surely not. In paragraphs 128 and 129 of the Judgment it is suggested that this segment of the line derives from a parallel with the general direction of the coast of Tunisia north of the most westerly point of the Gulf of Gabes, as adjusted to allow a "half-effect" to the Kerkennah Islands. Why should this segment of the line be parallel with the coast of Tunisia rather than the coast of Libya? In any case, a line in parallel to the coastline can appropriately be used for the outer limit of maritime zones, but not for the lateral or common boundaries of the zones of adjacent or even opposite States. If a geometrical method of delimitation such as a parallel to the bisector of the angle made by one line drawn from the most westerly point of the Gulf of Gabes to Ras Kaboudia and another to the seaward coast of the Kerkennah Islands is to be used, why should not this idea of bisecting angles have been applied for drawing the first segment of the boundary? In addition, in spite of recognizing that low-tide elevations have some significance, the Court not only seems to ignore them for no stated reason as a possible baseline for the shelf delimitation, but also disregards them in recommending an angle of 52° to the meridian as being the bisector of the angle between the (42°) line drawn from "the most westerly point of the Gulf of Gabes" to Ras Kaboudia, and the other (62°) line "from that point along the seaward coast of the Kerkennah Islands" (emphasis added), simply because "to cause the delimitation line to veer even as far as to 62°, to run parallel to the island coastline, would, in the circumstances of the case, amount to giving excessive weight to the Kerkennahs". The treatment here given by the Judgment to low-tide elevations (however correct in itself) cannot but give rise to a suspicion that the "bisector" is employed simply to justify the somewhat arbitrarily determined angle of the second segment. In fact, the angle of 52° seems to depend on the happy coincidence that the seaward coast of the Kerkennahs happens to lie in the path of the line extended from the most westerly point of the Gulf of Gabes. That being so, I am personally at a loss to see any reason why this particular parallelism adds to the persuasiveness of the inclination of 52° preferred for the second segment.

180. In fact, the Court fails to adduce any cogent ground for either segment of the line, or for the line as a whole, a line which does not exemplify any principle or rule of international law. It may represent an acceptable solution, but whether it is equitable can only be verified by comparing it with the outcome of applying a truly equitable method. But if a method can be applied for the purpose of verification, why should it not have been tried in the first place?

181. As demonstrated above, equity requires that delimitation of the continental shelf (or of the exclusive economic zone) should be effected in accordance with the geography of the area concerned, i.e., so as to secure reasonable proportionality between lengths of coastline and the expanses allocated. I hold this to be generally true, but there will surely be wide agreement that it is at any rate true in cases, like the present one, where (as the Judgment indicates in para. 133 A (2)) the concept of natural prolongation provides no useful guide. It can be shown, both as a geometrical theorem and empirically, that the plotting of an equidistance line will normally satisfy this requirement of equity, provided certain preliminary
conditions, which I have described, are observed before the plotting is undertaken. The qualified equidistance method is thus the equitable method *par excellence*, and for this reason alone should be tried before all others.

182. In paragraph 109 the Judgment states that "equidistance may be applied if it leads to an equitable solution; if not, other methods should be employed". Despite the proposition put forward in paragraph 110 of the Judgment, the fact that the Parties have (for reasons not unconnected with the extent of their respective claims) argued that the application of the equidistance method would not be an appropriate solution does not, in my view, conclusively deprive the Court of its right to suggest the qualified equidistance method that I have just suggested. Is there in the Judgment a trace of any effort to prove that equidistance in the present case will lead to an inequitable solution? I feel bound to point out the inconsistencies in the Court’s preference for bisected angles, compromise boundaries, half-effects, etc. Not only do these attempts to “split the difference” derive from an implicit purpose of apportionment, but they are all simply approximations to the consistent geometrical approach, based on a distance criterion, which the Court has rejected for no stated reason. And a distance criterion is precisely the one established feature of the exclusive economic zone régime which is destined to replace natural prolongation as a test in delimitation of the continental shelf.

183. In the present case the preliminaries involve taking into account the following geographical circumstances:

1. On inspection of the map, the coastlines of Tunisia and Libya which face the area concerned, namely from Cap Bon in the north to Ras al-Hamamah in the east, no feature is revealed, apart perhaps from the presence of some islands, which calls for any departure from the coastal configuration in determining the baseline from which to plot the equidistance line for the delimitation of the continental shelf. The question of the islands is dealt with in the next subparagraph.

2. I have earlier concluded that islands should be considered on their own merits for the purpose of delimitation of the continental shelf, and suggested that an island within easy reach of the coast should be viewed to that end from the viewpoint of demographic and geographic circumstances. I shall devote a few words to Jerba, whose size, configuration, contiguity to the coast and nearness to the frontier-point (see below) are, taken together, such as to preclude its being disregarded. From the viewpoint of demography and economics, it can be shown that the Kerkennahs are also of importance to Tunisia. However, this fact does not definitively exclude the possibility of disregarding them in plotting the equidistance line for the purpose of delimitation of the continental shelf. To see whether this possibility is plausible, one has to look closely at the geographical circumstances.

Now, although within easy reach of the mainland, the Kerkennahs are separated from it by approximately 11 miles and, being elongated and far from parallel to the coast, project far out to sea; they have thus pushed the baseline for the territorial sea of Tunisia far to the east. While this effect is tolerable and necessary for the territorial sea, it would be so pronounced if applied to a vast and economically important zone like the continental shelf that I feel impelled to recommend the exclusion of the Kerkennahs from consideration in determining the baseline from which the equidistance line is to be plotted, despite their demographic importance. Here attention needs to be drawn to a peculiarity of the equidistance method, namely that the extent to which a geographical feature can be treated as an irregularity and disregarded may depend on its distance from the frontier point. It may be inequitable to disregard a feature near to that point, because to do so would bring the dividing line too close to it, and in any case a feature near to the frontier will not affect the course of the line for a very great distance. A similar feature far from the frontier-point may, on the contrary, have an altogether disproportionate effect, but that feature can be disregarded without bringing the dividing line in any sense close to it. Thus even if, for the sake of argument, the island of Jerba had not been contiguous to the mainland and had had a similar configuration to the Kerkennahs, it would have been very doubtful that it could be disregarded.

3. Under the Geneva Conventions on the Law of the Sea, it was provided that any low-tide elevation should form part of the baseline for the measurement of the territorial sea, and also that this baseline should apply when an equidistance line is plotted for the purpose of delimitation of the continental shelf. However, as I have pointed out earlier, it is scarcely appropriate to take account of low-tide elevations in the delimitation of the continental shelf. This is particularly true in the present case, since it is only on the coast of Tunisia that a significant number of low-tide elevations exist, and their effect has been to place the baseline for measuring the territorial sea of that country at a far remove from the real coastline of the mainland. This simply reinforces my view that low-tide elevations should be discarded as an element of the baseline for the delimitation of the continental shelf.

184. Thus I would suggest that the line for the delimitation of the continental shelf between Tunisia and Libya should be drawn as a line equidistant from their respective coasts, disregarding all the low-tide elevations off the coast of either Party and the existence of the Kerkennah Islands.

185. The technical methods for drawing the equidistance-median line in the case of neighbouring States which are either adjacent or opposite are well illustrated in Shalowitz’s *Shore and Sea Boundaries*, Volume I (1962),
particularly at pages 232-235. Reference can also be made to Hodgson and Cooper, "The Technical Delimitation of a Modern Equidistant Boundary", Ocean Development and International Law, Vol. 3, No. 4, 1976, pp. 361 ff. In this connection I must point out that the Court seems to misunderstand the practical application of the method of equidistance in suggesting "the equidistance method [takes] full account of almost all variations in the relevant coastlines" (para. 126). In fact, in drawing the equidistance line, it is scarcely possible to take full account of "almost all variations", as only salient points or convexities on the coastline can affect the drawing of this line. Provided only that the baseline excludes long, narrow spurs or promontories and similar features, this is wholly equitable, for the lengths of coastline between salient points or convexities will embrace areas commonly recognized as internal in status, such as mouths of rivers, coves and bays.

2. Suggested Line

186. Properly applied, from a baseline determined as I have explained, the method of equidistance results in a line which, subject to expert verification, includes the following points:

(i) 33° 50' N and 11° 57' E
(ii) 34° 25' N and 12° 47' E
(iii) 34° 35' N and 13° 03' E

The line should be extended in the direction of the line connecting points (ii) and (iii) above.

187. (1) Point (i) is roughly 40 miles from Ras Ajdir, and from it the closest points are Ras Ajdir itself, together with a point on the eastern coast of Jerba in Tunisia and Ras at-Talqa on the Libyan coast. It is technically impossible to single out one equidistance line within the area landwards from point (i), since Ras Ajdir, where the coastlines of both Parties meet, is located at an apex. In cases where the point from which the line is to start is so located, a plurality of equidistance lines is inevitable between the starting-point and a point P equidistant from the starting-point itself and two other points, one on each of the respective coasts. In the present case, P is point (i). Hence the single line of equidistance can only start from point (i). It then follows a course in which every point is equidistant from a point on the eastern coast of Jerba in Tunisia and Ras at-Talqa on the Libyan coast, until it reaches point (ii).

(2) Point (ii) is equidistant from Ras Kaboudia and the point on the eastern coast of Jerba on the Tunisian side and Ras at-Talqa and Tripoli on the Libyan side and it is the spot where the combined effect of the presence of Ras Kaboudia in Tunisia and Tripoli in Libya is to deflect the line slightly eastwards. In other words, it is the turning-point of the equidistance line. The line then follows a course in which every point is equidistant from Ras Kaboudia in Tunisia and Tripoli in Libya.

(3) Point (iii) is the point on the last-mentioned line which is equidistant from Tunisia and Libya, as well as from Malta. Since Malta is not a party to the present case, this point is marked on the line simply to indicate the direction of the line to be drawn from point (ii). In fact, it so happens that at this point a feature located a few miles east of Tripoli, on the Libyan side, starts pushing the line westwards, but only to a negligible degree.

(4) Although only point (ii) is mentioned as a turning-point, there are, theoretically, more, but in each case the alteration in direction which would result from changing the points of reference on the coast would be practically negligible, as the new reference-point would be merely a few miles distant from the old.

(5) As stated previously, in the area landwards of point (i) any line within a certain rhomboid can be an equidistance line. It may not be inequitable to suggest the straight line connecting Ras Ajdir and point (i) as the equidistance line for the purpose of delimitation. This line represents a perpendicular to the coasts of both Parties measured over a distance which is relatively short in comparison with that of about 40 miles from Ras Ajdir to point (i).

(6) Attached hereto, purely by way of illustration, are two maps, one giving the proposed equidistance line in the area offering itself for delimitation, and the other giving the position of this line in the full background of the entire coastlines of both Parties.

188. It would be invidious to proceed farther and to demonstrate how the suggested line satisfies the requirement of a reasonable degree of proportionality (as defined in an earlier chapter), but I suggest that if this demonstration is carried out it will be seen that the line in question provides a useful yardstick against which to verify the equitable nature of the two-part line prescribed by the Court. Without going into detail, I would like before concluding to stress one very important advantage of the equidistance method, when employed with the precautions I have outlined. It lies in the fact that its inherent property of equity remains constant whatever the "area relevant to the delimitation", so that the imperious necessity of defining that area is removed – and with it the need to resort to the arbitrary and artificial use of parallels and meridians.

(Signed) Shigeru Oda.
International Court of Justice

Delimitation of the Maritime Boundary in the Gulf of Maine Area
(Canada/United States of America)
Judgment

*ICJ Reports 1984*, paras. 124-125, 157, 194-199, 222
is in the process of becoming a norm of general application. What that
Decision did state is that the rule in question

"gives particular expression to a general norm that, failing agreement,
the boundary between States abutting on the same continental shelf is
to be determined on equitable principles" (Decision, para. 70),

which is a different matter. On the contrary, the finding of the Court of
Arbitration clearly shows the different levels at which the various rules
concerned are situated: the provisions of Article 6 of the 1958 Convention
at the level of special international law, and, at the level of general inter-
national law, the norm prescribing application of equitable principles, or
rather equitable criteria, without any indication as to the choice to be made
among these latter or between the practical methods to implement them.
The Chamber considers that such is the current state of customary inter-
national law.

124. In short, the Chamber does not believe that there is any argument
to justify the attempt to turn the provisions of Article 6 of the 1958
Convention into a general rule applicable as such to every maritime
delimitation. The treaty provisions in question, as the 1969 Judgment of
the Court pointed out, can have no mandatory force as regards delimita-
tion, even delimitation of the continental shelf alone, between States which
are not parties to the 1958 Convention. Similarly, they cannot have such
mandatory force even between States which are parties to the Convention,
as regards a maritime boundary concerning a much wider subject-matter
than the continental shelf alone.

125. The Chamber must therefore conclude in this respect that the
provisions of Article 6 of the 1958 Convention on the Continental Shelf,
although in force between the Parties, do not entitle either for them or for
the Chamber any legal obligation to apply them to the single maritime
delimitation which is the subject of the present case.

* *

126. The Chamber, having reached this conclusion as to the absence
between the Parties of any legal obligation deriving from treaty to apply
specific practical methods to the determination of the single boundary
between their respective maritime zones, must also examine a related
question. It must ascertain whether, as between the Parties, any other
factors have intervened which might, independently of any formal act
creating rules or instituting relations under special international law,
nonetheless give rise to an obligation of this kind. The question, which
the Parties have argued at length during the present case, is whether the
conduct of the Parties over a given period of their relationship constituted

it must be effected by agreement and that, in as much as the argument of
the United States based on Canada's failure to react to the Truman
Proclamation amounts to claiming that delimitation must be effected in
accordance with equitable principles, the United States position on that
point merely refers back to the "fundamental norm" which Canada also
relies on in the case. This comment does not derogate in any way from the
observation made above that it is impossible to conclude from the conduct
of the Parties that there is a binding legal obligation, in their bilateral
relations, to make use of a particular method for delimiting their respective
maritime jurisdictions.

* *

155. Having concluded the two-stage analysis carried out in the fore-
going paragraphs, the Chamber is now able to give a definitive answer to
the question posed in paragraph 114 above. It has just been noted that the
Parties to the present case, in the current state of the law governing
relations between them, are not bound, under a rule of treaty-law or other
rule, to apply certain criteria or to use certain particular methods for the
establishment of a single maritime boundary for both the continental shelf
and the exclusive maritime fishery zone, as in the present case. Conse-
sequently, the Chamber also is not so bound.

156. The Chamber may therefore begin by taking into consideration,
without its approach being influenced by predetermined preferences, the
criteria and especially the practical methods that may theoretically be
applied to determining the course of the single maritime boundary
between the United States and Canada in the Gulf of Maine and in the
adjacent outer area. It will then be for the Chamber to select, from this
range of possibilities, the criteria that it regards as the most equitable for
the task to be performed in the present case, and the method or combi-
nation of practical methods whose application will best permit of their
concrete implementation.

157. There has been no systematic definition of the equitable criteria
that may be taken into consideration for an international maritime delimi-
tation, and this would in any event be difficult a priori, because of their
highly variable adaptability to different concrete situations. Codification
efforts have left this field untouched. Such criteria have however been
mentioned in the arguments advanced by the parties in cases concerning
the determination of continental shelf boundaries, and in the judicial or
arbitral decisions in those cases. There is, for example, the criterion
expressed by the classic formula that the land dominates the sea; the
criterion advocating, in cases where no special circumstances require correction thereof, the equal division of the areas of overlap of the maritime and submarine zones appertaining to the respective coasts of neighbouring States; the criterion that, whenever possible, the seaward extension of a State's coast should not encroach upon areas that are too close to the coast of another State; the criterion of preventing, as far as possible, any cut-off of the seaward projection of the coast or of part of the coast of either of the States concerned; and the criterion whereby, in certain circumstances, the appropriate consequences may be drawn from any inequalities in the extent of the coasts of two States into the same area of delimitation.

158. With regard to these and other possible criteria, the Chamber does not think it would be useful to undertake a more or less complete enumeration in the abstract of the criteria that are theoretically conceivable, or an evaluation, also in the abstract, of their greater or lesser degree of equitableness. As the Chamber has emphasized a number of times, their equitableness or otherwise can only be assessed in relation to the circumstances of each case, and for one and the same criterion it is quite possible to arrive at different, or even opposite, conclusions in different cases. The essential fact to bear in mind is, as the Chamber has stressed, that the criteria in question are not themselves rules of law and therefore mandatory in the different situations, but "equitable", or even "reasonable", criteria, and that what international law requires is that recourse be had in each case to the criterion, or the balance of different criteria, appearing to be most appropriate to the concrete situation.

159. Unlike the equitable criteria by which the delimitation must be guided, the practical methods that can be used for effecting the material delimitation have of course been the subject of certain a priori analyses. In this connection, mention may be made of the observations in the Court's Judgment in the North Sea Continental Shelf cases regarding the work done on the subject by the International Law Commission and its request for advice from a Committee of Experts (I.C.J. Reports 1969, p. 35, para. 53). During the course of that work mention was made of the use, according to circumstances, of the method of the lateral equidistance line or the median line, the method which was finally adopted by the Commission (and later by the 1958 Convention) as applicable, provided always that special circumstances do not justify the use of another method. But, as the Court also recalled, mention was then made concurrently of other possible methods: that of drawing a line perpendicular to a coast, or to the general direction of a coast; that of drawing a boundary prolonging an existing division of territorial waters, or the direction of the final segment of a land boundary, or the overall direction of such boundary. This list was moreover by no means exhaustive. These different methods, and others, have been used in turn in different delimitations effected by direct agreement between neighbouring States; in this connection statistical considerations afford no indication either of the greater or lesser degree of appropriateness of any formed by the aquatic fauna of the delimitation area. As the Chamber then observed, a criterion of this kind could scarcely be adapted also to a delimitation which had not only to divide a volume of water but had also to effect a division of the underlying continental shelf, in respect of which the criterion in question could not be appropriate. Conversely, it may be remarked that, in a concrete situation where distinctive geological characteristics can be observed in the continental shelf, such as might have special effect in determining the division of that shelf and the resources of its subsoil, there would in all likelihood be no reason to extend the effect of those characteristics to the division of the superjacent volume of water, in respect of which they would not be relevant. These are merely two of many examples that could be cited.

194. In reality, a delimitation by a single line, such as that which has to be carried out in the present case, i.e., a delimitation which has to apply at one and the same time to the continental shelf and to the superjacent water column can only be carried out by the application of a criterion, or combination of criteria, which does not give preferential treatment to one of these two objects to the detriment of the other, and at the same time is such as to be equally suitable to the division of either of them. In that regard, moreover, it can be foreseen that with the gradual adoption by the majority of maritime States of an exclusive economic zone and, consequently, an increasingly general demand for single delimitation, so as to avoid as far as possible the disadvantages inherent in a plurality of separate delimitations, preference will henceforth inevitably be given to criteria that, because of their more neutral character, are best suited for use in a multi-purpose delimitation.

195. To return to the immediate concerns of the Chamber, it is, accordingly, towards an application to the present case of criteria more especially derived from geography that it feels bound to turn. What is here understood by geography is of course mainly the geography of coasts, which has primarily a physical aspect, to which may be added, in the second place, a political aspect. Within this framework, it is inevitable that the Chamber's basic choice should favour a criterion long held to be as equitable as it is simple, namely that in principle, while having regard to the special circumstances of the case, one should aim at an equal division of areas where the maritime projections of the coasts of the States between which delimitation is to be effected converge and overlap.

196. Nevertheless, it is not always the case that the choice of this basic criterion appears truly equitable when it, and it alone, is exclusively applied to a particular situation. The multiplicity and diversity of geographical situations frequently call for this criterion to be adjusted or flexibly applied to make it genuinely equitable, not in the abstract, but in relation to the varying requirements of a reality that takes many shapes and forms. To mention only the situation involved in the present proceedings, it is a fact that the Parries, and one of them in particular, with the aid of comparisons with situations considered in previous cases, persistently empha-
sized the importance they attached to one concrete aspect or another of the geographical situation in the present case. The Chamber cannot but recognize, to a certain extent, that the concerns thus expressed were not wholly unfounded. It does not here intend to enter into detailed considerations, for it will be sufficient to note in general at this stage that, in the present case, the situation arising out of the physical and political geography of the delimitation area does not present ideal conditions for the full, exclusive application of the criterion specified at the end of the previous paragraph. Some corrections must be made to certain effects of its application that might be unreasonable, so that the concurrent use of auxiliary criteria may appear indispensable. Having regard to the special characteristics of the area, the auxiliary criterion which the Chamber has particularly in mind is that whereby a fair measure of weight should be given to a by no means negligible difference within the delimitation area between the lengths of the respective coastlines of the countries concerned. It also has in mind the likewise auxiliary criterion whereby it is held equitable partially to correct any effect of applying the basic criterion that would result in cutting off one coastline, 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 application of the basic criterion might entail giving them full effect or, alternatively, no effect.

197. At this point, accordingly, the Chamber finds that it must finally confirm its choice, which is to take as its starting-point the above-mentioned criterion of the division — in principle, equal division — of the areas of convergence and overlapping of the maritime projections of the coastlines of the States concerned in the delimitation, a criterion which need only be stated to be seen as intrinsically equitable. However, in the Chamber’s view, the adoption of this starting-point must be combined with the parallel and partial adoption of the appropriate auxiliary criteria in so far as it is apparent that this combination is necessitated by the relevant circumstances of the area concerned, and provided they are used only to the extent actually dictated by this necessity. By this approach the Chamber seeks to ensure the most correct application in the present case of the fundamental rule of international law here applicable, which requires that any maritime delimitation between States should be carried out in accordance with criteria that are equitable and are found more specifically to be so in relation to the particular aspects of the case under consideration.

198. The equitable nature of the criteria adopted in the light of the circumstances of the case will emerge the more convincingly — one might almost say tangibly — after the transition from the preliminary phase of choosing equitable criteria to the next phase, in which these criteria are to be reflected in the drawing of a particular delimitation line with the aid of appropriate practical methods.

199. As regards these practical methods, it can be said at the outset that, given the equitable criteria which the Chamber feels bound to apply in the case referred to it for judgment, the choice to be made is predetermined. Methods must be chosen which are instruments suitable for giving effect to these criteria and not other criteria of a fundamentally different kind. Just as the criteria to which they must give effect are basically founded upon geography, the practical methods in question can likewise only be methods appropriate for use against a background of geography. Moreover, like the underlying criteria, the methods employed to give them effect must, in this particular case, be just as suitable for the delimitation of the sea-bed and its subsoil as for the delimitation of the superjacent waters and their fishery resources. In the outcome, therefore, only geometrical methods will serve.

200. It would however be going too far to infer from this finding that the practical methods suitable for use in the present case must necessarily be identifiable with the method adopted in Article 6 of the 1958 Convention, so that all that the Chamber need do (even if, as already stressed, it has no obligation so to proceed) is to make use of that method, subject to the correction of certain effects as required by any special circumstances. In fact there are also other methods, differing from it in varying degree even while prompted by similar considerations, which may prove equally appropriate or even distinctly preferable, given that the task is to delimit not only a continental shelf, as provided for in the 1958 Convention, but also the volume of superjacent waters. Nor should one overlook the possibility that, over the whole course of a delimitation line, various, though related, methods may successively appear more appropriate to the different segments.

201. In this connection, the Chamber would emphasize the necessity of not allowing oneself to be too easily swayed by the perfection which is apparent a priori, from the viewpoint of equally dividing a disputed area, in a line drawn in strict compliance with the canons of geometry, i.e., a line so constructed that each point in it is equidistant from the most salient points on the respective coastlines of the parties concerned. In an atypical passage of the 1969 Judgment on the North Sea Continental Shelf cases (I.C.J. Reports 1969, p. 36, para. 57), the Court showed how, in determining the course of a delimitation line intended to “effect an equal division of the particular area involved” between two coasts, no account need be taken of the presence of “islets, rocks and minor coastal projections, the disproportionately distorting effect of which can be eliminated by other means”. In pursuance of this remark, the Chamber likewise would point out the potential disadvantages inherent in any method which takes tiny islands, uninhabited rocks or low-tide elevations, sometimes lying at a considerable distance from terra firma, as baspoint for the drawing of a line
of the United States coastline in the Gulf, as measured along the coastal fronts from the elbow of Cape Cod to Cape Ann, from Cape Ann to Cape Elizabeth and from the latter to the international boundary terminus, is approximately 284 nautical miles. The overall length of the Canadian coastline, as similarly calculated along the coastal fronts from the terminal point of the international boundary to the point on the New Brunswick coast off which there cease to be any waters in the bay more distant than 12 miles from a low-water line (45° 16' 31" N and 65° 41' 01" W), then from that point across to the corresponding point on the Nova Scotian coast (44° 53' 49" N and 65° 22' 47" W), thence to Brier Island, and from there to Cape Sable, is approximately 206 nautical miles. In this respect, the Chamber wishes to emphasize that the fact that the two coasts oppose each other on the Bay of Fundy are both Canadian is not a reason to disregard the fact that the Bay is part of the Gulf of Maine, nor a reason to take only one of these coasts into account for the purpose of calculating the length of the Canadian coasts in the delimitation area. There is no justification for the idea that if a fairly substantial bay opening on to a broader gulf is to be regarded as a part of it, its shores must not all belong to the same State. The Chamber would also recall that in the 1982 Judgment in the case concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya), the Court was not deterred from including in its calculation of the length of the coasts of Tunisia in the delimitation area the whole of the coastal fronts of Tunisia on that area, including those of the Gulf of Gabes, by the fact that the coasts of the Gulf are wholly Tunisian.

222. The ratio between the coastal fronts of the United States and Canada on the Gulf of Maine as defined in the previous paragraph, is thus 1.38 to 1. In the view of the Chamber, this ratio should be reflected in the location of the second segment of the delimitation line. For this purpose, the Chamber considers that the appropriate method should be to apply the ratio selected to a line drawn across the Gulf where the coasts of Nova Scotia and Massachusetts are nearest to each other, i.e., between a point near the northeastern tip of Cape Cod, at 42° 00' 31" N, 70° 01' 36" W, and Chebogue Point, Nova Scotia (43° 43' 57" N, 66° 07' 18" W). In the view of the Chamber it would then be proper to shift the median line drawn initially between the opposite and quasi-parallel lines mentioned in paragraph 216 above, which join, on the Massachusetts coast, the elbow of Cape Cod to Cape Ann and, on the coast of Nova Scotia, Cape Sable to Brier Island, in such a way as to reflect this ratio along the line Cape Cod-Chebogue Point. Here, however, the Chamber has employed the conditional tense because there still remains one aspect which, though minor, might have some influence on the calculations. This is the presence of Nova Scotia of Seal Island and certain islets in its vicinity. The Chamber considers that Seal Island (together with its smaller neighbour, Mud Island), by reason both of its dimensions and, more particularly, of its geographical position, cannot be disregarded for the present purpose.

According to the information available to the Chamber it is some two-and-a-half miles long, rises to a height of some 50 feet above sea level, and is inhabited all the year round. It is still more pertinent to observe that as a result of its situation off Cape Sable, only some nine miles inside the closing line of the Gulf, the island occupies a commanding position in the entry to the Gulf. The Chamber however considers that it would be excessive to treat the coastline of Nova Scotia as transferred south-westwards by the whole of the distance between Seal Island and that coast, and therefore thinks it appropriate to give the island half effect, so that, as explained in the Report of the technical expert, the ratio to be applied for the purposes of determining the location of the corrected median line will be approximately 1.32 to 1 in place of 1.38 to 1. Since it is only a question of adjusting the proportion by reference to which the corrected median line is to be located, the result of the effect to be given to the island is a small transverse displacement of that line, not an angular displacement; and its practical impact therefore is limited.

223. The central segment of the delimitation line will thus correspond, over its entire length, with the corrected median line as so established. It will begin where this line intersects, within the Gulf, the bisector drawn from point A and constituting the first segment, and end on reaching the of-mentioned closing line of the Gulf. It will be noted that the meetingpoint 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.

224. There now remains to be determined the course of the third segment of the delimitation line, i.e., the longest portion of its entire course. This is the segment concerning that part of the delimitation area which lies outside and over against the Gulf of Maine. Nevertheless, it appears beyond question that, in principle, the determination of the path of this segment must depend upon that of the two previous segments of the line, those segments within the Gulf which have just been described and whose path so obviously depended on the orientation of those coasts of the Parties that abut upon the waters of the Gulf. In fact, the portion of the line now to be determined will inevitably, throughout its length, be situated in the open ocean. From the geographical point of view, there is no point of reference, outside the actual shores of the Gulf, that can serve as a basis for carrying out the final operation required. That being so, it appears obvious that the only kind of practical method which can be considered for this purpose is, once again, a geometrical method. Within the range of such
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Continental Shelf
(Libyan Arab Jamahiryia/Malta)
Judgment

I.C.J. Reports 1985, paras. 29, 33, 43, 52, 58, 61-63, 73
content. Secondly, the Court in 1982 observed the disappearance, in the
last draft text of what became Article 83, paragraph 1, of reference to
delimitation by agreement "in accordance with equitable principles"
(I.C.J. Reports 1982, p. 49, para. 49). It found however 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 principles must be equitable" (ibid.,
p. 59, para. 70).
29. In the present case, both Parties agree that, whatever the status of
Article 83 of the 1982 Convention, which refers only to the "solution" as
being equitable, and does not specifically mention the application of
equitable principles, both these requirements form part of the law to be
applied. In the first of Libya's submissions, the Court is asked to declare
that

"The delimitation is to be effected by agreement in accordance with
equitable principles and taking account of all relevant circumstances
in order to achieve an equitable result."

The first submission of Malta reads:

"the principles and rules of international law applicable to the
delimitation of the areas of the continental shelf which appertain to
Malta and Libya, and the delimitation shall be effected on the
basis of international law in order to achieve an equitable result."

The Agent of Malta confirmed that Malta also accepts that the delimita-
tion is to be effected in accordance with equitable principles and taking
account of all relevant circumstances.
30. It is however with regard to the legal basis of title to continental shelf
rights that the views of the Parties are irreconcilable. For Libya,

"The natural prolongation of the respective land territories of the
Parties into and under the sea is the basis of title to the areas of
continental shelf which appertain to each of them."

In Libya's view, the prolongation of the land territory of a State into
and under the sea, referred to by the Court in the North Sea Continental Shelf
cases (I.C.J. Reports 1969, p. 31, para. 43), was a "geological fact" and
natural prolongation in the same physical sense, involving geographical as
well as geological and geomorphological aspects, remains the fundamental
basis of legal title to continental shelf areas. For Malta, while it is still true
to say that the continental shelf of a State constitutes a natural
prolongation of its land territory into and under the sea, prolongation is no longer
defined by reference to physical features, geological or bathymetric, but by
reference to a certain distance from the coasts. The concept of natural
prolongation has in Malta's view become a purely spatial concept which
operates independently of all geomorphological or geological characteris-

33. Article 78, maintains the dissociation of the legal régime of the continental
shelf, the sea-bed and subsoil, from the régime of the superjacent
waters.
33. In the view of the Court, 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
cannot be left out of consideration. As the 1982 Convention demonstrates,
the two institutions — continental shelf and exclusive economic zone — are
linked together in modern law. Since the rights enjoyed by a State over its
continental shelf would also be possessed by it over the sea-bed and subsoil
of any exclusive economic zone which it might proclaim, one of the rele-
cvant 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 that same State. This does not mean that
the concept of the continental shelf has been absorbed by that of the
exclusive economic zone; it does however signify that greater importance
must be attributed to elements, such as distance from the coast, which are
common to both concepts.

34. For Malta, the reference to distance in Article 76 of the 1982
Convention represents a consecration of the "distance principle"; for
Libya, only the reference to natural prolongation corresponds to custom-
ary international law. It is in the Court's view incontestable that, apart
from those provisions, 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; in any case, Libya itself
seemed to recognize this fact when, at one stage during the negotiation of
the Special Agreement, it proposed that the extent of the exclusive eco-
nomic zone be included in the reference to the Court. Although the insti-
tutions of the continental shelf and the exclusive economic zone are dif-
ferent and distinct, the rights which the exclusive economic zone entails
over the sea-bed of the zone are defined by reference to the régime laid
down for the continental shelf. Although there can be a continental shelf
where there is no exclusive economic zone, there cannot be an exclusive
economic zone without a corresponding continental shelf. It follows that,
for juridical and practical reasons, the distance criterion must now apply to
the continental shelf as well as to the exclusive economic zone; and this
quite apart from the provision as to distance in paragraph 1 of Article 76.
This is not to suggest that the idea of natural prolongation is now sup-
pered by that of distance. What it does mean is that where the continental
margin does not extend as far as 200 miles from the shore, natural pro-
longation, which in spite of its physical origins has throughout its history
become more and more a complex and juridical concept, is in part defined
by distance from the shore, irrespective of the physical nature of the
intervening sea-bed and subsoil. The concepts of natural prolongation and
distance are therefore not opposed but complementary; and both remain
essential elements in the juridical concept of the continental shelf. As the
nation. For all the above reasons, the Court, therefore, rejects the so-called rift-zone argument of Libya.

42. Neither, however, is the Court able to accept the argument of Malta—almost diametrically opposed to the Libyan rift-zone argument—that the new importance of the idea of distance from the coast has, at any rate for delimitation between opposite coasts, in turn conferred a primacy on the method of equidistance. As already noted, Malta rejects the view that natural prolongation in the physical sense is the basis of title of the coastal State, and bases its approach to continental shelf delimitation on the “distance principle”: each coastal State is entitled to continental shelf rights to a certain distance from its coast, whatever may be the physical characteristics of the sea-bed and subsoil. Since there is 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 recognized by international law, the delimitation process must, according to Malta, necessarily begin by taking into consideration an equidistance line between the two coasts. The delimitation of the continental shelf must start from the geographical facts in each particular case; Malta regards the situation as one of two coastal States facing each other in an entirely normal setting. Malta does not assert that the equidistance method is fundamental, or inherent, or has a legally obligatory character. It does argue that the legal basis of continental shelf rights—that is to say, for Malta, the “distance principle”—requires that as a starting point of the delimitation process consideration must be given to a line based on equidistance; though it is only to the extent that this primary delimitation produces an equitable result by a balancing up of the relevant circumstances that the boundary coincides with the equidistance line. As a provisional point of departure, consideration of equidistance “is required” on the basis of the legal title.

43. 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, or that the Court is “required, as a first step, to examine the effects of a delimitation by application of the equidistance method” (I.C.J. Reports 1982, p. 79, para. 110). Such a rule would come near to an espousal of the idea of “absolute proximity”, which was rejected by the Court in 1969 (see I.C.J. Reports 1969, p. 30, para. 41), and which has since, moreover, failed of acceptance at the Third United Nations Conference on the Law of the Sea. That a coastal State may be entitled to continental shelf rights by reason of distance from the coast, and irrespective of the physical characteristics of the intervening sea-bed and subsoil, does not entail that equidistance is the only appropriate method of delimitation, even between opposite or quasi-opposite coasts, nor even the only permissible point of departure. 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.

44. In this connection, something may be said on the subject of the practice of States in the field of continental shelf delimitation; the Parties have in fact discussed the significance of such practice, as expressed in published delimitation agreements, primarily in the context of the status of equidistance in present international law. Over 70 such agreements have been identified and produced to the Court and have been subjected to various interpretations. Libya questions the relevance of State practice in this domain, and has suggested that this practice shows, if anything, progressive disappearance of the distinction to be found in Article 6 of the 1958 Geneva Convention on the Continental Shelf, between “opposite” and “adjacent” States, and that there has since 1969 been a clear trend away from equidistance manifested in delimitation agreements between States, as well as in jurisprudence and in the deliberations at the United Nations Conference on the Law of the Sea. Malta rejects both these latter contentions, and contends that such practice need not be seen as evidence of a particular rule of customary law, but must provide significant and reliable evidence of normal standards of equity. The Court for its part has no doubt about the importance of State practice in this matter. Yet that practice, however interpreted, falls short of proving the existence of a rule prescribing the use of equidistance, or indeed of any method, as obligatory. Even the existence of such a rule as is contended for by Malta, requiring equidistance simply to be used as a first stage in any delimitation, but subject to correction, cannot be supported solely by the production of numerous examples of delimitations using equidistance or modified equidistance, though it is impressive evidence that the equidistance method can in many different situations yield an equitable result.

45. Judicial decisions are at one—and the Parties themselves agree (paragraph 29 above)—in holding that the delimitation of a continental shelf boundary must be effected by the application of equitable principles in all the relevant circumstances in order to achieve an equitable result. The Court did of course remark in its 1982 Judgment that this terminology, though generally used, “is not entirely satisfactory because it employs the term equitable to characterize both the result to be achieved and the means to be applied to reach this result” (I.C.J. Reports 1982, p. 59, para. 70). It is however the goal—the equitable result—and not the means used to
51. Malta contends that the “equitable consideration” of security and defence interests confirms the equidistance method of delimitation, which gives each party a comparable lateral control from its coasts. Security considerations are of course not unrelated to the concept of the continental shelf. They were referred to when this legal concept first emerged, particularly in the Truman Proclamation. However, in the present case neither Party has raised the question whether the law at present attributes to the coastal State particular competences in the military field over its continental shelf, including competence over the placing of military devices. In any event, the delimitation which will result from the application of the present Judgment is, as will be seen below, not so near to the coast of either Party as to make questions of security a particular consideration in the present case.

52. A brief mention must also be made of another circumstance over the relevance of which the Parties have been in some contention. The fact that Malta constitutes an island State has given rise to some argument between the Parties as to the treatment of islands in continental shelf delimitation. The Parties agree that the entitlement to continental shelf is the same for an island as for mainland. However Libya insists that for this purpose no distinction falls to be made between an island State and an island politically linked with a mainland State; and further contends that while the entitlement is the same, an island may be treated in a particular way in the actual delimitation, as were the Channel Islands in the Decision of 30 June 1977 of the Court of Arbitration on the delimitation of the continental shelf between the United Kingdom of Great Britain and Northern Ireland and the French Republic. Malta explains that it does not claim any privileged status for island States, but does distinguish, for purposes of shelf delimitation, between island States and islands politically linked to a mainland State. It is only in the case of dependent islands, in Malta’s view, that international law gives varying effect to them, depending on such factors as size, geographical position, population or economy.

53. In the view of the Court, it is not a question of an “island State” having some sort of special status in relation to continental shelf rights; indeed Malta insists that it does not claim such status. It is simply that Malta being independent, the relationship of its coasts with the coasts of its neighbours is different from what it would be if it were a part of the territory of one of them. In other words, it might well be that the sea boundaries in this region would be different if the islands of Malta did not constitute an independent State, but formed a part of the territory of one of the surrounding countries. This aspect of the matter is related not solely to the circumstances of Malta being a group of islands, and an independent State, but also to the position of the islands in the wider geographical context, particularly their position in a semi-enclosed sea.

54. Malta has also invoked the principle of sovereign equality of States as an argument in favour of the equidistance method pure and simple, and

attributions of continental shelf to each State would be indicated by the geographical facts. Proportionality, therefore 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.” (Para. 101.)

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.

58. Both Parties appear to agree with these general propositions of law concerning the use of the proportionality factor or criterion. Nevertheless, Libya’s proportionality argument in effect goes a good deal further. The fifth and sixth submissions of Libya are to the effect that

“Equitable principles do not require that a State possessing a restricted coastline be treated as if it possessed an extensive coastline”;

and that

“In the particular geographical situation of this case, the application of equitable principles requires 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.”

These submissions have in argument been treated as ancillary to the fourth submission, whereby Libya contends that a criterion for delimitation can be derived from the principle of natural prolongation because of the presence of a fundamental discontinuity in the sea-bed and subsoil; but this submission—the rift-zone argument—has been rejected by the Court. Nothing else remains in the Libyan submissions that can afford an independent principle and method for drawing the boundary, unless the reference to the lengths of coastlines is taken as such. However, to use the ratio of coastal lengths as of itself determinative of the seaward reach and area of 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. If such a use of proportionality were right, it is difficult indeed to see what room would be left for any other consideration; for it would be at once the principle of entitlement to continental shelf rights and also the method of putting that principle into operation. Its weakness as a basis of argument, however, is that the use of proportionality as a method in its own right is wanting of support in the practice of States, in the public expression of their views at (in particular) the Third United Nations Conference on the Law of the Sea, or in the jurisprudence. It is not possible for the Court to endorse a proposal at once so far-reaching and so novel. That does not
however mean that the “significant difference in lengths of the respective coastlines” is not an element which may be taken into account at a certain stage in the delimitation process; this aspect of the matter will be returned to at the appropriate stage in the further reasoning of the Court.

59. Libya has also placed particular reliance upon the 1982 decision of the Court in the case concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya), in which the Court took note of the relationship of the lengths of the relevant coasts of the Parties, and compared that relationship with the ratio between the areas of continental shelf attributed to each Party. On the basis of figures for distances and ratios, the Court concluded that the result of the delimitation contemplated would “meet the requirements of the test of proportionality as an aspect of equity” (J.C.J. Reports 1982, p. 91, para. 131). Libya has in its pleadings and arguments carried out a similar operation in the present case, in order to show that “a delimitation within, and following the general direction of, the Rift Zone” would clearly meet the test of proportionality. Neither the Court’s findings as to the proper function of the concept of proportionality, set out above, nor its dismissal of the arguments based on geological or geophysical features in support of the rift zone, signify the rejection in principle of the applicability of the criterion of proportionality as a test of the equitableness of the result of a delimitation. The question of its practical applicability in the circumstances of this case however will fall to be examined once the Court has indicated the method of delimitation which results from the applicable principles and rules of international law.

* * *

60. In applying the equitable principles thus elicited, within the limits defined above, and in the light of the relevant circumstances, the Court intends to proceed by stages; thus, it will first make a provisional delimitation by using a criterion and a method both of which are clearly destined to play an important role in producing the final result; it will then examine this provisional solution in the light of the requirements derived from other criteria, which may call for a correction of this initial result.

61. The Court has little doubt which criterion and method it must employ at the outset in order to achieve a provisional position in the present dispute. The criterion is linked with the law relating to a State’s legal title to the continental shelf. As the Court has found above, the law applicable to the present dispute, that is, to claims relating to continental shelves located less than 200 miles from the coasts of the States in question, is based not on geological or geomorphological criteria, but on a criterion of distance from the coast or, to use the traditional term, on the principle of adjacency as measured by distance. It therefore seems logical to the Court that the choice of the criterion and the method which it is to employ in the first place to arrive at a provisional result should be made in a manner consistent with the concepts underlying the attribution of legal title.

62. The consequence of the evolution of continental shelf law can be noted with regard to both verification of title and delimitation as between rival claims. On the basis of the law now applicable (and hence of the distance criterion), the validity of the titles of Libya and Malta to the sea-bed areas claimed by those States is clear enough. Questions arise only in the assessment of the impact of distance considerations on the actual delimiting. In this assessment, account must be taken of the fact that, according to the “fundamental norm” of the law of delimitation, an equitable result must be achieved on the basis of the application of equitable principles to the relevant circumstances. It is therefore necessary to examine the equities of the distance criterion and of the results to which its application may lead. The Court has itself noted that the equitable nature of the equidistance method is particularly pronounced in cases where delimitation has to be effected between States with opposite coasts. In the cases concerning the North Sea Continental Shelf it said that:

“The continental shelf area off, and dividing, opposite States [consists of] prolongations [which] 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 disproportionately distorting effect of which can be eliminated by other means, such a line must effect an equal division of the particular area involved.” (J.C.J. Reports 1969, p. 36, para. 57.)

In the next paragraph it emphasized the appropriateness of a median line for delimitation between opposite coasts (ibid., p. 37, para. 58). But it is in fact a delimitation exclusively between opposite coasts that the Court is, for the first time, asked to deal with. It is clear that, in these circumstances, the tracing of a median line between those coasts, by way of a provisional step in a process to be continued by other operations, is the most judicious manner of proceeding with a view to the eventual achievement of an equitable result.

63. The median line drawn in this way is thus only provisional. Were the Court to treat it as final, it would be conferring on the equidistance method the status of being the only method which is compulsory in the case of opposite coasts. As already pointed out, existing international law cannot be interpreted in this sense; the equidistance method is not the only method applicable to the present dispute, and it does not even have the benefit of a presumption in its favour. Thus, under existing law, it must be demonstrated that the equidistance method leads to an equitable result in the case in question. To achieve this purpose, the result to which the distance criterion leads must be examined in the context of applying equitable principles to the relevant circumstances.
we have seen, which allows no effect at all to the islands of Malta. The position of such a median line, employing the baselines on the coasts of Sicily established by the Italian Government, may be defined for present purposes by its intersection with the meridian 15° 10' E; according to the information supplied to the Court, this intersection is at about latitude 34° 36' N. The course of that line evidently does not run parallel to that of the median line between Malta and Libya, but its form is, it is understood, not greatly different. The equidistance line drawn between Malta and Libya (excluding as basepoint the islet of Filfla), according to the information available to the Court, intersects that same meridian 15° 10' E at approximately 34° 12' N. A transposition northwards through 24' of latitude of the Malta-Libya median line would therefore be the extreme limit of such northward adjustment.

73. The position reached by the Court at this stage of its consideration of the case is therefore the following. It takes the median line (ignoring Filfla as a basepoint) as the first step of the delimitation. But relevant circumstances indicate that some northward shift of the boundary line is needed in order to produce an equitable result. These are first, the general geographical context in which the islands of Malta appear as a relatively small feature in a semi-enclosed sea; and secondly, the great disparity in the lengths of the relevant coasts of the two Parties. The next step in the delimitation is therefore to determine the extent of the required northward shift of the boundary line. Here, there are two important parameters which the Court has already mentioned above. First, there is the outside limit of any northward shift, of some 24' (see paragraph 72 above). Second, there is the considerable distance between the coasts (some 195' difference of latitude, in round terms, between Benghisa Point and the Libyan coast due south of that point), which is an obviously important consideration when deciding whether, and by how much, a median line boundary can be shifted without ceasing to have an approximately median location, or approaching so near to one coast as to bring into play other factors such as security. In the present case there is clearly room for a significant adjustment, if it is found to be required for achieving an equitable result. Weighing up these several considerations in the present kind of situation is not a process that can in all instances be reduced to a formula expressed in actual figures. Nevertheless, such an assessment has to be made, and the Court has concluded that a boundary line that represents a shift of around three-quarters of the distance between the two outer parameters – that is to say between the median line and the line 24' north of it – achieves an equitable result in all the circumstances. It has therefore decided that the equitable boundary line is a line produced by transposing the median line northwards through 18' of latitude. By "transposing" is meant the operation whereby to every point on the median line there will correspond a point on the line of delimitation, lying on the same meridian of longitude but 18' further to the north. Since the median line intersects the meridian 15° 10' E at 34° 12' N approximately, the delimitation line will intersect that meridian at 34° 30' N approximately; but it will be for the Parties and

74. There remains the aspect which the Court in its Judgment in the North Sea Continental Shelf cases called "the element of a reasonable degree of proportionality . . . between the extent of the continental shelf areas appertaining to the coastal State and the length of its coast" (I.C.J. Reports 1969, p. 54, para. 101 (D) (3)). In the view of the Court, there is no reason of principle why the test of proportionality, more or less in the form in which it was used in the Tunisia/Libya case, namely the identification of "relevant coasts", the identification of "relevant areas" of continental shelf, the calculation of the mathematical ratios of the lengths of the coasts and the areas of shelf attributed, and finally the comparison of such ratios, should not be employed to verify the equity of a delimitation between opposite coasts, just as well as between adjacent coasts. However, there may well in such a case be practical difficulties which render it inappropriate in that form. These difficulties are particularly evident in the present case where, in the first place, the geographical context is such that the identification of the relevant coasts and the relevant areas is so much at large that virtually any variant could be chosen, leading to widely different results; and in the second place the area to which the Judgment will in fact apply is limited by reason of the existence of claims of third States. To apply the proportionality test simply to the areas within these limits would be unrealistic; there is no need to stress the dangers of reliance upon a calculation in which a principal component has already been determined at the outset of the decision, not by a consideration of the equities, but by reason of quite other preoccupations of the Court. Yet to apply proportionality calculations to any wider area would involve two serious difficulties. First, there is the probability that future delimitations with third States would overthrow not only the figures for shelf areas used as basis for calculations but also the ratios arrived at. Secondly, it is the result of the delimitation line indicated by the Court which is to be tested for equitability; but that line does not extend beyond the meridians 13° 50' E to the west and 15° 10' E to the east. To base proportionality calculations on any wider area would therefore involve an artificial prolongation of the line of delimitation, which would be beyond the jurisdiction of the Court, even by way of hypothesis for an assessment of the equities within the area to which the Judgment relates.

75. This does not mean, however, that the Court is debarred from considering the equitability of the result of the delimitation which it has in contemplation from the viewpoint of the proportional relationship of
Arbitral Tribunal

Award of the Arbitral Tribunal in the Second Stage of the Proceedings between Eritrea and Yemen (Maritime Delimitation) Decision of 17 December 1999

*Reports of International Arbitral Awards*, vol. XXII, paras. 131-132, 155-156, 159
SECOND STAGE: MARITIME DELIMITATION

customary law of the sea, but many of the relevant elements of customary law are
incorporated in the provisions of the Convention. “Any other pertinent factors”
is a broad concept, and doubtless includes various factors that are generally
recognised as being relevant to the process of delimitation such as
proportionality, non-encroachment, the presence of islands, and any other factors
that might affect the equities of the particular situation.

131. It is a generally accepted view, as is evidenced in both the writings of
commentators and in the jurisprudence, that between coasts that are opposite to
each other the median or equidistance line normally provides an equitable
boundary in accordance with the requirements of the Convention, and in
particular those of its Articles 74 and 83 which respectively provide for the
equitable delimitation of the EEZ and of the continental shelf between States with
opposite or adjacent coasts. Indeed both Parties to the present case have claimed
a boundary constructed on the equidistance method, although based on different
points of departure and resulting in very different lines.

132. The Tribunal has decided, after careful consideration of all the cogent and skilful
arguments put before them by both Parties, that the international boundary shall
be a single all-purpose boundary which is a median line and that it should, as far
as practicable, be a median line between the opposite mainland coastlines. This
solution is not only in accord with practice and precedent in the like situations but
is also one that is already familiar to both Parties. As the Tribunal had occasion
to observe in its Award on Sovereignty (paragraph 438), the offshore petroleum
contracts entered into by Yemen, and by Ethiopia and by Eritrea, “lend a measure
of support to a median line between the opposite coasts of Eritrea and Yemen,
drawn without regard to the islands, dividing the respective jurisdiction of the
Parties”. In the present stage the Tribunal has to determine a boundary not merely
for the purposes of petroleum concessions and agreements, but a single
international boundary for all purposes. For such a boundary the presence of
islands requires careful consideration of their possible effect upon the boundary
line; and this is done in the explanation which follows. Even so it will be found
that the final solution is that the international maritime boundary line remains for
the greater part a median line between the mainland coasts of the Parties.

133. The median line is in any event a sort of coastal line by its very definition, for
it is defined as a line “every point of which is equidistant from the nearest points
on the baselines from which the breadth of the territorial seas of the two States is
measured” (Article 15 of the Convention), although the same definition will be
found in many maritime boundary treaties and also in expert writings. The
“normal” baseline of the territorial sea as stated in Article 5 of the Convention –
and this again accords with long practice and with the well established customary
rule of the law of the sea – is “the low-water line along the coast as marked on
deploy its arguments differently. It is however the view of the Tribunal that it is right to use as median line base points not only Kamaran and its satellite islets which appear in the Yemen Map 12.1, but also the islets to the northwest named Uqban and Kutama.

152. The above decisions having been made, it is now possible to compute and plot the northern stretch of the boundary line between turning points 1 and 13 (the list of the coordinates of the turning points is given below; see also the illustrative Charts 3 and 4). For this entire part of the line, the boundary should be a mainland-coastal median, or equidistance, line.

153. At turning point number 13, however, a simple mainland/coastal median line approaches the area of possible influence of the islands of the Zuqar-Hanish group, and clearly some decisions have to be made as to how to deal with this situation.

The Middle Stretch of the Boundary Line

154. It will be convenient for obvious reasons if the Tribunal first decides the question of the boundary in the narrow seas between the south-west extremity of the Hanish group on the one hand and the Eritrean islands of the Mohabbakahs, High Island, the Haycocks and the South West Rocks on the other. In this part of the boundary there is added to the boundary problem of delimiting continental shelves and EEZ the question of delimiting an area of overlapping territorial seas. This comes about because Zuqar and Hanish, attributed to the sovereignty of Yemen, both generate territorial seas which overlap with those generated by the Haycocks and South West Rocks, attributed to the sovereignty of Eritrea. It would appear from Yemen Map 12.1 that Yemen assumed that Eritrea is entitled only to a strictly 12 mile territorial sea extending from the Eritrean base points chosen by Yemen along the high-water line on the Eritrean coast; the outcome would be, according to Yemen, that the Haycocks and South West Rocks are thus left isolated outside and beyond the Eritrean territorial sea proper.

155. This proposition is questionable, quite apart from the obvious impracticality of establishing limited enclaves around islands and navigational hazards in the immediate neighbourhood of a main international shipping lane. There is no doubt that an island, however small, and even rocks provided they are indeed islands proud of the water at high-tide, are capable of generating a territorial sea of up to 12 miles (Article 121.2 of the Convention). It follows that a chain of islands which are less than 24 miles apart can generate a continuous band of territorial sea. This is the situation of the Eritrean islands out to, and including, the South West Rocks.

156. The point that the Yemen suggestion omits to take into account is that the effect of what has been referred to as "leap-frogging" the Eritrean islands and islets in this area is to extend the mainland coast territorial sea beyond the limit of 12 miles from the mainland coast. According to Article 3 of the Convention, the territorial sea extends "up to a limit not exceeding 12 nautical miles, measured from the baselines determined in accordance with this Convention". This is permissible because each island, however small or unimportant of itself, creates a further low-water baseline from which the coastal territorial sea is to be measured. This "leap-frogging" point was invoked strongly in support of Eritrea's claims to sovereignty. This reasoning was not accepted by the Tribunal in its Award on Sovereignty, it nonetheless his relevance in the present context.

157. If any further reason were needed to reject the Yemen suggestion of enclaving the Eritrean islands in this area beyond a limit of 12 miles from the high-water line of the mainland coast, it may be found in the principle of non-encroachment which was described by Judge Lachs in the Guinea/Guinea-Bissau Award in the following terms:

As stated in the award, our principal concern has been to avoid, by one means or another, one of the Parties finding itself faced with the exercise of rights, opposite to and in the immediate vicinity of its coast, which might interfere with its right to development or put its security at risk.

158. It will be seen that the international boundary line must therefore lie somewhere in a belt of sea no more than four or five miles wide. Once it is established that there is an area of Eritrean mainland coast territorial sea, potentially extending beyond the South West Rocks and the Haycock group of islands on the one hand and overlapping the territorial sea generated by the Yemen islands of the Hanish group on the other, the situation suggests a median line boundary. Under Article 15 of the Convention the normal methods for drawing an equidistant median line could be varied if reason of historic title or other special circumstances were to indicate otherwise. However, the Tribunal has considered these reasons and circumstances and finds no variance necessary.

159. Further bearing in mind its overall task of delimitation, the Tribunal also finds this line to be an entirely equitable one. The decision of the Tribunal is therefore that the median line is the international boundary line where it cuts through the area of overlap of the respective territorial seas of the Parties.

* * *

15 25 ILM 251.
International Court of Justice

Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)
Judgment

Qatar has sovereignty over Janan Island including Hadd Janan, on the basis of the decision taken by the British Government in 1939, as interpreted in 1947. The Court thus cannot uphold the submission of Bahrain on this point.

* * *

166. The Court will now turn to the question of the maritime delimitation.

167. The Parties are in agreement that the Court should render its decision on the maritime delimitation in accordance with international law. Neither Bahrain nor Qatar is party to the Geneva Conventions on the Law of the Sea of 29 April 1958; Bahrain has ratified the United Nations Convention on the Law of the Sea of 10 December 1982 but Qatar is only a signatory to it. Customary international law, therefore, is the applicable law. Both Parties, however, agree that most of the provisions of the 1982 Convention which are relevant for the present case reflect customary law.

168. Under the terms of the “Bahraini formula” adopted in December 1990 (see paragraphs 67 and 69 above), the Parties requested the Court, “to draw a single maritime boundary between their respective maritime areas of seabed, subsoil and superjacent waters”.

In its final submissions, which are identical to the submissions presented in the written proceedings, Qatar requested the Court to “draw a single maritime boundary between the maritime areas of sea-bed, subsoil and superjacent waters appertaining respectively to the State of Qatar and the State of Bahrain . . . .”.

Bahrain for its part asked the Court to adjudge and declare that “the maritime boundary between Bahrain and Qatar is as described in Part Two of Bahrain’s Memorial”. From this Memorial and the maps annexed thereto, it follows that Bahrain, too, is asking the Court to draw a single maritime boundary.

Both Parties therefore requested the Court to draw a single maritime boundary (see sketch-map No. 2, p. 92 below).

169. It should be kept in mind that the concept of “single maritime boundary” may encompass a number of functions. In the present case the single maritime boundary will be the result of the delimitation of various jurisdictions. In the southern part of the delimitation area, which is situated where the coasts of the Parties are opposite to each other, the distance between these coasts is nowhere more than 24 nautical miles. The boundary the Court is expected to draw will, therefore, delimit exclusively their territorial seas and, consequently, an area over which they enjoy territorial sovereignty.

170. More to the north, however, where the coasts of the two States are no longer opposite to each other but are rather comparable to adjacent coasts, the delimitation to be carried out will be one between the artesian wells would, taken by themselves, be considered controversial as acts performed à titre de souverain. The construction of navigational aids, on the other hand, can be legally relevant in the case of very small islands. In the present case, taking into account the size of Qit’at Jaradah, the activities carried out by Bahrain on that island must be considered sufficient to support Bahrain’s claim that it has sovereignty over it.

198. In this context the Court recalls that the Permanent Court of International Justice observed in the Legal Status of Eastern Greenland case that

“It is impossible to read the records of the decisions in cases as to territorial sovereignty without observing that in many cases the tribunal has been satisfied with very little in the way of the actual exercise of sovereign rights, provided that the other State could not make out a superior claim.” (P.C.I.J., Series A/B, No. 53, p. 46.)

199. Similar acts of authority have been invoked by Bahrain in order to support its claim that it has sovereignty over Fasht ad Dibal. In this respect Bahrain recalls that the British Government in 1947 recognized that Bahrain had sovereign rights over Fasht ad Dibal, even if it could not be considered as an island having territorial waters.

200. Both Parties agree that Fasht ad Dibal is a low-tide elevation. Whereas Qatar maintains — just as it did with regard to Qit’at Jaradah — that Fasht ad Dibal as a low-tide elevation cannot be appropriated, Bahrain contends that low-tide elevations by their very nature are territory, and therefore can be appropriated in accordance with the criteria which pertain to the acquisition of territory. “Whatever their location, low-tide elevations are always subject to the law which governs the acquisition and preservation of territorial sovereignty, with its subtle dialectic of title and effectivité.”

201. According to the relevant provisions of the Conventions on the Law of the Sea, which reflect customary international law, a low-tide elevation is a naturally formed area of land which is surrounded by and above water at low tide but submerged at high tide (1958 Convention on the Territorial Sea and the Contiguous Zone, paragraph 1 of Article 11; 1982 Convention on the Law of the Sea, paragraph 1 of Article 13).

Under these provisions, the low-water line of a low-tide elevation may be used as the baseline for measuring the breadth of the territorial sea if it is situated wholly or partly at a distance not exceeding the breadth of the territorial sea from the mainland or an island. If a low-tide elevation is wholly situated at a distance exceeding the breadth of the territorial sea, it has no territorial sea of its own. The above-mentioned Conventions further provide that straight baselines shall not be drawn to and
from low-tide elevations, unless lighthouses or similar installations which are permanently above sea level have been built on them (1958 Convention, paragraph 3 of Article 4; 1982 Convention, paragraph 4 of Article 7). According to Bahrain this is the case with regard to all low-tide elevations which are relevant in the present case for the delimitation process.

202. When a low-tide elevation is situated in the overlapping area of the territorial sea of two States, whether with opposite or with adjacent coasts, both States in principle are entitled to use its low-water line for the measuring of the breadth of their territorial sea. The same low-tide elevation then forms part of the coastal configuration of the two States. That is so even if the low-tide elevation is nearer to the coast of one State than that of the other, or nearer to an island belonging to one party than it is to the mainland coast of the other. For delimitation purposes the competing rights derived by both coastal States from the relevant provisions of the law of the sea would by necessity seem to neutralize each other.

203. In Bahrain’s view, however, it depends upon the effectivité presented by the two coastal States which of them has a superior title to the low-tide elevation in question and is therefore entitled to exercise the right attributed by the relevant provisions of the law of the sea, just as in the case of islands which are situated within the limits of the breadth of the territorial sea of more than one State.

Bahrain contends that it has submitted sufficient evidence of the display of sovereign authority over all the low-tide elevations situated in the sea between Bahrain’s main islands and the coast of the Qatar peninsula.

204. Whether this claim by Bahrain is well founded depends upon the answer to the question whether low-tide elevations are territory and can be appropriated in conformity with the rules and principles of territorial acquisition. In the view of the Court, the question in the present case is not whether low-tide elevations are or are not part of the geographical configuration and as such may determine the legal coastline. The relevant rules of the law of the sea explicitly attribute to them that function when they are within a State’s territorial sea. Nor is there any doubt that a coastal State has sovereignty over low-tide elevations which are situated within its territorial sea, since it has sovereignty over the territorial sea itself, including its sea-bed and subsoil. The decisive question for the present case is whether a State can acquire sovereignty by appropriation over a low-tide elevation situated within the breadth of its territorial sea when that same low-tide elevation lies also within the breadth of the territorial sea of another State.

205. International treaty law is silent on the question whether low-tide elevations can be considered to be “territory”. Nor is the Court its own effect for the determination of the baselines, on the understanding that, on the grounds set out before, the low-tide elevations situated in the overlapping zone of territorial seas will be disregarded. It is on this basis that the equidistance line must be drawn.

216. Fasht al Azm however requires special mention. If this feature were to be regarded as part of the island of Sitrak, the basepoints for the purposes of determining the equidistance line would be situated on Fasht al Azm’s eastern low-water line. If it were not to be regarded as part of the island of Sitrak, Fasht al Azm could not provide such basepoints. As the Court has not determined whether this feature does form part of the island of Sitrak (see paragraph 190 above), it has drawn two equidistance lines reflecting each of these hypotheses (see sketch-maps Nos. 3, 4, 5 and 6, pp. 105-108 below).

2*17. The Court now turns to the question of whether there are special circumstances which make it necessary to adjust the equidistance line as provisionally drawn in order to obtain an equitable result in relation to this part of the single maritime boundary to be fixed (see the case concerning Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway), Judgment, I.C.J. Reports 1993, p. 60, para. 50, p. 62, para. 54).

218. The first question to be considered is that of Fasht al Azm. The Court considers that if Fasht al Azm were to be regarded as part of the island of Sitrak, it would not be appropriate to take the equidistance line as the maritime boundary since, in view of the fact that less than 20 per cent of the surface of this island is permanently above water, this would place the boundary disproportionately close to Qatar’s mainland coast (see sketch-maps Nos. 3 and 5, pp. 105 and 107 below). If, on the other hand, Fasht al Azm were to be regarded as a low-tide elevation, the equidistance line would brush Fasht al Azm, and for this reason would also be an inappropriate delimitation line (see sketch-maps Nos. 3 and 6, pp. 105 and 108 below). The Court considers that, on either hypothesis, there are thus special circumstances which justify choosing a delimitation line passing between Fasht al Azm and Qit’at ash Shajarah.

219. The next question to be considered is that of Qit’at Jaradah. The Court observes that Qit’at Jaradah is a very small island, uninhabited and without any vegetation. This tiny island, which — as the Court has determined (see paragraph 197 above) — comes under Bahraini sovereignty, is situated about midway between the main island of Bahrain and the Qatar peninsula. Consequently, if its low-water line were to be used for determining a basepoint in the construction of the equidistance line, and this line taken as the delimitation line, a disproportionate effect
would be given to an insignificant maritime feature (see sketch-maps Nos. 3, 5 and 6, pp. 105, 107 and 108 above).

In similar situations the Court has sometimes been led to eliminate the disproportionate effect of small islands (see North Sea Continental Shelf, I.C.J. Reports 1969, p. 36, para. 57; Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985, p. 48, para. 64). The Court thus finds that there is a special circumstance in this case warranting the choice of a delimitation line passing immediately to the east of Qit’at Jaradah.

220. The Court observed earlier (see paragraph 216 above) that, since it did not determine whether Fasht al Azm is part of Sirath island or a separate low-tide elevation, it is necessary to draw provisionally two equidistance lines. If no effect is given to Qit’at Jaradah in the event that Fasht al Azm is considered to be part of Sirath island, the equidistance line thus adjusted cuts through Fasht ad Dibal leaving the greater part of it on the Qatari side. If, however, Fasht al Azm is seen as a low-tide elevation, the adjusted equidistance line runs west of Fasht ad Dibal. In view of the fact that under both hypotheses, Fasht ad Dibal is largely or totally on the Qatari side of the adjusted equidistance line, the Court considers it appropriate to draw the boundary line between Qit’at Jaradah and Fasht ad Dibal. As Fasht ad Dibal thus is situated in the territorial sea of Qatar, it falls for that reason under the sovereignty of that State.

221. The Court is now in a position to determine the course of that part of the single maritime boundary which will delimit the territorial seas of the Parties. Before doing so the Court notes, however, that it cannot fix the boundary’s southernmost point, since its definitive location is dependent upon the limits of the respective maritime zones of Saudi Arabia and of the Parties. The Court also considers it proper, in accordance with common practice, to simplify what would otherwise be a very complex delimitation line in the region of the Hawar Islands.

222. Taking account of all of the foregoing, the Court decides that, from the point of intersection of the respective maritime limits of Saudi Arabia on the one hand and of Bahrain and Qatar on the other, which cannot be fixed, the boundary will follow a north-easterly direction, then immediately turn in an easterly direction, after which it will pass between Jazirat Hawar and Janan; it will subsequently turn to the north and pass between the Hawar Islands and the Qatar peninsula and continue in a northerly direction, leaving the low-tide elevation of Fasht Bu Thur, and Fasht al Azm, on the Bahraini side, and the low-tide elevations of Qita’a el Erge and Qit’at ash Shajarah on the Qatari side; finally it will pass between Qit’at Jaradah and Fasht ad Dibal, leaving Qit’at Jaradah on the Bahraini side and Fasht ad Dibal on the Qatari side.

223. The Court notes that, because of the line thus adopted, Qatar’s maritime zones situated to the south of the Hawar Islands and those situated to the north of those islands are connected only by the channel separating the Hawar Islands from the peninsula. This channel is narrow and shallow, and little suited to navigation.

The Court therefore emphasizes that, as Bahrain is not entitled to apply the method of straight baselines (see paragraph 215 above), the waters lying between the Hawar Islands and the other Bahraini islands are not internal waters of Bahrain, but the territorial sea of that State. Consequently, Qatari vessels, like those of all other States, shall enjoy in these waters the right of innocent passage accorded by customary international law. In the same way, Bahraini vessels, like those of all other States, enjoy this right of innocent passage in the territorial sea of Qatar.

224. The Court will now deal with the drawing of the single maritime boundary in that part of the delimitation area which covers both the continental shelf and the exclusive economic zone (see paragraph 170 above).

225. In its Judgment of 1984, the Chamber of the Court dealing with the Gulf of Maine case noted that an increasing demand for single delimitation was foreseeable in order to avoid the disadvantages inherent in a plurality of separate delimitations; according to the Chamber, “preference will henceforth inevitably be given to criteria that, because of their more neutral character, are best suited for use in a multi-purpose delimitation” (I.C.J. Reports 1984, p. 327, para. 194).

226. The Court itself referred to the close relationship between continental shelf and exclusive economic zone for delimitation purposes in its Judgment in the case concerning the Continental Shelf (Libyan Arab Jamahiriya/Malta). It observed 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 cannot be left out of consideration. As the 1982 Convention demonstrates the two institutions — continental shelf and exclusive economic zone — are linked together in modern law.” (I.C.J. Reports 1985, p. 33, para. 33.)

And the Court went on to say that, in case of delimitation, “greater importance must be attributed to elements, such as distance from the coast, which are common to both concepts” (ibid.).

227. A similar approach was taken by the Court in the Jan Mayen case, where it was also asked to draw a single maritime boundary. With regard to the delimitation of the continental shelf the Court stated that

“even if it were appropriate to apply . . . customary law concerning the continental shelf as developed in the decided cases [the Court had referred to the Gulf of Maine and the Libyan Arab Jama-
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hiriya/Malta cases], it is in accord with precedents to begin with the median line as a provisional line and then to ask whether 'special circumstances' [the term used in Article 6 of the 1958 Convention on the Continental Shelf, which was the applicable law in the case] require any adjustment or shifting of that line” (I.C.J. Reports 1993, p. 61, para. 51).

228. After having come to a similar conclusion with regard to the fishery zones, the Court stated:

“It thus appears 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.” (Ibid., p. 62, para. 53.)

229. The Court went on to say that it was further called upon to examine those factors which might suggest an adjustment or shifting of the median line in order to achieve an “equitable result”. The Court concluded:

“It is thus apparent that special circumstances are those circumstances which might modify the result produced by an unqualified application of the equidistance principle. General international law, as it has developed through the case-law of the Court and arbitral jurisprudence, and through the work of the Third United Nations Conference on the Law of the Sea, has employed the concept of ‘relevant circumstances’. This concept can be described as a fact necessarily to be taken into account in the delimitation process.” (Ibid., p. 62, para. 55.)

230. The Court will follow the same approach in the present case. For the delimitation of the maritime zones beyond the 12-mile zone it will first provisionally draw an equidistance line and then consider whether there are circumstances which must lead to an adjustment of that line.

231. The Court further notes that the equidistance/special circumstances rule, which is applicable in particular to the delimitation of the territorial sea, and the equitable principles/relevant circumstances rule, as it has been developed since 1958 in case-law and State practice with regard to the delimitation of the continental shelf and the exclusive economic zone, are closely interrelated.

232. The Court will now examine whether there are circumstances which might make it necessary to adjust the equidistance line in order to achieve an equitable result.

233. The Court recalls first that in its Judgment in the case concerning the Continental Shelf (Libyan Arab Jamahiriya-Malta) it said:

“the equidistance method is not the only method applicable to the present dispute, and it does not even have the benefit of a presump-

niton of an exclusive quasi-territorial right to the fishing grounds themselves or to the superjacent waters.

The Court, therefore, does not consider the existence of pearling banks, though predominantly exploited in the past by Bahrain fishermen, as forming a circumstance which would justify an eastward shifting of the equidistance line as requested by Bahrain.

237. In its Application of 1991 Qatar requested the Court to draw the single maritime boundary “with due regard to the line dividing the seabed of the two States as described in the British decision of 23 December 1947” (see paragraph 31 above). According to Qatar

“the 1947 line in itself constitutes a special circumstance insofar as it was drawn in order to permit each of the two interested States actually to exercise its inherent right over the sea-bed. While it cannot be said that any historic title has derived from that decision, the situation thus created however does not fall short of it.”

During the oral proceedings Qatar modulated this view when it said that

“the nature of the 1947 line . . . relates not so much to the line itself, as drawn, but rather to the elements on the basis of which the line was drawn by the British; in our view the important factor is, above all, that this line was drawn starting from the principal coasts and was constructed in a simplified manner on the basis of a few significant points”.

238. Bahrain has contested the relevance of the 1947 line for the present delimitation process on a number of grounds. It stated, inter alia, that its course does not meet the requirements of contemporary law and that it merely served the purpose of regulating activities of oil companies and was not intended by its authors nor understood by its recipients as having binding legal force.

239. The Court does not need to determine the legal character of the “decision” contained in the letters of 23 December 1947 to the Rulers of Bahrain and Qatar with respect to the division of the sea-bed. It suffices for it to note that neither of the Parties has accepted it as a binding decision and that they have invoked only parts of it to support their arguments.

240. The Court further observes that the British decision only concerned the division of the sea-bed between the Parties. The delimitation to be effected by the Court, however, is partly a delimitation of the territorial sea and partly a combined delimitation of the continental shelf
and the exclusive economic zone. The 1947 line cannot therefore be considered to have direct relevance for the present delimitation process.

241. Qatar has also argued that there is a significant disparity between the coastal lengths of the Parties, and that the ratio of its mainland coast to that of Bahrain's principal islands is 1.59:1. It has referred to earlier decisions of the Court where the Court has qualified a substantial disparity between the lengths of the coasts as a special or relevant circumstance calling for an appropriate correction of the delimitation line provisionally arrived at.

242. Bahrain has stated that the purported disparity is the result of Qatar's assumption that the Hawar Islands are under its sovereignty; if these islands are considered as appertaining to Bahrain, the lengths of the relevant coasts would be almost equal.

243. Taking into account the fact that the Court has decided that Bahrain has sovereignty over the Hawar Islands, the disparity in length of the coastal fronts of the Parties cannot be considered such as to necessitate an adjustment of the equidistance line.

244. The Court will now consider whether there are other reasons which might require an adjustment of the course of the equidistance line in order to achieve an equitable solution.

245. In drawing the line which delimits the continental shelves and exclusive economic zones of the Parties the Court cannot ignore the location of Fasht al Jarim, a sizeable maritime feature partly situated in the territorial sea of Bahrain. The Parties have expressed differing views on the legal nature of this maritime feature but, in any event, given the feature's location, its low-water line may be used as the baseline from which the breadth not only of the territorial sea, but also of the continental shelf and the exclusive economic zone, is measured.

246. The Court recalls that in the Libyan Arab Jamahiriya/Malta case, referred to above, it stated:

"the equitableness of an equidistance line depends on whether the precaution is taken of eliminating the disproportionate effect of certain 'islets, rocks and minor coastal projections', to use the language of the Court in its 1969 Judgment [(case concerning North Sea Continental Shelf)]" (I.C.J. Reports 1985, p. 48, para. 64).

247. The Court further recalls that in the northern sector the coasts of the Parties are comparable to adjacent coasts abutting on the same maritime areas extending seawards into the Gulf. The northern coasts of the territories belonging to the Parties are not markedly different in character or extent; both are flat and have a very gentle slope. The only noticeable element is Fasht al Jarim as a remote projection of Bahrain's coastline in the Gulf area, which, if given full effect, would "distort the boundary and
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zone, i.e., that the two lines would coincide, but the two boundaries would remain conceptually distinct. In the pleadings of the Parties, and especially in the oral argument of Norway, some importance has been attached to this difference between the ways in which the Parties have submitted their dispute to the Court; particularly the absence of any agreement of the Parties, of the kind to be found in the Special Agreement in the case concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area, to ask the Court 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” (I.C.J. Reports 1984, p. 253).

42. At first sight it might be thought that asking for the drawing of a single line and asking for the drawing of two coincident lines amounts in practical terms to the same thing. There is, however, in Norway’s view, this important difference, that the two lines, even if coincident in location, stem from different strands of the applicable law, the location of the one being derived from the 1958 Convention, and the location of the other being derived from customary law.

43. There is no agreement between the Parties for a single maritime boundary; the situation is thus quite different from that in the Gulf of Maine case. The Chamber of the Court was requested by the Special Agreement in that case to effect a single-line, dual-purpose delimitation; it indicated that in its view, on the basis of such an agreement, a delimitation valid for both continental shelf and the superjacent water column

"can only be carried out by the application of a criterion, or combination of criteria, which does not give preferential treatment to one of these two objects to the detriment of the other, and at the same time is such as to be equally suitable to the division of either of them" (ibid., p. 327, para. 194).

The Chamber decided that Article 6 of the 1958 Convention could not, because of the Parties’ agreement to ask for a single maritime boundary, be applied for the determination of such a boundary. It observed that in such a case Article 6 has no “mandatory force even between States which are parties to the Convention” (ibid., p. 303, para. 124). The Court in the present case is not empowered — or constrained — by any such agreement for a single dual-purpose boundary.

44. Furthermore, the Court has already found, contrary to the contention of Norway, that there is not a continental shelf boundary already “in place”. The Court accordingly does not have to express any view on the legal situation which would have arisen if the continental shelf had been delimited, but the fishery zones had not. It is sufficient for it to note, as do the Parties, that the 1958 Convention is binding upon them, that it governs the continental shelf delimitation to be effected, and that it is certainly a source of applicable law, different from that governing the delimitation of fishery zones. The Court will therefore examine separately the two strands of the applicable law: the effect of Article 6 of the 1958 Convention applicable to the delimitation of the continental shelf boundary, and then the effect of the customary law which governs the fishery zone.

45. It may be observed that the Court has never had occasion to apply the 1958 Convention. In the North Sea Continental Shelf cases, the Federal Republic of Germany was not a party to the 1958 Convention; similarly, in the continental shelf cases between Tunisia and Libya and between Libya and Malta, Libya was not a party to the 1958 Convention. In the Gulf of Maine case, Canada and the United States of America were parties to the 1958 Convention; but they requested the Chamber to define “the course of the single maritime boundary that divides the continental shelf and fisheries zones”, so that, as already noted, the Chamber considered that the 1958 Convention, being applicable to the continental shelf only, did not govern the delimitation requested. In the present case, both States are parties to the 1958 Convention and, there being no joint request for a single maritime boundary as in the Gulf of Maine case, the 1958 Convention is applicable to the delimitation of the continental shelf between Greenland and Jan Mayen.

46. The fact that it is the 1958 Convention which applies to the continental shelf delimitation in this case does not mean that Article 6 thereof 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. The Anglo-French Court of Arbitration in 1977 placed Article 6 of the 1958 Convention in the perspective of customary law in the much-quoted passage of its Decision, that:

"the combined ‘equidistance-special circumstances rule’, in effect, gives particular expression to a general norm that, failing agreement, the boundary between States abutting on the same continental shelf is to be determined on equitable principles” (United Nations, Reports of International Arbitral Awards (RIAA), Vol. XVIII, p. 45, para. 70).

If the equidistance-special circumstances rule of the 1958 Convention is, in the light of this 1977 Decision, to be regarded as expressing a general norm based on equitable principles, it must be difficult to find any material difference — at any rate in regard to delimitation between opposite coasts — between the effect of Article 6 and the effect of the customary rule which also requires a delimitation based on equitable principles. The Court in the case concerning the Continental Shelf (Libyan Arab Jamahiriya/Malta), where it was asked only to delimit the continental shelf boundary, expressed the 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 cannot be left out of consideration”; that “the two institutions — continental shelf and exclusive economic zone — are linked together in modern law” and that the result is “that greater importance must be attributed to elements, such as distance from the coast, which are common to both concepts” (I.C.J. Reports 1985, p. 33, para. 33).

47. Regarding the law applicable to the delimitation of the fishery zone, there appears to be no decision of an international tribunal that has been concerned only with a fishery zone; but there are cases involving a single dual-purpose boundary asked for by the parties in a special agreement, for example the Gulf of Maine case, already referred to, which involved delimitation of “the continental shelf and fishery zones” of the parties. The question was raised during the hearings of the relationship of such zones to the concept of the exclusive economic zone as proclaimed by many States and defined in Article 55 of the 1982 United Nations Convention on the Law of the Sea. Whatever that relationship may be, the Court takes note that the Parties adopt in this respect the same position, in that they see no objection, for the settlement of the present dispute, to the boundary of the fishery zones being determined by the law governing the boundary of the exclusive economic zone, which is customary law: however the Parties disagree as to the interpretation of the norms of such customary law.

48. Denmark and Norway are both signatories of the 1982 United Nations Convention on the Law of the Sea, though neither has ratified it, and it is not in force. There can be no question therefore of the application, as relevant treaty provisions, of that Convention. The Court however notes that Article 74, paragraph 1, and Article 83, paragraph 1, of that Convention provide for the delimitation of the continental shelf and the exclusive economic zone between States with opposite or adjacent coasts to be effected

“by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution”.

That statement 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.

* *

49. Turning first to the delimitation of the continental shelf, since it is governed by Article 6 of the 1958 Convention, and the delimitation is between coasts that are opposite, it is appropriate to begin by taking provi-

sionally the median line between the territorial sea baselines, and then enquiring whether “special circumstances” require “another boundary line”. Such a procedure is consistent with the words in Article 6, “In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary is the median line.”

50. Judicial decisions on the basis of the customary law governing continental shelf delimitation between opposite coasts have likewise regarded the median line as a provisional line that may then be adjusted or shifted in order to ensure an equitable result. The Court, in the Judgment in the case concerning the Continental Shelf (Libyan Arab Jamahiriya/Malta) already referred to (paragraph 46 above), in which it took particular account of the Judgment in the North Sea Continental Shelf cases, said:

“The Court has itself noted that the equitable nature of the equidistance method is particularly pronounced in cases where delimitation has to be effected between States with opposite coasts.” (I.C.J. Reports 1985, p. 47, para. 62.)

It then went on to cite the passage in the Judgment in the North Sea Continental Shelf cases where the Court stated that the continental shelf off, and dividing, opposite States “can ... only be delimited by means of a median line” (I.C.J. Reports 1969, p. 36, para. 57; see also p. 37, para. 58). The Judgment in the Libya/Malta case then continues:

“But it is in fact a delimitation exclusively between opposite coasts that the Court is, for the first time, asked to deal with. It is clear that, in these circumstances, the tracing of a median line between those coasts, by way of a provisional step in a process to be continued by other operations, is the most judicious manner of proceeding with a view to the eventual achievement of an equitable result.” (I.C.J. Reports 1985, p. 47, para. 62.)

51. Denmark has, it is true, disputed the appropriateness of drawing an equidistance line even provisionally as a first step in the delimitation process; and to this end it has recalled previous decisions of the Court: the case concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya) (I.C.J. Reports 1982, p. 79, para. 110); the case concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (I.C.J. Reports 1984, p. 297, para. 107); and indeed the case concerning the Continental Shelf (Libyan Arab Jamahiriya/Malta) (I.C.J. Reports 1985, p. 37, para. 43). These cases were, as already observed (paragraph 45 above), not governed by Article 6 of the 1958 Convention, which specifically provides that the median line be employed “unless another boundary line is justified by special circumstances”. The 1977 Anglo-French Court of Arbitration, on the other hand, when applying Article 6 of the 1958 Convention to the
delimitation between opposite coasts in the Atlantic region, after observing that "the obligation to apply the equidistance principle is always one qualified by the condition "unless another boundary line is justified by special circumstances"" (RIAA, Vol. XVIII, p. 45, para. 70), began by employing the equidistance method, and then adjusting the result in the light of special circumstances, namely the existence of the Scilly Isles (ibid., pp. 115-116, para. 248). In this respect it is observed that

"it seems to the Court to be in accord not only with the legal rules governing the continental shelf but also with State practice to seek the solution in a method modifying or varying the equidistance method rather than to have recourse to a wholly different criterion of delimitation" (ibid., p. 116, para. 249).

In any event, all that need be said of the decisions cited by Denmark is that the Court considered that the provisional drawing of an equidistance line was not a necessary or obligatory step in every case; yet in two of the cases mentioned (Gulf of Maine and the Libya/Malta case), where the delimitation was between opposite coasts, it was found entirely appropriate to begin with such a provisional line. Thus, in respect of the continental shelf boundary in the present case, even if it were appropriate to apply, not Article 6 of the 1958 Convention, but customary law concerning the continental shelf as developed in the decided cases, it is in accord with precedents 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.

52. Turning now to the delimitation of the fishery zones, the Court must consider, on the basis of the sources listed in Article 38 of the Statute of the Court, the law applicable to the fishery zone, in the light also of what has been said above (paragraph 47) as to the exclusive economic zone. Of the international decisions concerned with dual-purpose boundaries, that in the Gulf of Maine case — in which the Chamber rejected the application of the 1958 Convention, and relied upon the customary law — is here material. After noting that a particular segment of the delimitation was one between opposite coasts, the Chamber went on to question the adoption of the median line "as final without more ado", and drew attention to the "difference in length between the respective coastlines of the two neighbouring States which border on the delimitation area" and on that basis affirmed "the necessity of applying to the median line as initially drawn a correction which, though limited, will pay due heed to the actual situation" (I.C.J. Reports 1984, pp. 334-335, paras. 217, 218).

53. This process clearly approximates to that followed by the Court in respect of the Libya/Malta case in determining the continental shelf boundary between opposite coasts. It follows that it is also an appropriate starting-point in the present case; not least because the Chamber in the Gulf of Maine case, when dealing with the part of the boundary between opposite coasts, drew attention to the similarity of the effect of Article 6 of the 1958 Convention in that situation, even though the Chamber had already held that the 1958 Convention was not legally binding on the Parties. It thus appears 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.

54. The Court is now 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".

55. The concept of "special circumstances" was discussed at length at the First United Nations Conference on the Law of the Sea, held in 1958. It was included both in the Geneva Convention of 29 April 1958 on the Territorial Sea and the Contiguous Zone (Art. 12) and in the Geneva Convention of 29 April 1958 on the Continental Shelf (Art. 6, paras. 1 and 2). It was and remains linked to the equidistance method then contemplated, so much so indeed that in 1977 the Court of Arbitration in the case concerning the delimitation of the continental shelf (United Kingdom/ France) was able to refer to the existence of a rule combining "equidistance-special circumstances" (see paragraph 46 above). It is thus apparent that special circumstances are those circumstances which might modify the result produced by an unqualified application of the equidistance principle. General international law, as it has developed through the case-law of the Court and arbitral jurisprudence, and through the work of the Third United Nations Conference on the Law of the Sea, has employed the concept of "relevant circumstances". This concept can be described as a fact necessary to be taken into account in the delimitation process.

56. 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. It cannot be surprising if an equidistance-special circumstances rule produces much the same result as an equitable principles-relevant circumstances rule in the case of opposite coasts, whether in the case of a delimitation of continental shelf, of fishery zone, or of an all-purpose single boundary. There is a further finding of the Anglo-French Court of
Arbitration to this effect when, after referring to the rule in Article 6, and to the rule of customary law based upon equitable principles and "relevant" circumstances, it said that the double basis on which the parties had put their case,

"confirms the Court's conclusion that the different ways in which the requirements of 'equitable principles' or the effects of 'special circumstances' are put reflect differences of approach and terminology rather than of substance" (RIA, Vol. XVIII, p. 75, para. 148).

57. There has been much argument in the present case, both under the heading of "special circumstances" and that of "relevant circumstances", as to what circumstances are juridically relevant to the delimitation process. It may be useful to recall the much-cited statement from the Court's Judgment in the North Sea Continental Shelf cases:

"In fact, there is no legal limit to the considerations which States 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." (I.C.J. Reports 1969, p. 50, para. 93.)

It is to be noted that the Court in 1969 was addressing the task of States in negotiation; indeed the entire 1969 Judgment was necessarily thus as a result of the terms of the special agreement by which the cases were taken to the Court. In the Libya/Malta case the Court added the following caveat:

"Yet although there may be no legal limit to the considerations which States may take account of, this can hardly be true for a court applying equitable procedures. For a court, although there is assuredly no closed list of considerations, it is evident that only those that are pertinent to the institution of the continental shelf as it has developed within the law, and to the application of equitable principles to its delimitation, will qualify for inclusion. Otherwise, the legal concept of continental shelf could itself be fundamentally changed by the introduction of considerations strange to its nature." (I.C.J. Reports 1985, p. 40, para. 48.)

58. A court called upon to give a judgment declaratory of the delimitation of a maritime boundary, and a fortiori a court called upon to effect a delimitation, will therefore have to determine "the relative weight to be accorded to different considerations" in each case; to this end, it will con-

67. The practical implementation of the principle may sometimes be complicated, as in the Libya/Malta case, by the presence of claims of third States, or by difficulties in defining with sufficient precision which coasts and which areas are to be treated as relevant. Such problems do not arise in the present case. The possible claims of Iceland appear to be fully covered by the 200-mile line (BCD on sketch-map No. 1, p. 45 above) which the Parties are treating as the southern limit of the delimitation requested of the Court. It is appropriate to treat as relevant the coasts between points E and F and between points G and H on sketch-map No. 1, in view of their role in generating the complete course of the median line provisionally drawn which is under examination. The question for the Court is thus the following. The difference in length of the relevant coasts is striking. Regard being had to the effects generated by it, does this disparity constitute, for purposes of the 1958 Convention, a "special circumstance", and as regards the delimitation of the fishery zones a "relevant circumstance" for purposes of the rules of customary law, requiring an adjustment or shifting of the median line?

68. A delimitation by the median line would, in the view of the Court, involve disregard of the geography of the coastal fronts of eastern Greenland and of Jan Mayen. It is not a question of determining the equitable nature of a delimitation as a function of the ratio of the lengths of the coasts in comparison with that of the areas generated by the maritime projection of the points of the coast (cf. Continental Shelf (Libyan Arab Jamahiriya/Malta), I.C.J. Reports 1985, p. 46, para. 59), nor of "rendering the situation of a State with an extensive coastline similar to that of a State with a restricted coastline" (North Sea Continental Shelf, I.C.J. Reports 1969, pp. 49-50, para. 91). Yet the differences in length of the respective coasts of the Parties are so significant that this feature must be taken into consideration during the delimitation operation. It should be recalled that in the Gulf of Maine case the Chamber considered that a ratio of 1 to 1.38, calculated in the Gulf of Maine as defined by the Chamber, was sufficient to justify "correction" of a median line delimitation (I.C.J. Reports 1984, p. 336, paras. 221-222). The disparity between the lengths of coasts thus
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, in view of the great disparity of the lengths of the coasts, that the application of the median line leads to manifestly inequitable results.

69. 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. As the Court has observed:

“If such a use of proportionality were right, it is difficult indeed to see what room would be left for any other consideration; for it would be at once the principle of entitlement to continental shelf rights and also the method of putting that principle into operation. Its weakness as a basis of argument, however, is that the use of proportionality as a method in its own right is wanting of support in the practice of States, in the public expression of their views at (in particular) the Third United Nations Conference on the Law of the Sea, or in the jurisprudence.” (Continental Shelf (Libyan Arab Jamahiriya/Malta), I.C.J. Reports 1985, p. 45, para. 58.)

70. 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 (the polygon ABFEA on sketch-map No. 1, p. 45 above) 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 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.

71. 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
International Court of Justice

Separate Opinion of Judge Oda, Maritime Delimitation in the Area Between Greenland and Jan Mayen (Denmark v. Norway) Judgment

I.C.J. Reports 1993
SEPARATE OPINION OF VICE-PRESIDENT ODA

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INTRODUCTION

1. I am somewhat concerned by the rather incorrect manner in which Denmark formulated its Application and submissions and the way in which the Court responded to them. I will accordingly begin my opinion by pointing out that Denmark appears to have misunderstood certain concepts of the law of the sea, such as the exclusive economic zone and the continental shelf, as reflected in its submissions (Part I of this opinion).

2. However, the principal reason why I am inclined to criticize the Judgment lies in my belief that, as a matter of principle, the delimitation of maritime boundaries, whether of the exclusive economic zone or of the continental shelf, does not fall within the sphere of competence of the Court unless the Court is specifically requested, by agreement of the parties, to effect a delimitation of that kind, applying equity within the law or determining a solution *ex aequo et b opporto*. Hence I believe that the Application unilaterally submitted by Denmark in the present case should have been dismissed (Part II).

3. Even assuming that the Court is competent to draw a line or lines of delimitation of the exclusive economic zone or the continental shelf, the line drawn in the Judgment (paras. 91-92) does not appear to be supported by any cogent reasoning, although of course that line or another line could have been decided by agreement of the Parties (Part III).

PART I. DENMARK'S MISUNDERSTANDING OF CERTAIN CONCEPTS OF THE LAW OF THE SEA AS REFLECTED IN ITS SUBMISSIONS

1. The Submissions of Denmark

4. In its Application of 16 August 1988, Denmark 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” (emphasis added).

In its submissions of 31 July 1989 contained in the Memorial, Denmark asked the Court

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

   (2) To draw a single line of delimitation of the fishing zone and the 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” (emphasis added).

In the submissions presented on 31 January 1991 in its Reply, Denmark added concrete map references to submission (2). A further request, dated 25 January 1993, was added in the final submissions presented at the close of the oral phase, to the effect that

   “(3) 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” (emphasis added).

5. It appears to me that Denmark fails to appreciate certain concepts of the law of the sea. In the first place, it does not seem to grasp the proper concept of the exclusive economic zone, the concept adopted in the 1982 United Nations Convention on the Law of the Sea. As a matter of fact, this misunderstanding is not only displayed by Denmark but is also to be observed in the position taken by Norway in these proceedings as well as by some other countries in various contexts (Sec. 2 below). Secondly, Denmark seems to pay little heed to the regime of the continental shelf which is fated — at least under the contemporary law of the sea — to exist in parallel with the regime of the exclusive economic zone (Sec. 3 below). Thirdly, Denmark seems to confuse *title* to the continental shelf or the exclusive economic zone with the concept of delimitation of overlapping sea-areas (Sec. 4 below).

2. Problem 1: The Fishery Zone (However Called) Is Not Identical to the Exclusive Economic Zone

6. What exactly is meant by the "fishing zone", "fishery zone" or "fisheries zone" extending "200 miles from the coast", to which Denmark refers in its Application and submissions? Denmark indeed claimed a 200-mile "fishing territory" in its Act No. 597 of 1976, but it has never relied upon the concept of the exclusive economic zone, which was adopted in the 1982 United Nations Convention on the Law of the Sea. This consideration leads me to present some reflections on the development of the coastal State's exercise of jurisdiction over offshore areas.

(a) The period prior to the 1950s

7. Until the time of UNCLOS I in 1958, neither Denmark nor Norway had ever considered the possibility of jurisdiction over, or control of, off-
shore fisheries beyond a distance of 1 league (3 nautical miles) or at most 4 nautical miles from the coast.

8. While the post-war claims of some Latin American countries to wider offshore areas of maritime sovereignty (extending over a 200-mile distance from the coast) for exploitation as their own fishing grounds were eventually asserted jointly in the Santiago Declaration of 1952, both Denmark and Norway lodged their respective protests at the position being taken by those countries. The areas claimed by those Latin American countries were sometimes referred to as "fishery zones" or "fishing zones", but they never gained universal recognition in international law.

(b) **UNCLOS I (1958)**

9. One of the most important issues at UNCLOS I (a conference convened in 1958 in Geneva after being prepared over several years by the International Law Commission) consisted in the determination of the limit of the territorial sea. This problem was characterized at the Conference as a confrontation between the narrower limit (3 or 4 miles) and the wider limit (12 miles), and the concept of a "fishery zone" to be established outside the territorial sea but within 12 miles from the coast was proposed by States favouring the narrower territorial-sea limit as a compromise to be offered those wanting a 12-mile limit within which to exercise exclusive offshore fishing rights.

10. The very concept of the "fishery zone" was thus proposed as a substitute for the extension of the territorial sea to 12 miles, which was not then acceptable to some States (mostly the Western States), and it is important to note that the outer limit of the fishery zone thus mooted was to be 12 miles from the coast. It cannot be over-emphasized, moreover, that the concept of the fishery zone discussed at UNCLOS I was different in nature from that of the maritime sovereignty straightforwardly claimed around 1950 by the Latin American States, to cover 200-mile offshore areas.

11. UNCLOS I narrowly failed in its attempt to fix the limit of the territorial sea, and for that reason there were no further references to the concept of the fishery zone, which had been put forward only in that connection.

(c) **The 12-mile fishery zone in the period following UNCLOS I**

12. In the upshot, UNCLOS I neither fixed a 12-mile limit to the territorial sea in the Convention on the Territorial Sea and the Contiguous Zone, nor introduced the concept of the 12-mile fishery zone as compensation for the retention of the narrower territorial sea. Nevertheless, the concept of the 12-mile "fishery zone" which had not been recognized in 1958 began to take root in the period after UNCLOS I.

13. One after the other, both Denmark and Norway unilaterally established a 12-mile zone for fishery purposes. However, the unilateral establishment of such a fishery zone at that time was, of course, not limited to Denmark and Norway. Indeed, States began increasingly to agree among themselves that they should be entitled to establish such a zone. The 1964 Fisheries Convention concluded among European countries including Denmark (but not Norway), represented a type of such an agreement in which each contracting State recognized the right of any other contracting party to establish a belt 6 miles wide in which the coastal State would have the exclusive right to fish and exclusive jurisdiction in matters of fisheries, together with an outer 6-mile belt in which the continuation of traditional foreign fishing would be guaranteed.

14. The concept of the 12-mile fishery zone, which was never accepted at UNCLOS I, had thus rapidly gained general recognition. By the mid-1970s, that same fishery zone, while not provided for in any of the universal documents concerning the law of the sea, existed as a firmly established institution.

15. Iceland was unique in claiming a 50-mile fishery limit by its 1971 policy statement and the 1972 resolution adopted by the Althing. That Icelandic claim occasioned objections by the Federal Republic of Germany and the United Kingdom, and was in issue in proceedings before the International Court of Justice in the Fisheries Jurisdiction (United Kingdom v. Iceland) and Fisheries Jurisdiction (Federal Republic of Germany v. Iceland) cases. In its Judgments, the Court found that the unilateral extension of the exclusive fishing rights of Iceland to 50 miles was "not opposable" to the United Kingdom or the Federal Republic (I.C.J. Reports 1974, pp. 34 and 205).

(d) **Emergence of the new concept of the exclusive economic zone**

16. One of the new trends in UNCLOS III during the 1970s was that the claim to a 200-mile zone (which had been advanced by some Latin American nations as an area of maritime sovereignty in the post-war period but had met with strenuous objections from other countries), had now become recognized — but only in the form of the "exclusive economic zone". In comparison with the progress made by the concept of the 200-mile "exclusive economic zone", which rapidly gained world-wide support, the concept of a 12-mile "fishery zone" lost all its significance. However, the concept of the "exclusive economic zone", which on the one hand was much wider in scope than that of the fishery zone because of the inclusion of control by the coastal State not only over fishing but also over various other activities, did on the other hand envisage for the coastal
State certain obligations concerning the control and management of fisheries.

(e) Claims to a 200-mile fishery zone since the mid-1970s

17. While the régime envisaged for the exclusive economic zone was still in a chaotic state at the early stages of UNCLOS III (the Caracas session in 1974 and the Geneva session in 1975), a number of States, which had discerned the general trend of expansion of coastal jurisdiction over extended offshore areas, vied with each other, prior to the adoption of the Convention at the Conference in 1982, in bluntly claiming their fishery interests in those areas.

18. Denmark established a 200-mile “fishery territory” by Act No. 597 of 17 December 1976 to replace its Act No. 207 of 1964, and Norway established a 200-mile “economic zone” by its Act No. 91 of 17 December 1976 and its Royal Decree of the same date. Other States were meanwhile making haste to declare a 200-mile fishery zone in order to secure exclusive control of fishing in their respective offshore areas, disregarding the concept of the exclusive economic zone (which was to be suggested at UNCLOS III for incorporation into the as yet unfinalized Convention).

19. This unilateral process does not alter the fact that, under the 1982 United Nations Convention on the Law of the Sea, whose rules in most respects are widely held to have superseded earlier law, the claim to a distance of 200 miles is permissible only in respect of the exclusive economic zone (defined in detail and in strict terms in Part V of the Convention), in which due consideration is given to the common interest of the rest of the world — that is, to the conservation and optimum utilization of fishery resources.

(f) “Fishery zone” not a legal concept

20. There is certainly no provision in the 1982 Convention that relates to a 200-mile “fishery zone” as such. The “fishing zone” (or “fishery zone”) which Denmark and Norway established respectively (and which Denmark mentions in its Application) is not the exclusive economic zone as defined in that Convention.

21. However, it is undeniable that today a number of States have claimed a 200-mile “fishery zone” or “economic zone” — but not an “exclusive economic zone”. These States include Canada, Germany, Japan, the Netherlands and the United States, all of which would have been strongly opposed to the exercise of exclusive fishing rights by coastal

States in offshore areas beyond the limit of the territorial sea even if the latter had been extended from its traditional 3-mile to a 12-mile limit. It may for this reason be contended that, thanks to these repeated claims made by certain States, including both developed and developing countries (many of which have been asserted during the past decade), the concept of the 200-mile fishery zone has become customary international law quite independently of the 1982 Convention.

22. It is noted that the respondent State, Norway, has also and in the same manner laid claim to a 200-mile “fishing zone”. Thus I am ready to accept that the Court was bound, in these proceedings, to proceed with the “fishery zone” as an established concept, setting aside that of the “exclusive economic zone”.

(g) The Court’s position on the 200-mile offshore fisheries

23. As the concept of the “fishery zone” has no standing, at least in the 1982 Convention, and still remains a merely political concept, I would have liked the Court to have taken a clear stance with respect to the confusion (by not only the Applicant but by both Parties) between the concepts of the “exclusive economic zone” and the “fishery zone”. Its failure to do so leads me to wonder what will become in future of the concept of the exclusive economic zone, as provided for in that Convention. I am afraid that the concept of the “exclusive economic zone” will appear completely obsolete, even before the 1982 Convention has come into force.

3. Problem 2: The Régime of the Continental Shelf Is Independent of the Concept of the Exclusive Economic Zone

24. In its Application, Denmark asked the Court to “decide . . . where a single line of delimitation shall be drawn between Denmark’s and Norway’s fishing zones and continental shelf areas” and in its subsequent submissions requested the Court “to draw a single line of delimitation of the fishing zone and the continental shelf area of Greenland . . . at . . .”.

25. How is it possible for Denmark to presuppose the identity of the boundary of the exclusive economic zone (for that is what it really alludes to) with that of the continental shelf, when both régimes originated against different backgrounds and exist in parallel? Is it the intention of Denmark to contend that the original, or proper, régime of the continental shelf has completely crumpled away, to be replaced by the new régime of the exclusive economic zone? An examination of the emergence and evolution of the concept of the continental shelf may be in order, given these considerations.
a) Emergence and evolution of the legal concept of the continental shelf

26. There can be no doubt that the political concept of the continental shelf was initiated by the Truman Proclamation of 1945. At that time, neither Denmark nor Norway indicated any specific attitude either for or against it. In other words, they appeared indifferent to the problem of the continental shelf.

27. It was UNCLOS I that produced the legal concept of the continental shelf, defined as:

"the sea-bed and subsoil of the submarine areas adjacent to the coast . . . to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas" (Convention on the Continental Shelf, Art. 1).

(In the last-quoted phrase, the word "admits" has been generally interpreted as meaning "ceases to admit", which is of course a necessary gloss.) Later, the definition of the continental shelf seems to have been further affected by the 1969 Judgments in the North Sea Continental Shelf cases, in which it was seen as constituting a "natural prolongation of [the] land territory into and under the sea" (I.C.J. Reports 1969, p. 53).

28. The fact is that few States at UNCLOS I had any firm idea concerning the concept of the "exploitability test", and may well have entertained nothing more than a very vague notion that the exploitation of the submarine areas should be permitted somewhere — even beyond a depth of 200 metres — if the development of technology were to allow that possibility, and that it should remain subject to some degree of national control. If there was any question of delimitation at that time, what was really at issue related simply to submarine areas up to the 200-metre isobath. In 1958, at any rate, few delegates realized where the novel introduction of submarine technology into the debate might ultimately lead.

(b) Post-UNCLOS I

29. The Geneva Convention on the Continental Shelf became effective in June 1964; Denmark had ratified it in 1963 and Norway acceded to it in 1967. In 1968, Denmark also ratified the Optional Protocol of Signature concerning the Compulsory Settlement of Disputes; Norway neither ratified nor acceded to the Optional Protocol.

30. The concept of the continental shelf as a geographical entity subject to a special régime rapidly became established in customary international law. At all events, the actual institution in law of the continental shelf has not been challenged since the adoption of the Convention.

31. Whether the national continental shelf requires the specific claim of each State, or whether it now exists ipso jure in international law, remains to be examined. In 1963 Denmark issued a "Royal Decree concerning the Exercise of Danish sovereignty over the Continental Shelf", using terms similar to those used in the 1958 Convention: in the same year Norway issued a "Royal Decree relating to the Sovereign Rights of Norway over the Sea-Bed and Subsoil outside the Norwegian Coast", an "Act No. 12 relating to Exploration and Exploitation of Submarine Natural Resources" and an "Act No. 12 relating to Scientific Research and Exploration for and Exploitation of Resources other than Petroleum Resources".

32. I must add at this juncture, and it cannot be over-emphasized, that in the mid-1960s there did not exist any idea that the area between Greenand and Jan Mayen would constitute a part of the continental shelf of any State.

(c) Transition to a new situation due to new technological developments

33. In the mid-1960s, when it became apparent that the rapid development of technology would accelerate the exploitation of mineral resources beyond the 200-metre isobath and that the whole submarine area of the vast ocean might eventually become exploitable, two opposite interpretations were presented for the definition of the "exploitability test". One was that, as the whole area of the ocean would become exploitable (thus becoming a continental shelf within the meaning of the 1958 Convention), it should be divided by a median line throughout the world. The other idea was that, with the gradual advancement of technology throughout the world, the continental shelf of each State would gradually extend further, thus meeting the continental shelf of the opposite side at the deepest point.

34. In response to the median-line theory and the deepest-ricken theory, which had in common their understanding that, in theory, the whole area of the world's ocean would, owing to the development of advanced technologies, soon have the status of the continental shelf of any and every State, Ambassador Pardo of Malta, in his epoch-making statement to the General Assembly on 1 November 1967, appealed for a halt to that expansion of the continental shelf, by suggesting that the sea-bed of the vast ocean should be considered as the "common heritage of mankind". The work towards a new régime of the ocean was accordingly launched at the United Nations Sea-Bed Committee between 1968 and 1973, and was followed up by UNCLOS III, which commenced in 1974 in Caracas.
39. Furthermore, throughout the meetings of the United Nations Sea-Bed Committee and UNCLOS III in the 1970s, the exclusive economic zone as a new concept and the continental shelf as a concept transformed from the 1958 Convention were considered as separate regimes, to be provided for in parallel in the final text of the Convention. In this respect the Danish submissions in its Application were misguided when the Court was asked "to decide . . . where a single line of delimitation shall be drawn", because Denmark presupposed a line which could not a priori exist. This is another point which did not receive the due attention of the Applicant and the Court.

4. Problem 3: Confusion of Title to the Exclusive Economic Zone and the Continental Shelf and the Question of Delimitation of Overlapping Entitlements

40. Denmark, in submission (1) in the Memorial and the Reply, asks the Court to declare its entitlement "to a full 200-mile fishery zone and continental shelf area vis-à-vis the island of Jan Mayen". In my view, when title to an area of maritime jurisdiction exists — be it to a continental shelf or (arguedo) to a fishery zone — it exists erga omnes, i.e., is opposed to all States under international law and is not limited to any specific geographical component of any one State. That being understood, it appears to me necessary to point to a certain conceptual confusion that emerges from Denmark's presentation of its claim.

(a) Denmark's entitlement to an exclusive economic zone and a continental shelf in respect of Greenland

41. Whether "Greenland" is entitled "to a full 200-mile fishery zone and continental shelf area" is a general question concerning Denmark's title to those areas. It is accordingly different from the question of the extent of the area in which its entitlement may be claimed and which needs to be delimited as it overlaps with the opposing entitlement of another State. What Denmark really seeks in submission (1), in its relation "vis-à-vis the island of Jan Mayen", is that the Court should effect a delimitation making no abatement of what would be its maximum theoretical entitlement in the absence of any competing title; submission (1) has no effective meaning if read on its own, i.e., without any reference to submission (2).

(b) Norway's entitlement to an exclusive economic zone and a continental shelf in respect of Jan Mayen

42. In the light of the drafting process of the 1958 and 1982 Conventions, the entitlements of Jan Mayen (or rather of Norway on its behalf) to
the 200-mile exclusive economic zone and/or continental shelf need not, I submit, have been taken for granted. In the present case, however, Denmark did not dispute the entitlements of Jan Mayen as a singular island of smaller dimensions to an exclusive economic zone and/or a continental shelf.

43. Denmark only questioned the extent of the area to which Jan Mayen's entitlements extend. It is important to note, however, that Norway claimed theoretical entitlement up to the full 200-mile extent for the exclusive economic zone and continental shelf of Jan Mayen but, taking a rather modest approach, simply refrained from asserting its full entitlement vis-à-vis Greenland.

(c) Overlapping of entitlements or claims

44. As can be seen from its submissions, Denmark does not seem to grasp that, where the entitlements of two opposite States overlap in an area less than 400 miles apart, the question of delimitation arises in the area of overlapping entitlements of the two States. Unlike Norway, Denmark was not ready to have the area of overlap delimited but simply claimed the whole potential area of its entitlement. Denmark appears to believe that the possession of a maximum entitlement (in respect of Greenland) implies that the line of delimitation should be drawn without any regard to the maximum entitlement of Norway (in respect of Jan Mayen). In this respect, Denmark tends to ignore the distinction between determining the limits of entitlements to sea areas and the division of overlapping claims.

45. The Court likewise pays insufficient heed to this distinction. Despite the fact that at one point it suggests the "area of overlapping potential entitlement" as one of the three areas designated as relevant for the purpose of the Judgment (para. 19), it scarcely makes use of this area in its reasoning but relies mainly on the "area of overlapping claims", i.e., the overlapping of the maximum entitlement of Greenland, presented as a claim, and the modest claim made on behalf of Jan Mayen (Judgment, para. 18), in order to justify the line which it has drawn.

46. I am afraid that this Judgment, which barely paid the requisite attention to Jan Mayen's potential entitlement and was too much concerned with the "area of overlapping claims" could well lead a State, at some future time, to claim its maximum entitlement in the initial stage of negotiations with its neighbouring State for the delimitation of maritime boundaries, either of the exclusive economic zone or the continental shelf.

PART II. THE POSSIBLE FUNCTION OF THE COURT IN CASES OF MARITIME DELIMITATION

47. To define what roles it may or may not be open to the Court to assume in matters of maritime delimitation, it is necessary to review the principles on the subject that have evolved in international law.

I. Law of Maritime Delimitation in the 1958 Convention on the Continental Shelf

(a) Delimitation of fisheries jurisdiction not at issue at UNCLOS I

48. The offshore areas dealt with in UNCLOS I were primarily either the territorial sea or the contiguous zone. Agreement on the width of the territorial sea was not reached, except in the sense that it should not exceed 12 miles — the distance fixed for the contiguous zone. In such circumstances, the delimitation of the territorial sea and the contiguous zone as between adjacent or opposite States in rather narrow areas was not seen as a new or very significant issue. The focus in UNCLOS I was upon the delimitation of the continental shelf, extending further than those narrower areas but, in principle, as far as the 200-metre isobath. However, I must repeat that for fisheries purposes there did not exist any concept of further jurisdiction of the coast. State beyond 12 miles from the coast.

(b) UNCLOS I: Adoption of the Convention on the Continental Shelf

49. It is not necessary to follow the whole of the drafting process leading to Article 6 of the Convention governing the delimitation of the continental shelf. UNCLOS I accepted the need for the insertion into the Convention of a provision on the continental shelf, the text of which had been prepared by the International Law Commission in deliberations over a period of several years in the mid-1950s:

"Where the same continental shelf is adjacent to the territories of two or more States [(a)] whose coasts are opposite each other, [(b)] 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, [(a)] the boundary is the median line] [(b)] the
boundary of the continental shelf shall be determined by application of the principle of equidistance from the nearest points of the baseline..." (Convention on the Continental Shelf, Art. 6.)

50. It is important to note, firstly, that when the delimitation of the continental shelf was under consideration prior to or at UNCLOS I, the area beyond the 200-metre isobath was scarcely considered. This preliminary understanding is essential when one is interpreting Article 6 of the Convention.

51. Secondly, the provision that "the boundary...shall be determined by agreement between the States concerned" may well have the status of a legal principle but it does not indicate any criteria for determining the boundaries of the (legal) continental shelf. In addition, the suggestion to employ as the boundary line, "in the absence of agreement and unless another boundary line is justified by special circumstances", (i) "a median line (in the case of the opposite States)", and (ii) a line to be determined by the principle of equidistance (in the case of adjacent States) gave not the slightest clue as to the "circumstances" which would be so "special" as to "justify" a line other than a median line (or the equidistance line).

52. Certainly, one State might have the view that no other line but the median line (or the equidistance line) would be justified in the absence of any "special circumstances" and the other State might point to the existence of some special circumstances which, in its view, did justify a departure from the median line (or the equidistance line). The question remained as to whether any legal criteria would have to be met by such justifying special circumstances.

(c) The North Sea as a practical case-study

53. The question of the delimitation of the continental shelf became of imminent importance in the mid-1960s, particularly in the areas of the North Sea. The discovery of reserves of oil or natural gas in this region necessitated the division, early in the 1960s, of the sea-bed of these shallow waters among the surrounding nations. The whole area of the North Sea is shallower than 200 metres (with the exception of the Norwegian Trough) and there was no doubt about the area being a continental shelf within the meaning of the 1958 Convention, irrespective of any interpretation of the definition of its "exploitability" as provided for in the Convention.

54. A number of bilateral agreements were successively concluded in the period 1964-1966 among States of the region, including Denmark and Norway, on the basis of a general application of the equidistance or the median line (Netherlands-United Kingdom, 1965; Norway-United Kingdom, 1965; Denmark-Germany, 1965; Germany-Netherlands, 1965; Denmark-United Kingdom, 1966; Denmark-Netherlands, 1966). It is important to bear in mind that the 1965 Agreement between Denmark and Norway, which has been much discussed in the present case, was simply one of a number. As has already been stated (para. 32 above), in those days the area between Greenland and Jan Mayen was never deemed to be one covered by the concept of the continental shelf, so it is obvious that the 1965 Agreement did not apply to that area.

55. In 1967 the delimitation between Germany on the one hand and Denmark and the Netherlands on the other, which except for some areas extending over a shorter distance from their coasts had not been agreed upon through diplomatic negotiations, was brought jointly to the International Court of Justice. The North Sea Continental Shelf cases should be understood in the context of a chain of bilateral negotiations in the North Sea region in the 1960s.

56. Germany viewed the mechanical application of the equidistance-line rule as being unfavourable to its own interests in respect of the adjacent coasts of Denmark and the Netherlands. In that case before the Court, Germany presented various arguments contesting Denmark's/the Netherlands' positions based on the application of the equidistance-line rule. It was argued by Germany that, while the equidistance line was applicable, the base for measuring the distance should be determined in the case of adjacent States in such a way as to take account of macrogeographical factors, by taking a rectified coastline, that is, the coastal front or "coastal façade" (see I.C.J. Pleadings, North Sea Continental Shelf, Vol. II, p. 193).

57. The International Court of Justice stated, in its 1969 Judgment, that:

"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, without encroachment on the natural prolongation of the land territory of the other" (I.C.J. Reports 1969, p. 53, para. 101 (C) (1)).

Thanks to that Judgment of the Court, the delimitation in the south-east-
ern part of the North Sea was subsequently agreed in 1971 between Denmark and Germany, as well as between the Netherlands and Germany.

(d) Implications of the Judgment in the North Sea Continental Shelf cases

58. There are a few points which must be given due consideration when the Judgment in the North Sea Continental Shelf cases is interpreted. Firstly, the Judgment referred to a sea not exceeding 200 metres in depth, hence one underlain by a continental shelf of the most unambiguous kind, and was delivered in 1969, at a time when jurists continued to conceive of the shelf primarily in a geological and topographical sense — hence in terms (to quote the Judgment) of the “natural prolongation of [the] land territory into and under the sea”.

59. Secondly, the suggestion of dividing the shelf 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 . . . without encroachment on the natural prolongation of the land territory of the other”

did not contain any concrete indication for the delimitation of the area and did not go beyond the simple suggestion of an “equitable solution”, the expression later employed in the 1982 United Nations Convention.

60. Thirdly, one should try to be precise about the status of the indication given by the Court as to “the factors to be taken into account . . . in the course of the negotiation”. Did this indication simply constitute a suggestion put forward by the Court in order to assist negotiations between the Parties, or did it amount to a determination of law on the basis of Article 38, paragraph 1, of the Court’s Statute?

(e) Article 6 of the 1958 Convention not applicable to the present case

61. As has already been explained (para. 50 above), Article 6 of the 1958 Convention is applicable to the continental shelf in an orthodox sense, i.e., the sea-bed areas inside the 200-metre isobath. The area between Greenland and Jan Mayen is not a continental shelf in that sense, though it certainly is taken to be a continental shelf in accordance with the transformed concept. This is a point of which, in my view, the Applicant and the Court were not sufficiently aware. It seems to me that the Parties to this case and the Court erred in taking the 1958 Convention as the rule with regard to the delimitation of the continental shelf while the rule of the 1982 Convention is valid for the delimitation of the exclusive economic zone. What applies today to the delimitation of either the exclusive economic zone or the continental shelf is the 1982 United Nations Convention — or customary international law which may be reflected in that Convention.

2. The Rules for Maritime Delimitation Discussed at the Sea-Bed Committee and UNCLOS III, and Their Adoption in the 1982 United Nations Convention

(a) Drafting of Articles 74 and 83 of the 1982 Convention

62. As has already been said (para. 16 above), the new concept of the exclusive economic zone has its own background and exists in parallel with the transformed concept of the continental shelf. The delimitations to be effected under each régime could have been separate. Nevertheless, as they had in common at least the 200-mile distance criterion (qualified, in the case of the continental shelf, by the possibility of a further extension as far as the outer edge of the continental slope), the delimitation issues of these two separate régimes were discussed together by the delegates at UNCLOS III. Article 74 (for the delimitation of the exclusive economic zone) and Article 83 (for the delimitation of the continental shelf) were drafted in the same fashion in the 1982 United Nations Convention on the Law of the Sea.

63. A detailed analysis of the background to these provisions may not be necessary, as only minimum information is required in this instance. In 1978, the conflict of the two schools of thought had become apparent with regard to the question of the delimitation of both the exclusive economic zone or the continental shelf at UNCLOS III. The median-line school proposed the following draft:

“The delimitation of the Exclusive Economic Zone [Continental Shelf] between adjacent or opposite States shall be effected by agreement employing, as a general principle, the median or equidistance line, taking into account any special circumstances where this is justified”

and the equitable-principle school proposed that:

“The delimitation of the exclusive economic zone [continental shelf] between adjacent or/and opposite States shall be effected by agreement, in accordance with equitable principles taking into
account all relevant circumstances and employing any methods, where appropriate, to lead to an equitable solution.”

64. The effort to reach a compromise between these two schools of thought was not successful 1. In 1981, at the tenth session, Ambas-

1 Mr. Manner, Chairman of Negotiating Group 7, reported in the course of the seventh session (28 March-19 May 1978):

“No compromise on this point did materialize during the discussions held, although one may note, that there appears to be general agreement as regards two of the various elements of delimitation: first, consensus seems to prevail to the effect that any measure of delimitation should be effected by agreement, and second, all the proposals presented refer to relevant or special circumstances as factors to be taken into account in the process of delimitation.” (UNCLOS III, Official Records, Vol. X, p. 124.)

He also reported at the resumed seventh session (21 August-15 September 1978):

“During the discussions general understanding seemed to emerge to the effect that the final solution could contain the following four elements: (1) a reference to the effect that any measure of delimitation should be effected by agreement; (2) a reference to the effect that all relevant or special circumstances are to be taken into account in the process of delimitation; (3) in some form, a reference to equity or equitable principles; (4) in some form, a reference to the median or equidistance line.” (Ibid., p. 171.)

In his statement on 24 April 1979 to the Second Committee of the Conference at the eighth session, he stated that “despite intensive negotiations, the Group had not succeeded in reaching agreement on any of the texts before it” (Ibid., Vol. XI, p. 59) but suggested as a possible basis for compromise the following text:

“The delimitation of the exclusive economic zone (or of the continental shelf) between States with opposite or adjacent coasts shall be effected by agreement between the parties concerned, taking into account all relevant criteria and special circumstances in order to arrive at a solution in accordance with equitable principles, applying the equidistance rule or such other means as are appropriate in each specific case.” (Ibid.)

Mr. Manner again in his Report on 22 August 1979, at the resumed eighth session, stated that

“[a]s before, the discussions on delimitation criteria were characterized by the opposing positions of, on the one hand, delegations advocating the equidistance rule and, on the other hand, those specifically emphasizing delimitation in accordance with equitable principles” (Ibid., Vol. XII, p. 107).

On 24 March 1980 at the ninth session he suggested his assessment of alternatives which might, in time, secure a consensus at the conference:

“A. Article 74 (3). 1. The delimitation of the exclusive economic zone [continental shelf] between States with opposite or adjacent coasts shall be effected by agreement in conformity with international law. Such an agreement shall be in accordance with equitable principles, employing the median or equidistance line, where appropriate, and taking account of all circumstances prevailing in the area concerned.” (Ibid., Vol. XIII, p. 77.)

This draft was incorporated in the Informal Composite Negotiating Text/Revision 2 (11 August 1980) by a decision of the “collegium” but was not agreed to by both groups at the plenary meetings on 28 July 1980 at the resumed ninth session; Negotiating Group 7 had, by that time, been dissolved.

sador Koh of Singapore, who became President of UNCLOS III on the death of Ambassador Amerasinghe of Sri Lanka, held meetings with the chairmen of each group and then, on 26 August 1981 at the resumed tenth session, formulated a proposal for a solution. In the plenary meetings the chairmen of the two groups gave their respective support and that text constituted the provisions in the final version of the Draft Convention on the Law of the Sea (28 August 1981) which was finally adopted as Articles 74 and 83 of the 1982 United Nations Convention, which read:

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

Whether Articles 74 and 83 of the 1982 Convention (which has not yet entered into force) have any validity as customary international law or not may still be arguable, but this is a different problem.

65. It is not easy to give a proper interpretation to a text which, after the failure of negotiations over a lengthy period at the Conference, was drafted by one person (i.e., the President of UNCLOS III) and adopted without any further discussion. However, there can be no doubt that the whole concept of Articles 74 and 83 originated from Article 6 of the 1958 Convention and was a product of a compromise between the two opposite schools of thought, the median-line school and the equitable-principle school. Against this background, I would make the following suggestions.

66. Firstly, the words “in order to achieve an equitable solution” cannot be interpreted as indicating anything more than the target of the negotiation to reach an agreement. The text may indicate a frame of mind, but it is not expressive of a rule of law. It must be borne in mind that, while the reference to “special circumstances” in the 1958 Convention or to “all relevant circumstances” in the negotiations at UNCLOS III was finally dropped, those concepts were well reflected in the provision quoted above. In other words, the consideration of some relevant or special circumstances may be required if one is to arrive at an “equitable solution”.

67. Secondly, what is the meaning of this provision that agreement must be reached “on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice”? Agreement between States is simply a result of diplomatic negotiations and is reached by the
free will of the States concerned (cf. the doctrine of liberty of contract). The
deciding factors in such diplomatic negotiations are simply negoti-
ing powers and the skills of each State’s negotiator as well as the position,
geographical and other, of each State.

68. It may be contended that there can be a legal framework within
which — and only within which — the content of an agreement is justifi-
able under international law and that any agreement contrary to jus cogens
should be regarded as invalid. For example, an agreement obtained by
duress might be open to challenge. Except in that very general sense, there
does not in my view exist any jus cogens governing the delimitation of
overlapping maritime titles. The parties can freely negotiate and can reach
an agreement on whatever they wish, employing all possible elements and
factors to strengthen their own position. In other words, there is no legal
constraint, hence no rule, which guides the negotiations on delimitation,
even though the negotiations should be directed “to achieving an equi-
table solution”. Disagreement over the points arising during the effort to
reach agreement cannot constitute a “legal dispute”, because law is not
involved in choosing the line among infinite possibilities.

69. Thirdly, in spite of the practical identity between Article 74 and
Article 83, there is, of course, no guarantee that the delimitation of the
exclusive economic zone and the delimitation of the continental shelf will
necessarily be identical. The “equitable solution” to be reached by nego-
tiation in the delimitation of the exclusive economic zones and that of the
continental shelf areas can certainly be different, as the “special” or “re-
vant” circumstances to be taken into account when defining a delimita-
tion line may well be different in each case.

(c) One or two delimitation lines?

70. Whether the boundary of the continental shelf areas and the bound-
dary of the exclusive economic zone are or are not identical will depend
quite simply on the result of each delimitation, which can well be different
with respect to the two different areas. In the absence of an agreement
between the States concerned, one cannot presuppose a single delimita-
tion for two separate and independent regimes, the exclusive economic
zone and the continental shelf, although the possibility of an eventual
coincidence of the two lines may not be excluded.

71. I have however some sympathy with the Danish attitude and with
the Court’s tendency to prefer a single maritime boundary, since, if the
acceptance of wider claims to coastal jurisdiction over offshore fisheries
had been seen as inevitable, those two regimes should have been amalga-
mated in the new law of the sea. What is deplorable about the new order in
the oceans (which was being prepared in UNCLOS III) is the fact that an

immature concept of the exclusive economic zone has been introduced to
exist with the previously accepted concept of the continental shelf
which has been re-defined and thus transformed, and that the concept of
the exclusive economic zone has in fact had the effect of ousting the latter
concept. Article 5h, paragraph 3, which provides that

“[the rights set out in this article [rights, jurisdiction and duties of the
coastal State in the exclusive economic zone] with respect to the sea-
bed and subsoil shall be exercised in accordance with Part VI [continen-
tal shelf]]”,

which was incorporated without discussion, seems to be an extremely
misguided provision and is difficult to understand.

72. If UNCLOS III was set upon instituting the exclusive economic
zone, it ought frankly to have first wound up the original concept of the
continental shelf. Thus the régime under the 1982 Convention remains
immature in some respects, such as the exclusive economic zone and the
continental shelf. At all events, the transformed concept of the continental
shelf espoused by the 1982 Convention still remains unclear, particularly
in its relation to the parallel régime of the exclusive economic zone, and
does not stand up to criticism from a purely legal standpoint. As has
already been said (para. 37 above), the continental shelf (which should
have been examined more cautiously with the introduction of its new
definition) was scarcely discussed at UNCLOS III.

73. However, in spite of all I have said, the two régimes of the exclusive
economic zone and the continental shelf exist separately and in parallel in
the 1982 United Nations Convention, hence in existing international law,
and the delimitation for each is different.

74. Having said all this, I do not rule out the possibility that, from the
practical standpoint of the exercise of their respective jurisdictions over
the offshore areas for the purpose of the control of maritime resources,
States in negotiation may prefer to have a single boundary rather than two
separate boundaries, but then they should be in agreement on this point as
in the case concerning the Delimitation of the Maritime Boundary in the
Gulf of Maine Area.

3. Role of the Third Party in Settling Disputes concerning Maritime
Delimitation

(a) Infinite variety of potential delimitation lines

75. While the entitlement to areas is erga omnes, the delimitation of
areas is solely related to the drawing of a line between two conflicting
entitlements, which remains a matter for the States concerned. This is
why the 1958 Convention provides in the case of the continental shelf that “the boundary of the continental shelf appertaining to . . . States shall be determined by agreement between them” (Art. 6) and the 1982 United Nations Convention provides in relation to the exclusive economic zone and the continental shelf that “[t]he delimitation of [the exclusive economic zone] [the continental shelf] between States with opposite or adjacent coasts shall be effected by agreement” (Arts. 74 and 83).

76. In reality the delimitation of a line to be effected by agreement may vary in an infinite number of ways within a certain range, and the choosing of one of these variations after consideration of “special circumstances”, “relevant circumstances” or “factors to be taken into account” etc., does not belong to the function of law. No line thus drawn can be illegal or contrary to rules of international law.

(b) Role of the third party in the delimitation of maritime boundaries

77. When a question is to be resolved by agreement, if that agreement cannot be achieved because of a divergence of views on various relevant elements governing the negotiation, that failure to reach agreement — assuming good faith — will not have been due to a difference in the interpretation of international law but to a difference in the concepts of equity upheld by each party.

78. The function of the third party in assisting the parties in dispute could be either to suggest concrete guidelines for the evaluation of each of the above-mentioned relevant elements in order to assign them a proper place in the negotiations or to proceed itself to choose a line by weighing up the relevant factors or elements from among an infinite variety of possibilities so that an equitable solution may be reached.

79. The most that can be done by this Court, as a judicial tribunal applying international law, is to declare that the lines of delimitation for the exclusive economic zone and the continental shelf, respectively, must be drawn by agreement between the Parties, as provided for in the 1982 United Nations Convention, from among the infinite possibilities lying somewhere between the line asked for by Denmark and the other line asked for by Norway. This is, however, not what Denmark asked the Court to do in the present case. Denmark asked the Court to draw “a line of delimitation . . . at a distance of 200 nautical miles” (submission (2)) or to draw simply “the line of delimitation” (submission (3)).

(c) Arbitration ex aequo et bono

80. The delimitation of a maritime boundary line which “shall be effected by agreement” is not a matter to be decided by the International Court of Justice unless it is jointly requested to do so by the States concerned. With the exception of the Aegean Sea Continental Shelf case which was also concerned with the title of islands to a continental shelf but which did not proceed to the merits phase, this is the first case in the history of the Court concerning maritime delimitation to have been brought by unilateral application.

81. The Court is competent under Article 36, paragraph 1, to be seised of “all cases which the parties refer to it”, but does not have jurisdiction under Article 36, paragraph 2, to deal with a dispute of this kind, which is neither “the interpretation of a treaty” nor “any question of international law”. Let me, for the sake of argument, assume (in the light of the different ways in which Norway, as a respondent State, argued its case before the Court) that Norway had consented to join Denmark in asking the Court to draw a boundary line and that the present case therefore fell to be considered as one in which the Court had been requested jointly by the Parties to decide on maritime delimitation.

82. Here it is once again important to be clear about the distinction between the invocation of declarations made under Article 36, paragraph 2, of the Statute, which cannot enlarge the Court’s powers beyond the strict application of law to the case concerned, and the submission of a case by special agreement — one of the methods of seisin available under Article 36, paragraph 1 — which does enable the parties, by consent, to confer on the Court an arbitral, i.e., quasi-political, role whereby equity may be applied where no law exists.

83. It may be interesting to note that the initial draft of the provision relevant to the delimitation of the continental shelf, that is, the provision adopted by the International Law Commission in 1951, read as follows:

“Two or more States to whose territories the same continental shelf is contiguous should establish boundaries in the area of the continental shelf by agreement. Failing agreement, the parties are under the obligation to have the boundary fixed by arbitration”,

and the commentary attached to this provision read, in part:

“It is not feasible to lay down any general rule which States should follow; . . . It is proposed . . . that if agreement cannot be reached and a prompt solution is needed, the interested States should be under an obligation to submit to arbitration ex aequo et bono. The term ‘arbitration’ is used in the widest sense, and includes possible recourse to
the International Court of Justice.” (Yearbook of the International Law Commission, 1951, Vol. II, p. 143.)

84. Another important factor to be remembered is that in the 1982 United Nations Convention, an independent part of which contains the detailed provisions on dispute settlement, disputes concerning the interpretation or application of Articles 74 and 83 relating to sea boundary delimitations may, by the declaration of a State party, be excluded from compulsory procedures entailing binding decisions, provided that the matter is submitted to conciliation as provided in Annex V of that Convention.

(d) Limited function of the International Court of Justice in a maritime delimitation

85. Accordingly, and on the premise that there are in fact no rules of law for effecting a maritime delimitation in the presence of overlapping titles (not overlapping claims), it follows that if the Court is requested by the parties to decide on a maritime delimitation in accordance with Article 36, paragraph 1, of the Statute, it will not be expected to apply rules of international law but will simply “decide a case ex aequo et bono”.

86. In other words, the presentation of a case of maritime delimitation by agreement between the States in dispute in accordance with Article 36, paragraph 1, means by implication that the parties are requesting the Court “to decide a case ex aequo et bono” in accordance with Article 38, paragraph 2, of the Statute. For instance, in my view, the Judgment of the Court in the case concerning the Continental Shelf (Libyan Arab Jamahiriya/Malta) must be interpreted as having been given on that basis, even though the Court never expressly stated as much. It certainly is not a convincing exposition of the law.

87. However, there is no escaping the fact that the rendering of a decision ex aequo et bono is only admissible with the consent of the parties. This was not a big problem in earlier delimitation cases, because the consent derived or could be inferred from the special agreement concerned. But if the Court intended in this case to apply equitable considerations, it

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1 This text did not appear in the later (i.e., post-1953) text drawn up by the International Law Commission. After 1953, the International Law Commission prepared an independent article concerning dispute settlement, to cover not only delimitation but also other aspects of the continental shelf, which finally became the optional protocol for the settlement of disputes attached to the four Geneva Conventions on the law of the sea adopted at UNCLOS I.

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should, in my view, first have decided that the submissions or, alternatively, the arguments of the Parties, in particular Norway, permitted the conclusion that a consent had emerged between them amounting to a special agreement to the effect that the Court was not bound to adhere to strict law. In this way the case could conceivably have been, so to speak, transferred from the ambit of Article 36, paragraph 2, to that of Article 36, paragraph 1, as a very special case of forum prorogatum.

(e) Effecting a delimitation ex aequo et bono

88. Only in a case in which the parties in dispute have asked the Court by agreement to effect a maritime delimitation ex aequo et bono is it qualified to examine what factors or elements should be taken into account as relevant, and to what degree such factors or elements should be evaluated when it is determining the line to be drawn or indicating a concrete line based on its own evaluation of the relevant factors and elements.

89. I must add furthermore that, if a single maritime delimitation for the continental shelf and the exclusive economic zone is to be effected by the Court in response to a joint request by the parties in dispute, then the parties have to agree which factors or elements relevant to either the exclusive economic zone or the continental shelf (or, in other words, relevant to either fishery resources or mineral resources), are to be given priority. The Court is not competent even as an arbitrator to decide the priority of either the exclusive economic zone or the continental shelf unless expressly requested to do so by the parties.

PART III. LACK OF VALID GROUNDS FOR THE LINE DRAWN IN THE JUDGMENT

90. The Court has drawn “the delimitation line that divides the continental shelf and fishery zones of the Kingdom of Denmark and the Kingdom of Norway”. Holding as I do the view that the Court is not competent to determine the delimitation line at all unless requested jointly by the Parties to decide the case ex aequo et bono, I am in no position to comment on the actual course of the delimitation effected by the Court.

91. I am concerned, however, that, even supposing that the Court had been requested by agreement to draw a single maritime boundary on the basis of Article 38, paragraph 2, of the Statute, it did not present any convincing statement of its reasons for having drawn the particular single maritime boundary line shown on sketch-map No. 2 attached to the Judgment. The line drawn by the Court may well be one of an infinite number of possibilities which could have been indicated if the Court had thought
any one of them would lead to an equitable solution. However, in choosing this line rather than any other, the Court seems to have taken a purely arbitrary decision.

(a) Unsatisfactory "justification" by special (relevant) circumstances

92. Firstly, the Court seems to take the view that the disparity in the lengths of the coastlines of the opposite States must necessarily be reflected in an adjustment or shifting of the median line taken as a line of departure. However, the Court appears to overlook one geometrical fact, namely that, in the case of opposite coasts of disparate lengths, even an unadjusted median line leaves a greater portion to the State with the longer coastline. What is more, the Court does not indicate the reasoning that has led it to conclude that the longer coastline should automatically lead to an even larger portion of the maritime area.

93. Even supposing that the State with the longer coastline is to be entitled to a much larger portion than the median line would confer, the drawing of the line connecting points A, O, N and M, as proposed in sketch-map No. 2 in the Judgment, is not, in my view, supported by any reasons that can be described as objective or convincing.

94. Secondly, I can accept that, just as in the North Sea Continental Shelf cases where the “natural resources of the continental shelf areas involved” were suggested as a factor to be taken into account, the “fishing resources” may well be a relevant factor in the delimitation of the exclusive economic zone. However, no reason is given in the Judgment as to why “equitable access” to the fishing resources is a relevant factor and the Court does not explain what the words “equitable access” can be taken to mean. Does the Court intend that Greenland’s inhabitants or Danish fishermen, together with Norwegian fishermen (there are no inhabitants on Jan Mayen), should be entitled to “equitable access” to the fishing resources in one specific area, the area east of the median line, a long way from Greenland but close to Jan Mayen? Why is only that specific area taken up for the consideration of “equitable access to the fishing resources”? In fact, capelin fishing has been controlled under an international arrangement without any reference to the division of the sea areas concerned.

95. In spite of repeated references to the concept of “equitable access to the fishing resources”, the Court does not give the slightest hint in its reasoning as to why the median line as a line of departure should be adjusted or shifted so as to allot one-half of the southern part of the “area of overlapping claims” to Greenland (or Denmark) while leaving the other half to Jan Mayen (or Norway).

(b) Unjustified choice of the line

96. In taking not only “the disparity of coastal lengths” but also “equitable access to the fishing resources” as factors for the purpose of adjusting or shifting the median line as a line of departure, the Court was too much concerned with “the area of overlapping claims” when it divided the area between Greenland and Jan Mayen. The Court was incorrect in unduly concerning itself with the “area of overlapping claims” while neglecting the rest of the “relevant area”, when allocating the areas to each State.

97. The task confronting the Court was not to delimit the boundary of the “area of overlapping claims” but to do so of the maritime area between Greenland and Jan Mayen, in other words the “relevant area” as defined in the Judgment (para. 20), although the line had of course to be located in the “area of overlapping claims”. Its manipulation of the delimitation line, choosing points M, N and O on a ratio of 1:1 or 1:2 between the two lines, i.e., the maximum 200-mile line of the Danish entitlement and the median line, the line of Norway’s modest assertion, can only be described as misguided.

98. I accept that the median line may be taken as a line of departure and then adjusted or shifted, with special (relevant) circumstances or relevant factors (elements) being given due consideration. In my concept of equity, it is not merely the simple disparity of opposite coastlines which must be taken into account but also disparity of geographical (natural or socio-economic) situations, for example, population, socio-economic activity, existence of communities behind the coastline and the distance of an uninhabited island from the nearest community of the mainland or main territory. The existence, quality and quantity of marine resources (either fishery or mineral) are relevant, but equity surely requires that any decision as to how these resources should be allotted to each party should take account not only of such relatively objective ecological facts but also of their relative significance, perhaps amounting to dependence, to the communities appertaining to either party. Certainly, it is impossible to calculate and balance up these elements mathematically in order to draw a line with total objectivity. Thus the drawing of a line must depend upon the conscientious but infinitely variable assessment of those drawing it.

(c) Mistaken definition of a single maritime boundary

99. I must also add that the Court failed to discern the possible differences in the special (relevant) circumstances which need to be taken into
consideration in order to achieve an equitable solution, depending on
whether one is effecting the delimitation of the exclusive economic zone
or that of the continental shelf. If the marine resources constitute a factor
to be taken into account, it is unthinkable to draw a single maritime boundary
without having a clear idea as to which particular circumstances ought
to predominate (i.e., those relating either to the exclusive economic zone
or to the continental shelf). The Court does not give any good reason why
equitable access to the “fishing resources” should have also been taken
into account when it drew the line constituting the boundary not only of
the exclusive economic zone but also of the continental shelf. The Court
has apparently erred in this respect after taking it for granted that there
ought to be such a single boundary.

(d) Conclusion

100. As I have already pointed out, the line connecting points M, N, O
and A, which is drawn eastwards of the median line as a result of adjust-
ment and shifting, cannot be categorized as mistaken because it rep-
resents one choice from an infinite number of potential lines of delimita-
tion in this area, but I venture to suggest that it was drawn in an arbitrary
manner, unsupported by any sufficiently profound analysis. That the
effort of the Court was conscientiously directed towards the finding of an
equitable solution is something which, however, I readily acknowledge.

(Signed) Shigeru Oda.
International Court of Justice

Separate Opinion of Judge Schwebel,
Maritime Delimitation in the Area Between
Greenland and Jan Mayen
(Denmark v. Norway)
Judgment

I.C.J. Reports 1993, paras. 126, 128-129
was made to furnish “equitable access” to the southern sector in which capelin may be fished. In Selden’s seventeenth-century days, equity was described as the Chancellor’s conscience, variable indeed; it was as if the standard of measurement called a foot were to be the length of the Chancellor’s foot, “an uncertain measure”. (Pollock, ed., Table Talk of John Selden, 1927, p. 43.) Nowadays, equity is to be impressionistically measured by the length of opposite coastlines.

III. SHOULD MAXIMALIST CLAIMS BE REWARDED?

If the case between Denmark and Norway is to be considered in a fashion which places the legal entitlements of each Party on an equal plane, then both Greenland and Jan Mayen should be viewed as entitled prima facie to a 200-mile zone. These entitlements, however, being less than 400 miles apart, overlap. Thus it is within this large maritime area of overlapping potential entitlements that the line of delimitation had to be drawn. But not in Denmark’s view. For its part, Denmark claimed its full 200-mile entitlement, proposing to leave Norway none of its, whereas Norway, for its part, took a more modest approach, claiming not the full extent of its 200-mile entitlement but only those areas which lie to the east of a median line drawn between the opposite coasts of Jan Mayen and Greenland. That is to say, Denmark’s claim is precisely the same claim as could be made if Jan Mayen Island did not exist or, if existing, were to be treated not as an island but as a rock “which cannot sustain human habitation or economic life” of its own and which accordingly shall have “no exclusive economic zone or continental shelf” (Art. 121 of the 1982 United Nations Convention on the Law of the Sea). The singular characteristics of Jan Mayen Island may leave room for argument about whether it meets the standards of Article 121, but Denmark did not make that argument; it accepted that Jan Mayen Island is not a rock but an island.

The line of delimitation indicated by the Court gives the impression of rewarding Denmark’s maximalist claim and penalizing Norway’s moderation. Equitable or equal access is given to the Parties in the southerly area that matters, and the remainder of the line is indicated to conjoin with the line so to be drawn, apparently all of this to fall within the area of Norway’s claim. Norway proposed a median line, which fell roughly midway between the coasts of Greenland and Jan Mayen, but which nevertheless would have accorded Greenland significantly more continental shelf and fishing zone than Jan Mayen, for the reason that Greenland’s far longer
which applies the sources of that law, and the power of the Court to decide a case ex aequo et bono if the parties so agree.

Nevertheless, the authority to seek an equitable solution by the application of a law whose principles remain largely undefined affords the Court an exceptional measure of judicial discretion. In this Judgment, the Court's attempted definition of that law ultimately does little more than require the investigation of "relevant circumstances" which have to be taken into account if an equitable result is to be achieved. Invoking "relevant circumstances" is in accord with earlier Judgments of the Court, beginning with the North Sea Continental Shelf cases, and is consistent with the tenor of the debate at the Third United Nations Conference on the Law of the Sea. If the Court draws from the cornucopia of judicial discretion afforded by its appreciation of what circumstances are relevant the decision that the fishing zone shall be equally apportioned in this case, it is difficult to maintain that that exercise of discretion is more objectionable than indication of an alternative line.

If that is so, the question then arises, should the continental shelf line imported by the 1958 Convention — the median line — govern, or should the fishing zone line indicated by the Court's sense of equity govern?

There is no ready answer to this conundrum. It might on the one hand be maintained that the 1958 Convention affords anterior and harder law, unmodified by a subsequent treaty in force. It should accordingly govern, the more so because there are a number of continental shelf agreements and awards which are in force which are not treated as having been reworked by the subsequent advent of the concept of the exclusive economic zone or variants thereof or by the lenient terms of the United Nations Convention on the Law of the Sea. On the other hand, it might be maintained that, even if that be generally so, the real interests at stake in this case involve the apportionment of fishing rights and that, therefore, the Court's appreciation of fishing zone equities should govern any apportionment of the continental shelf.

The Court avoids a choice between these approaches by maintaining that it applies "a general norm based on equitable principles" amalgamating the two in a formula it describes as "the equidistance-special circumstances rule". Whether, in view of the reasoning employed in this case by the Court, it has effectively employed that rule is debatable. But what is clear is that the Court leavens its Judgment with a large infusion of equitable ferment, importing as it does a search for "relevant circumstances", and so concocts a conclusion which does not lend itself to dissection or, for that matter, dissent. Based on large and loose approaches such as its gross impression of the effects of differing lengths of coasts, its desire to afford equitable access to fishing resources, and the attractions of the
symmetrical conjoinder of indicated lines of delimitation, the Court comes up with a line which, given the criteria employed, may be as reasonable as another. Where this leaves the law of maritime delimitation, to the extent that such a law subsists, is perplexing.

(Signed) Stephen M. SCHWEBEL.
Arbitral Tribunal

Arbitration between Barbados and the Republic of Trinidad and Tobago, relating to the delimitation of the exclusive economic zone and the continental shelf between them

Decision of of 11 April  2006

Reports of International Arbitral Awards, vol. XXVII, paras. 221, 230-231, 244, 334-338, 350, 371-379
Arbitration between Barbados and the Republic of Trinidad and Tobago, relating to the delimitation of the exclusive economic zone and the continental shelf between them, decision of 11 April 2006

11 April 2006

VOLUME XXVII pp.147-251

in waters which may be determined to form part of Trinidad and Tobago’s EEZ.

218. The Tribunal wishes to emphasise that its jurisdiction is limited to the dispute concerning the delimitation of maritime zones as between Barbados and Trinidad and Tobago. The Tribunal has no jurisdiction in respect of maritime boundaries between either of the Parties and any third State, and the Tribunal’s award does not prejudice the position of any State in respect of any such boundary.

Chapter V

MARITIME DELIMITATION: GENERAL CONSIDERATIONS

219. The Tribunal will now set out the general considerations that will guide its examination of the issues concerning maritime delimitation that the Parties have put forth in their claims and allegations.

A. APPLICABLE LAW

220. Article 293 of UNCLOS provides:

Applicable Law

1. A court or tribunal having jurisdiction under this section shall apply this Convention and other rules of international law not incompatible with this Convention.

2. Paragraph 1 does not prejudice the power of the court or Tribunal having jurisdiction under this section to decide a case ex aequo et bono, if the parties so agree.

221. Articles 74(1) and 83(1) of UNCLOS lay down the law applicable to the delimitation of the exclusive economic zone and the continental shelf, respectively. In the case of States with either opposite or adjacent coasts, the delimitation of such maritime areas “shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution”.

222. This apparently simple and imprecise formula allows in fact for a broad consideration of the legal rules embodied in treaties and customary law as pertinent to the delimitation between the parties, and allows as well for the consideration of general principles of international law and the contributions that the decisions of international courts and tribunals and learned writers have made to the understanding and interpretation of this body of legal rules.

223. As noted above, both Barbados and Trinidad and Tobago are parties to UNCLOS, the principal multilateral convention concerning not only
equidistance alone will in many circumstances not ensure an equitable result in the light of the peculiarities of each specific case. The second step accordingly requires the examination of this provisional line in the light of relevant circumstances, which are case specific, so as to determine whether it is necessary to adjust the provisional equidistance line in order to achieve an equitable result (Cameroon v. Nigeria, I.C.J. Reports 2002, p. 303; Prosper Weil, Perspectives du droit de la délimitation maritime p. 223 (1988)). This approach is usually referred to as the “equidistance/relevant circumstances” principle (Qatar v. Bahrain, I.C.J. Reports 2001, p. 40; Cameroon v. Nigeria, I.C.J. Reports 2002, p. 303). Certainty is thus combined with the need for an equitable result.

243. The process of achieving an equitable result is thus constrained by legal principle, in particular in respect of the factors that may be taken into account. It is furthermore necessary that the delimitation be consistent with legal principle as established in decided cases, in order that States in other disputes be assisted in the negotiations in search of an equitable solution that are required by Articles 74 or 83 of the Convention.

244. Within those constraints imposed by law, the Tribunal considers that it has both the right and the duty to exercise judicial discretion in order to achieve an equitable result. There will rarely, if ever, be a single line that is uniquely equitable. The Tribunal must exercise its judgment in order to decide upon a line that is, in its view, both equitable and as practically satisfactory as possible, while at the same time in keeping with the requirement of achieving a stable legal outcome. Certainty, equity, and stability are thus integral parts of the process of delimitation.

245. This is the process of delimitation that the Tribunal will now undertake in respect of the dispute submitted to it and the respective claims of the Parties. A chart, Map IV, facing, depicts the claim line of Barbados, the claim line of Trinidad and Tobago, and the segment of the equidistance line that is agreed between them.

Chapter VI

DELIMITATION IN THE WEST

A. THE FLYINGFISH FISHERY AND BARBADOS’ CLAIM TO ADJUST THE EQUIDISTANCE LINE

1. The Positions of the Parties

246. It is common ground between the Parties that the line of delimitation in the west is provisionally to be found in the equidistance line

* Secretariat note: See map No. IV in the back pocket of this volume.
geographical element as the basis of its conclusion. Barbados examines the orientation arising from Trinidad and Tobago's archipelagic baselines and in this perspective the orientation is indeed a southeasterly one. Trinidad and Tobago relies on the actual presence of the bulk of its coastline, irrespective of the archipelagic baselines.

333. The Parties have quite naturally shaped their arguments to support their respective claims but in doing so, contradictions become apparent. Barbados asserts that archipelagic basepoints cannot be used for calculating the equidistance line, yet archipelagic baselines are used by it for concluding that Trinidad and Tobago's coastal frontages are orientated towards the southeast. Trinidad and Tobago claims to the contrary that its archipelagic baselines can be counted as basepoints for the drawing of the equidistance line and other effects, but that such baselines are not to be used for determining the coastal orientation.

334. The Tribunal's conclusion in this connection is that the orientation of coastlines is determined by the coasts and not by baselines, which are only a method to facilitate the determination of the outer limit of the maritime zones in areas where the particular geographical features justify the resort to straight baselines, archipelagic or otherwise. In this perspective, the Tribunal must also conclude that broad coastal frontages of the island of Trinidad and of the island of Tobago as well as the resulting disparity in coastal lengths between the Parties, are relevant circumstances to be taken into account in effecting the delimitation as these frontages are clearly abutting upon the disputed area of overlapping claims.

2. Proportionality as a Relevant Circumstance

335. The second circumstance invoked by Trinidad and Tobago as relevant to the adjustment of the equidistance line is proportionality. According to Trinidad and Tobago's estimates, the adjustment claimed by it leads to 49% of the overlapping EEZ entitlements being attributed to Barbados and 51% attributed to Trinidad and Tobago, a result that it considers equitable in the light of the test of proportionality and thus consistent with UNCLOS Article 74. Proportionality in this argument is related to and is a function of the coastal lengths and relevant frontages discussed above, as these frontages are those producing entitlement to the areas to be attributed.

336. In Barbados' view, the fact that a delimitation line might be found to be inequitable because it results in a disproportionate division of the disputed area does not mean that proportionality can be used as an independent method of delimitation and hence it cannot by itself produce a boundary line or require a proportional division of the area where claims overlap. As has been noted, Barbados also opposes Trinidad and Tobago's identification of the relevant coastal frontages and the relevance of coastal lengths to effect delimitation, thus also disagreeing about their eventual role in the test of proportionality.

337. The Tribunal has explained above the meaning that the principle of proportionality has in maritime delimitation as developed by the decisions of international courts and tribunals. In the light of such considerations, the Tribunal concludes that proportionality is a relevant circumstance to be taken into consideration in reviewing the equity of a tentative delimitation, but not in any way to require the application of ratios or mathematical determinations in the attribution of maritime areas. The role of proportionality, as noted, is to examine the final outcome of the delimitation effected, as the final test to ensure that equitableness is not contradicted by a disproportionate result.

338. The Tribunal will thus not resort to any form of “splitting the difference” or other mathematical approaches or use ratio methodologies that would entail attributing to one Party what as a matter of law might belong to the other. It will review the effects of the line of delimitation in the light of proportionality as a function of equity after having taken into account any other relevant circumstance, most notably the influence of coastal frontages on the delimitation line.

3. Regional Considerations as a Relevant Circumstance

339. The third circumstance invoked by Trinidad and Tobago as relevant to the justification of its claim is the effect of the delimitation for the region as a whole.

340. Just as the tribunal in Guinea/Guinea-Bissau held that an equitable delimitation cannot ignore other delimitations already made or still to be made in the region (Guinea/Guinea-Bissau, 77 I.L.R. p. 635, at p. 682, para. 104), so too, Trinidad and Tobago asserts, the delimitation between Trinidad and Tobago and Venezuela in the region south of Barbados and that between France (Guadeloupe and Martinique) and Dominica in the region north of Barbados need to be considered in this dispute as they entail a recognition of a departure from the equidistance line in order to avoid a cut-off effect.

341. Trinidad and Tobago explains that one purpose of the 1990 Trinidad-Venezuela Agreement is to allow Venezuela access to the Atlantic (“salida al Atlántico”), an access that would be impeded by an equidistance line delimitation between Trinidad and Tobago and Barbados in that area. Trinidad and Tobago further explains that Point A on the delimitation line it proposes in the present case, and the vector it claims in respect of delimitation with Barbados, discussed below, also find a justification in the contribution that they make to facilitation of the “salida al Atlántico”.

342. Trinidad and Tobago also invokes to this effect the Agreement of 7 September 1987 between France (Guadeloupe and Martinique) and Dominica where a tentative equidistance line was adjusted to avoid a cut-off effect and prevent Dominica and Martinique being deprived of an outlet to the Atlantic.
Tobago areas it no longer claims. Nor has this been requested by Trinidad and Tobago.

348. It follows that the maximum extent of overlapping areas between the Parties is determined in part by the treaty between Trinidad and Tobago and Venezuela, in so far as far as Trinidad and Tobago’s claim is concerned. This the Tribunal will take into account in determining the delimitation line.

349. Barbados has also invoked the Barbados/Guyana Joint Cooperation Zone Treaty as a relevant circumstance influencing the delimitation between Barbados and Trinidad and Tobago. This other treaty, however, is also res inter alios acta in respect of Trinidad and Tobago and as such could not influence the delimitation in the present dispute, except in so far as it would reflect the limits of Barbados’ maritime claim.

E. THE ADJUSTMENT OF THE EQUIDISTANCE LINE: TRINIDAD AND TOBAGO’S CLAIMED TURNING POINT

350. The Tribunal has concluded above that there are in this case relevant circumstances that justify the adjustment of the equidistance line and has identified their meaning. The disparity of the Parties’ coastal lengths resulting in the coastal frontages abutting upon the area of overlapping claims is sufficiently great to justify an adjustment. Whether this adjustment should be a major one or a limited one is the question the Tribunal must now address.

351. Trinidad and Tobago has identified Point A of its claim as the turning point for the adjustment claimed, in the belief that all the circumstances it has argued as relevant to the delimitation justify a major adjustment as from that point.

352. Trinidad and Tobago explains that the rationale for Point A is that it is the “last point on the equidistance line which is controlled by points on the south-west coast of Barbados”. In Trinidad and Tobago’s view, Point A is thus the appropriate turning point as it separates the area in which delimitation is between opposite coasts from that where coasts are adjacent. To the east of that point, it says, only the adjacent eastern coastal frontages of the Parties influence the line; and those frontages generate a ratio of coastline lengths of 8.2:1 in favour of Trinidad and Tobago.

353. The adjusted line claimed by Trinidad and Tobago then proceeds along a constant azimuth of 88° from Point A to the outer limit of the EEZ of Trinidad and Tobago (Point B).

354. Barbados is of the view that no adjustment of the equidistance line is necessary and that in particular, Point A has been calculated by a reference to basepoints that have no justification, as there is no coastal adjacency involved in this case. But even if there were a situation of adjacency, acquiescence in, the equidistance line as a definitive boundary by any neighbouring State.

366. The Tribunal accordingly does not consider that the activities of either Party, or the responses of each Party to the activities of the other, themselves constitute a factor that must be taken into account in the drawing of an equitable delimitation line.

G. TRINIDAD AND TOBAGO’S CLAIM TO AN OUTER CONTINENTAL SHELF

367. Trinidad and Tobago principally justifies its claim to the adjustment of the equidistance line on the ground of an entitlement to a continental shelf out to the continental margin defined in accordance with UNCLOS Article 76(4)-(6). To this end, Trinidad and Tobago argues that its continental shelf extends to an area beyond 200 nm from its own baselines that lie within, and beyond, Barbados’ 200 nm EEZ so as to follow on uninterruptedly to the outer limit of the continental margin. Trinidad and Tobago asserts that its rights to the continental shelf cannot be trumped by Barbados’ EEZ.

368. The Tribunal has concluded above that it has jurisdiction to decide upon the delimitation of a maritime boundary in relation to that part of the continental shelf extending beyond 200 nm. As will become apparent, however, the single maritime boundary which the Tribunal has determined is such that, as between Barbados and Trinidad and Tobago, there is no single maritime boundary beyond 200 nm. The problems posed by the relationship in that maritime area of CS and EEZ rights are accordingly problems with which the Tribunal has no need to deal. The Tribunal therefore takes no position on the substance of the problem posed by the argument advanced by Trinidad and Tobago.

H. THE ADJUSTMENT OF THE EQUIDISTANCE LINE

369. Because the Tribunal has found that there should be no adjustment of the equidistance line at Point A of Trinidad and Tobago’s claim, the equidistance line continues unbent in its southeasterly direction further out to the ocean. This does not mean, however, that the line will not be subject to an adjustment further out.

370. The Tribunal has found above that the provisional equidistance line needs to be examined in the light of the circumstances that might be relevant to attain the equitable solution called for by UNCLOS Articles 74 and 83.

371. While the Tribunal has found that regional circumstances do not have a role to play in this delimitation, except to the extent that the area to which one party maintains a claim is determined by agreements it has made with a third country in the region, there is one relevant circumstance invoked
by Trinidad and Tobago that does indeed have such a role and which needs to be taken into consideration in order to determine whether it is necessary to adjust the equidistance line and, if so, where and to what extent.

372. This relevant circumstance is the existence of the significant coastal frontage of Trinidad and Tobago described above. This particular coastal frontage abuts directly upon the area subject to delimitation and it would be inequitable to ignore its existence. Just as opposite coasts have influenced the orientation of the line from its starting point for a significant distance out to the sea, so too a lengthy coastal frontage abutting directly upon such area is to be given a meaningful influence in the delimitation to be effected. The mandate of UNCLOS Articles 74 and 83 to achieve an equitable result can only be satisfied in this case by the adjustment of the equidistance line.

373. There is next the question of where precisely the adjustment should take place. There are no magic formulas for making such a determination and it is here that the Tribunal’s discretion must be exercised within the limits set out by the applicable law. The Tribunal concludes that the appropriate point of deflection of the equidistance line is located where the provisional equidistance line meets the geodetic line that joins (a) the archipelagic baseline turning point on Little Tobago Island with (b) the point of intersection of Trinidad and Tobago’s southern maritime boundary with its 200 nm EEZ limit. This point, described in the Tribunal’s delimitation line as “10”, is situated at 11° 03.70’N, 57° 58.72’W. This point gives effect to the presence of the coastal frontages of both the islands of Trinidad and of Tobago thus taking into account a circumstance which would otherwise be ignored by an unadjusted equidistance line.

374. The delimitation line is then drawn from this point in a straight line in the direction of its terminal point, which is located at the point of intersection of Trinidad and Tobago’s southern maritime boundary with its 200 nm EEZ limit. This point, described in the Tribunal’s delimitation line as “11”, has an approximate geographic coordinate of 10° 58.59’N, 57° 07.05’W. The terminal point is where the delimitation line intersects the Trinidad and Tobago-Venezuela agreed maritime boundary, which as noted establishes the southernmost limit of the area claimed by Trinidad and Tobago. This terminal point marks the end of the single maritime boundary between Barbados and Trinidad and Tobago and of the overlapping maritime areas between the Parties.

375. In effecting this adjustment the Tribunal has been mindful that, as far as possible, there should be no cut-off effects arising from the delimitation and that the line as drawn by the Tribunal avoids the encroachment that would result from an unadjusted equidistance line.

376. The Tribunal having drawn the delimitation line described above, it remains to examine the outcome in the light of proportionality, as the ultimate test of the equitableness of the solution. As has been explained, proportionality is not a mathematical exercise that results in the attribution of maritime areas as a function of the length of the coasts of the Parties or other such ratio calculations, an approach that instead of leading to an equitable result could itself produce inequity. Proportionality is a broader concept, it is a sense of proportionality, against which the Tribunal can test the position resulting from the provisional application of the line that it has drawn, so as to avoid gross disproportion in the outcome of the delimitation.

377. In reaching this conclusion the Tribunal is mindful of the observation of the Chamber of the International Court of Justice in the Gulf of Maine case that “maritime delimitation can certainly not be established by a direct division of the area in dispute proportional to the respective lengths of the coasts belonging to the parties in the relevant area, but it is equally certain that a substantial disproportion to the lengths of those coasts that resulted from a delimitation effected on a different basis would constitute a circumstance calling for an appropriate correction” (I.C.J. Reports 1984, p. 323, at para. 185).

378. In examining the provisional equidistance line in the light of that sense of proportionality, the Tribunal finds that a provisional equidistance line influenced exclusively by short stretches of coasts that are opposite to each other cannot ignore the influence of a much larger relevant coastline constituting coastal frontages that are also abutting upon the area of delimitation. While not a question of the ratio of coastal lengths, it would be disproportionate to rely on the one and overlook the other as if it did not exist. Equity calls for the adjustment of the equidistance line on this basis as well.

379. The Tribunal is also satisfied that the deflection effected does not result in giving effect to the relevant coastal frontages in a manner that could itself be considered disproportionate, as would be the case if the coastal frontages in question were projected straight out to the east. The bending of the equidistance line reflects a reasonable influence of the coastal frontages on the overall area of delimitation, with a view to avoiding reciprocal encroachments which would otherwise result in some form of inequity.

380. In the light of the foregoing analysis, the Tribunal concludes that the maritime boundary between Barbados and Trinidad and Tobago shall run as depicted in the map on the facing page. Map V is illustrative of the line of maritime delimitation; the precise, governing coordinates are set forth below and are explicated in the Appendix to the Award.

381. The verbal description of the maritime boundary is as follows. The delimitation shall extend from the junction of the line that is equidistant from the low water line of Barbados and from the nearest turning point of the...
International Court of Justice

Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea
(Nicaragua v. Honduras)
Judgment

*I.C.J. Reports 2007, paras. 272-287, 304*
“the distorting effects of lateral equidistance lines under certain conditions of coastal configuration are nevertheless comparatively small within the limits of territorial waters, but produce their maximum effect in the localities where the main continental shelf areas lie further out” (Judgment, I.C.J. Reports 1969, p. 37, para. 59).

270. For the exclusive economic zone and the continental shelf, Articles 74, paragraph 1, and 83, paragraph 1, of UNCLOS provide that they are to be delimited by “agreement on the basis of international law” to “achieve an equitable solution”.

271. As to the plotting of a single maritime boundary the Court has on various occasions made it clear that, when a line covering several zones of coincident jurisdictions is to be determined, the so-called equitable principles/relevant circumstances method may usefully be applied, as in these maritime zones this method is also suited to achieving an equitable result:

“This method, which is very similar to the equidistance/special circumstances method applicable in delimitation of the territorial sea, involves first drawing an equidistance line, then considering whether there are factors calling for the adjustment or shifting of that line in order to achieve an ‘equitable result’.” (Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002, p. 441, para. 288.)

272. The jurisprudence of the Court sets out the reasons why the equidistance method is widely used in the practice of maritime delimitation: it has a certain intrinsic value because of its scientific character and the relative ease with which it can be applied. However, the equidistance method does not automatically have priority over other methods of delimitation and, in particular circumstances, there may be factors which make the application of the equidistance method inappropriate.

273. Nicaragua contends that the current case is not one in which the equidistance/special circumstances approach would be appropriate for the delimitation to be effected. Nicaragua asserts that the instability of the mouth of the River Coco at the Nicaragua-Honduras land boundary terminus, combined with the small and uncertain nature of the offshore islands and cays north and south of the 15th parallel, would make fixing base points and using them to construct a provisional equidistance line unduly problematic. Nicaragua urges the Court instead to account for the coastal geography by constructing the entire single maritime boundary from “the bisector of two lines representing the entire coastal front of both states”, which would run as a line of constant bearing 52° 45′ 21″.

274. Honduras’s principal argument with respect to the delimitation is that there was a tacit agreement on the 15th parallel as the single maritime boundary. Honduras has acknowledged that “geometrical methods of delimitation, such as perpendiculars and bisectors, are methods that may produce equitable delimitations in some circumstances”. As regards equidistance, Honduras agrees that the mouth of the River Coco “shifts considerably, even from year to year”, making it “necessary to adopt a technique so that the maritime boundary need not change as the mouth of the river changes”. Honduras asserts, moreover, that the 15th parallel accurately reflects the eastward facing coastal fronts of the two countries such that it represents “both an adjustment and simplification of the equidistance line”.

275. Thus neither Party has as its main argument a call for a provisional equidistance line as the most suitable method of delimitation.

276. Honduras initially referred to its version of a provisional equidistance line constructed by using the islands as base points in its Rejoinder. At the end of its oral argument, Honduras presented a provisional equidistance line (azimuth 78° 48′) constructed from one pair of base points fixed at the low-water line of the apparent easternmost endpoint of the mainland Honduran and Nicaraguan coasts at Cape Gracias a Dios, as identified from a recent satellite photograph. Honduras did not use the islands north and south of the 15th parallel as base points for constructing this line but did adjust the line both to allow a full 12-mile territorial sea for these islands where possible and to follow a median line where their opposite-facing territorial seas overlap (mostly to the south of the 15th parallel) (see also paragraph 285 below).

277. The Court observes at the outset that both Parties have raised a number of geographical and legal considerations with regard to the method to be followed by the Court for the maritime delimitation. Cape Gracias a Dios, where the Nicaragua-Honduras land boundary ends, is a sharply convex territorial projection abutting a concave coastline on either side to the north and south-west. Taking into account Article 15 of UNCLOS and given the geographical configuration described above, the pair of base points to be identified on either bank of the River Coco at the tip of the Cape would assume a considerable dominance in constructing an equidistance line, especially as it travels out from the coast. Given the close proximity of these base points to each other, any variation or error in situating them would become disproportionately magnified in the resulting equidistance line. The Parties agree, moreover, that the sediment carried to and deposited at sea by the River Coco have caused its delta, as well as the coastline to the north and south of the Cape, to exhibit a very active morpho-dynamism. Thus continued accretion at the Cape might render any equidistance line so constructed today arbitrary and unreasonable in the near future.
These geographical and geological difficulties are further exacerbated by the absence of viable base points claimed or accepted by the Parties themselves at Cape Gracias a Dios. In accordance with Article 16 of UNCLOS, Honduras has deposited with the Commission the geographical co-ordinates of its base points, "Point 17", as having co-ordinates 14° 59.8′ N and 83° 08.9′ W. These are the exact co-ordinates identified by the Mixed Commission in 1962 as being the thalweg of the River Coco at the mouth of its main branch. This point, even if it can be said to be unchallenged by Nicaragua, is no longer used as a base point (UNCLS, Art. 5). Nicaragua has yet to deposit the geographical co-ordinates of its base points and baselines.

Article 15 of UNCLOS itself envisages an exception to the drawing of a straight baseline in the case of special circumstances, namely "where it is necessary by reason of historic title or special configurations of the coast or for any other special circumstances within the meaning of the exception, that such special circumstances are of a magnitude to justify a change in the method of delimitation". The combination of thalweg and intervening islands, as identified by the Mixed Commission in 1962, would make these base points uncertain within a short period of time.

The genesis of the text of Article 12 of the 1982 Convention on the Territorial Sea and the Contiguous Zone, as the Court notes, is difficult to identify with certainty. However, the Court notes first that the Parties are in disagreement as to title over the unstable islands having formed in the mouth of the River Coco, islands which the Parties suggested would make these base points uncertain within a short period of time.

278. These geographical and geological difficulties are further exacerbated by the absence of viable base points claimed or accepted by the Parties themselves at Cape Gracias a Dios. In accordance with Article 16 of UNCLOS, Honduras has deposited with the Commission the geographical co-ordinates of its base points, "Point 17", as having co-ordinates 14° 59.8′ N and 83° 08.9′ W. These are the exact co-ordinates identified by the Mixed Commission in 1962 as being the thalweg of the River Coco at the mouth of its main branch. This point, even if it can be said to be unchallenged by Nicaragua, is no longer used as a base point (UNCLS, Art. 5). Nicaragua has yet to deposit the geographical co-ordinates of its base points and baselines.

279. This difficulty in identifying reliable base points is compounded by the differences addressed, in particular, that apparently still remain between the Parties as to the interpretation and application of the King of Spain's 1906 Arbitral Award in respect of the "extreme common boundary point on the coast of the Atlantic" (Arbitral Award Made by the King of Spain on 23 December 1906 (Honduras v. Nicaragua), Judgment, I.C.J. Reports 1960, p. 202). The Court notes that in the case concerning Delimitation of the Maritime Boundary in the Gulf of Maine (United States of America v. Canada, Judgment, I.C.J. Reports 1984, p. 327, para. 21).

280. Given the set of circumstances in the current case, it is impossible for the Court to identify points and construct a provisional equidistant line for the single maritime boundary delimiting maritime areas off the Parties' mainland coasts. Even if the particular features already identified by the Parties as points from which to draw an equidistant line were to be equidistant lines, these points are not equidistant to the coastlines of the Parties as they have not been determined by a court of competent jurisdiction.

281. The Court notes, however, that on previous occasions the median line in delimiting the territorial sea has not been used, either for very putative purpose, or for the Territorial Sea and the Contiguous Zone, as the Court notes, is difficult to identify with certainty. However, the Court notes first that the Parties are in disagreement as to title over the unstable islands having formed in the mouth of the River Coco, islands which the Parties suggested would make these base points uncertain within a short period of time.
ticular reasons (see *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, *Judgment, I.C.J. Reports* 1982, p. 85, para. 121, where the Court worked backwards from a line of convergence of the concessions granted by each Party and reflected this in a line drawn from a defined point offshore to the endpoint of the land frontier) or because of the adverse effect of coastal configurations (see *Delimitation of the Maritime Boundary between Guinea and Guinea-Bissau*, *International Law Reports*, Vol. 77, p. 682, para. 104. [English translation of French original]).

281. For all of the above reasons, the Court finds itself within the exception provided for in Article 15 of UNCLOS, namely facing special circumstances in which it cannot apply the equidistance principle. At the same time equidistance remains the general rule.

282. The Court observes that in this case the Parties have each envisaged methods for delimiting the territorial sea other than the drawing of an equidistance line.

* * *

8.2.3. Construction of a bisector line

283. Having reached the conclusion that the construction of an equidistance line from the mainland is not feasible, the Court must consider the applicability of the alternative methods put forward by the Parties.

284. Nicaragua’s primary argument is that a “bisector of two lines representing the entire coastal front of both States” should be used to effect the delimitation from the mainland, while sovereignty over the maritime features in the area in dispute “could be attributed to either Party depending on the position of the feature involved with respect to the bisector line”.

285. Honduras “does not deny that geometrical methods of delimitation, such as perpendiculars and bisectors, are methods that may produce equitable delimitations in some circumstances”, but it disagrees with Nicaragua’s construction of the angle to be bisected. Honduras, as already explained, advocates a line along the 15th parallel, no adjustment of which would be necessary in relation to the islands. In the Rejoinder, Honduras, in order to demonstrate the equitable character of its proposed boundary along the 15th parallel, refers to a provisional equidistance line constructed by using islands to the north and south of the 15th parallel as base points. In addition, during the oral proceedings, Honduras referred to a provisional equidistance line drawn from a single pair of purported mainland base points without using any of the islands as base points. The islands would be dealt with separately by overlaying on this equidistance line the 12-mile territorial seas of the islands north and south of the 15th parallel. Honduras also argues with respect to this alternative that where the islands’ territorial seas overlap an equidistance line should be drawn between them.

286. The Court notes that in Honduras’s final submissions it requested the Court to declare that the single maritime boundary between Honduras and Nicaragua “follows 14° 59.8′ N latitude, as the existing maritime boundary, or an adjusted equidistance line, until the jurisdiction of a third State is reached”. During the oral proceedings, Honduras explained that, “if the Court rejects its submission — that the 15th parallel is the existing maritime boundary between Honduras and Nicaragua — then an adjusted equidistance line provides the basis for an alternative boundary”. The Court recalls that both of Honduras’s proposals (the main one based on tacit agreement as to the 15th parallel representing the maritime frontier and the other on the use of an adjusted equidistance line) have not been accepted by the Court.

287. Thus the Court will consider whether in principle some form of bisector of the angle created by lines representing the relevant mainland coasts could be a basis for the delimitation. The Court will then consider the impact of the territorial seas of the islands. The use of a bisector — the line formed by bisecting the angle created by the linear approximations of coastlines — has proved to be a viable substitute method in certain circumstances where equidistance is not possible or appropriate. The justification for the application of the bisector method in maritime delimitation lies in the configuration of and relationship between the relevant coastal fronts and the maritime areas to be delimited. In instances where, as in the present case, any base points that could be determined by the Court are inherently unstable, the bisector method may be seen as an approximation of the equidistance method. Like equidistance, the bisector method is a geometrical approach that can be used to give legal effect to the “criterion long held to be as equitable as it is simple, namely that in principle, while having regard to the special circumstances of the case, one should aim at an equal division of areas where the maritime projections of the coasts of the States... converge and overlap” (*Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, I.C.J. Reports* 1984, p. 327, para. 195).

288. This was the situation in the case concerning the *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, where equidistance could not be used for the second segment of the delimitation because the segment was to begin at a point not on any possible equidistance line. The Court there used a bisector to approximate the northerly change in direction of the Tunisian coast beginning in the Gulf of Gabes (*I.C.J. Reports* 1982, p. 94, para. 133 C (3)). The Chamber of the Court in the *Gulf of Maine
stances.” (Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), Merits, Judgment, I.C.J. Reports 2001, p. 94, para. 176.)

304. Drawing a provisional equidistance line for this territorial sea delimitation between the opposite-facing islands does not present the problems that would an equidistance line from the mainland. The Parties have provided the Court with co-ordinates for the four islands in dispute north of the 15th parallel and for Edinburgh Cay to the south. Delimitation of this relatively small area can be satisfactorily accomplished by drawing a provisional equidistance line, using co-ordinates for the above islands as the base points for their territorial seas, in the overlapping areas between the territorial seas of Bobel Cay, Port Royal Cay and South Cay (Honduras), and the territorial sea of Edinburgh Cay (Nicaragua), respectively. The territorial sea of Savanna Cay (Honduras) does not overlap with the territorial sea of Edinburgh Cay. The Court does not consider there to be any legally relevant “special circumstances” in this area that would warrant adjusting this provisional line.

305. The maritime boundary between Nicaragua and Honduras in the vicinity of Bobel Cay, Savanna Cay, Port Royal Cay and South Cay (Honduras) and Edinburgh Cay (Nicaragua) will thus follow the line as described below.

From the intersection of the bisector line with the 12-mile arc of the territorial sea of Bobel Cay at point A (with co-ordinates 15° 05′ 25″ N and 82° 52′ 54″ W) the boundary line follows the 12-mile arc of the territorial sea of Bobel Cay in a southerly direction until its intersection with the 12-mile arc of the territorial sea of Edinburgh Cay at point B (with co-ordinates 14° 57′ 13″ N and 82° 50′ 03″ W). From point B the boundary line continues along the median line, which is formed by the points of equidistance between Bobel Cay, Port Royal Cay and South Cay (Honduras) and Edinburgh Cay (Nicaragua), through points C (with co-ordinates 14° 56′ 45″ N and 82° 33′ 56″ W) and D (with co-ordinates 14° 56′ 35″ N and 82° 33′ 20″ W), until it meets the point of intersection of the 12-mile arcs of the territorial seas of South Cay (Honduras) and Edinburgh Cay (Nicaragua) at point E (with co-ordinates 14° 53′ 15″ N and 82° 29′ 24″ W). From point E the boundary line follows the 12-mile arc of the territorial sea of South Cay in a northerly direction until it intersects the bisector line at point F (with co-ordinates 15° 16′ 08″ N and 82° 21′ 56″ W) (see below, pp. 753-754, sketch-maps Nos. 4 and 5).
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Separate Opinion of Judge Ranjeva, Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras) Judgment

*I.C.J. Reports 2007*, para. 10
tion on the Territorial Sea, and the jurisprudence of the Court, particularly since the Jan Mayen case, has settled that debate. The current Judgment represents a reversal of jurisprudence sanctioned by an obiter dictum:

“[h]owever, the equidistance method does not automatically have priority over other methods of delimitation and, in particular circumstances, there may be factors which make the application of the equidistance method inappropriate.”

9. The geometric figure that the line of delimitation represents is surprising. The text of Article 15 of UNCLOS refers to “the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured”. (The difference in terminology between equidistance and median lines relates not to the delimitation method but to the different geographic situations to which that method is applied: equidistance line in reference to adjacent coasts and median line for those opposite one another (cf. A. L. Shalowitz, Shore and Sea Boundaries, Washington, D.C., United States Department of Commerce, 1962-1964, Vol. I, pp. 232-235)). The Judgment, however, uses the bisector line to effect the delimitation of the territorial sea. Beyond a straightforward question of terminology, we are confronted with an operation of a completely different nature. The bisector is a line segment which divides the angle of a sector, that is to say a plane or area sector, by isometry and thus equally. The bisector is used in apportionment or division of the area concerned, in the present case the polygon formed by the adjacent maritime frontages. A reminder of this technical definition is necessary inasmuch as the Court was requested to carry out a maritime delimitation and not an apportionment or division. That consideration explains the omission of the bisector method in 1953, during the working session of the International Law Commission and the group of experts on the technical implications of delimitation methods. In its 1956 report, when listing the possible methods, the International Law Commission also made no mention of the bisector approach.

10. With the lack of textual support in the applicable Convention for the bisector technique, the issue next at hand concerns the relegation of the provisional equidistance line. The Judgment abandons it in view of the difficulties described in paragraphs 277 to 280. It concludes that

“(whether at Cape Gracias a Dios or elsewhere) uncertain within a short period of time.”

On the legal level, there is no obstacle preventing the identification of base points from which the pairs of points equidistant from the boundary point would be fixed. In practice, drawing the equidistance line provides a reminder of the relationship between nature and law in maritime delimitation, the pons asinorum of international law: the law inevitably transcends the natural features to which it attributes particular effects. The law, like the jurisprudence, aims to prevent outcomes in which “pronounced” configurations are ignored (North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969, p. 51, para. 96), and also an overly basic interpretation of nature. Gidel mentioned as a possible justification for abandoning the equidistance line “cases in which it would involve real drawbacks [and] . . . lead to serious inequity between the two coastal States” (G. Gidel, Le droit international de la mer, 3 vols., 1932-1934, p. 771). The plotting of the provisional line must add to the element of stability and permanence which characterizes a boundary delimitation exercise. The Court has not denied itself its discretionary powers to determine an abstract point from which the required linear geometrical figure is constructed (see paragraph 280 of the Judgment). Figure 7 (b) appended to the work by L. Lucchini and M. Voelckel (Droit de la mer, tome 2, Vol. 1, 1996) could have been of help in drawing such a provisional line. In the present instance, the choice of endpoints for the two States’ coastal fronts and of the point established by the Mixed Commission of 1962 has been clearly identified on sketch-map No. 3 on page 750 of the present Judgment. An equidistance line can then be constructed from pairs of points equidistant from the point determined by the Mixed Commission in 1962. Those pairs of points will be selected in such a way as to take account of the salient features of the coastal fronts of each State.

11. The genesis of Article 15 was mentioned in justification of the rule-making function, even by default, of special circumstances. The median line rule lies at the heart of the operative provisions of Article 15, the wording of which was practically settled, at the Third United Nations Conference on the Law of the Sea, in the 7 May 1975 draft of the single negotiating text. In such a situation, on that particular point of the consequential links between equidistance line and special circumstances, the Third Conference did not challenge the fundamental basis of the general scheme of Article 12 of the Geneva Convention on the Territorial Sea and the Contiguous Zone. In support of its interpretation, the Judgment takes refuge behind the comments in the Yearbook of the International Law Commission, 1952, Vol. II, p. 38. But the Judgment neglects to take account of the opinion of the Special Rapporteur in 1956:

“The Yugoslav Government had proposed the deletion of... the phrase ‘unless another boundary line is justified by special circumstances’. He did not believe that the Commission was prepared to
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Dissenting Opinion of Judge Torres Bernárdez,
Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea
(Nicaragua v. Honduras)
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_I.C.J. Reports 2007_, para. 128
128. Of all the considerations and difficulties mentioned in the Judgment in order to justify the Court’s decision not to use the equidistance method in the present case, even as an initial provisional measure, the only ones which in my opinion might be upheld are those concerning the geographical configuration of the coastline on either side of Cape Gracias a Dios and the marked instability of the delta of the River Coco at its mouth. These are two elements of physical geography to be taken into account by the Court in the delimitation exercise, but, in my view, neither of them justifies abandoning the equidistance method in favour of one such as the bisector, which creates far more serious problems of law and equity than equidistance.

129. The solution advocated by the 1982 Convention on the Law of the Sea, where physical circumstances of this type are present, is to use the “straight baselines” method to identify the base points (Articles 7 and 9 of the Convention), rather than a method such as the bisector, which is unable in the present circumstances to safeguard the principle of non-encroachment. When the Court ruled out the equidistance method in 1969, it did so precisely in view of the coastal configuration concerned, to avoid the areas situated off the coastal front of the other State from being amputated by the equidistance line. In the present case, the opposite occurs. In fact, over the first segment of the delimitation line, the equidistance method would make it possible to safeguard non-encroachment or ensure non-amputation of the areas situated off the coastal fronts of both Parties, whereas the bisector method selected by the Judgment, on the contrary, proves incapable of doing this as far as Honduras is concerned.

130. The macro-geographic basis underlying the bisector method means that it is not suitable for delimitations in proximity to coastlines and, consequently, for the delimitation of territorial seas. However, in the present case, the line of the single maritime boundary, which begins by delimiting only the territorial seas of the two States for a certain distance, passes too close to the mainland coast of Honduras because of the use of the bisector method. This line is therefore inequitable and it is so in a maritime area in which security and defence interests are bound to prevail over economic considerations. That is one of the reasons why I reject the application of the bisector method to the first segment of the line of maritime delimitation established by the Judgment.

131. And I am all the more adamant in my rejection because I am by no means convinced that “the construction of an equidistance line from the mainland is not feasible”, as asserted by the Judgment (para. 283). During the oral proceedings, both Parties presented sketch-maps which showed various provisional equidistance lines. Today, the technology exists to do this (satellite photography, for example), and the legal means are available (straight base lines) to overcome any difficulties that might arise, for the base points selected, from the instability of the mouth of the
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I.C.J. Reports 2009, paras. 77-219
the outer limit of its territorial sea around Serpents’ Island does not signify that it thereby gave up any entitlements to maritime areas beyond that zone.

76. The Court concludes that the 1949 instruments related only to the demarcation of the State border between Romania and the USSR, which around Serpents’ Island followed the 12-mile limit of the territorial sea. The USSR did not forfeit its entitlement beyond the 12-mile limit of its territorial sea with respect to any other maritime zones. Consequently, there is no agreement in force between Romania and Ukraine delimiting between them the exclusive economic zone and the continental shelf.

5. RELEVANT COASTS

77. The title of a State to the continental shelf and to the exclusive economic zone is based on the principle that the land dominates the sea through the projection of the coasts or the coastal fronts. As the Court stated in the North Sea Continental Shelf (Federal Republic of Germany/ Denmark; Federal Republic of Germany/Netherlands) cases, “the land is the legal source of the power which a State may exercise over territorial extensions to seaward” (Judgment, I.C.J. Reports 1969, p. 51, para. 96). In the Continental Shelf (Tunisia/Libyan Arab Jamahiriya) case, the Court observed that “the coast of the territory of the State is the decisive factor for title to submarine areas adjacent to it” (Judgment, I.C.J. Reports 1982, p. 61, para. 73). It is therefore important to determine the coasts of Romania and of Ukraine which generate the rights of these countries to the continental shelf and the exclusive economic zone, namely, those coasts the projections of which overlap, because the task of delimitation consists in resolving the overlapping claims by drawing a line of separation of the maritime areas concerned.

78. The role of relevant coasts can have two different though closely related legal aspects in relation to the delimitation of the continental shelf and the exclusive economic zone. First, it is necessary to identify the relevant coasts in order to determine what constitutes in the specific context of a case the overlapping claims to these zones. Second, the relevant coasts need to be ascertained in order to check, in the third and final stage of the delimitation process, whether any disproportionality exists in the ratios of the coastal length of each State and the maritime areas falling either side of the delimitation line.

79. The Court will begin by briefly setting out the Parties’ positions as to their respective relevant coasts (see sketch-maps Nos. 2 and 3, pp. 91-92).

5.1. The Romanian Relevant Coast

80. Romania invokes the principle that the relevant coast is the coast that generates the entitlement to maritime zones: that is, the coast whose projection extends over the area in question, which is the area of overlap between the zones generated by the coasts of the two States, so as to give the coastal State the basis for its claim to the area in question. It explains that “the criterion for determining the relevance of any given coast is the actual relation of adjacency or oppositeness between the coasts of the parties, as well as the ability of those coasts to generate overlapping entitlements”.

81. Romania contends that its coast is composed of two distinct segments: a short and more or less straight coast from the last point of the river border with Ukraine to the southern extremity of the Sacalin Peninsula, and a longer slightly concave coast from the extremity of the Sacalin Peninsula to the border with Bulgaria. Romania states that the only major features in this stretch of coast are the Sulina dyke and the mouth of the St. George arm of the Danube, located slightly to the north of the Sacalin Peninsula. The Sacalin Peninsula, which forms a narrow promontory, is the southern limit of this section. From that peninsula, “the coast proceeds in a westerly direction until it reaches the Razim Lake, a brackish Romanian lake separated from the sea by a narrow strip of land”. The coast then gradually curves to the south, and proceeds in a broadly southerly direction until it reaches the land border with Bulgaria, south of Vama Veche.

82. In Romania’s view, the whole Romanian coast is relevant. In particular, the coastal segment situated between the last point of the land/river border between Romania and Ukraine and the outer extremity of the Sacalin Peninsula is relevant for both sectors of the delimitation area characterized respectively by situations of coastal adjacency and coastal oppositeness. The segment situated south of the Sacalin Peninsula to the last point of the Romanian/Bulgarian land border is relevant only for the sector of the delimitation area characterized by a coastal situation of oppositeness.

83. The total length of its relevant coast, according to Romania, is 269.67 km (baselines 204.90 km).

84. Ukraine notes that Romania divides its coast into two segments: first of all, from the land boundary with Ukraine down to the Sacalin Peninsula, and secondly, from that peninsula southwards to the boundary with Bulgaria.

85. Ukraine further contends that “in constructing its claim line, Romania has double counted a significant part of its coast represented by the northern sector of that coast”. According to Ukraine, Romania treats
the northern sector of its coast as the relevant “adjacent coast” and then uses its entire coast (i.e., including the northern sector) as the relevant coast for the purposes of delimitation between the “opposite coasts” — “in other words, it double counts the 70 km-long stretch of its northern coast” as relevant for both the “adjacent” maritime boundary and the “opposite” boundary.

In response, Romania explains that, while its coast has a role to play both in relation to adjacent coasts and to opposite coasts, in the calculation of the total length of its relevant coast, each of the segments of its coast is counted only once.

86. While Ukraine expresses the view that “significant portions of Romania’s coast actually face south or south-east”, it states that it nonetheless prepared to treat all of Romania’s coast as a “relevant coast” for purposes of the present delimitation because the “projections from each Party’s coast generate overlapping maritime entitlements and EEZ entitlements in this part of the Black Sea”.

87. The total length of Romania’s coast, according to Ukraine, is approximately 258 km taking into account the sinuosities along that coast. If the coast is measured more generally according to its coastal front, then the length is 185 km. If Romania’s coast is measured by reference to Romania’s system of straight baselines, its length would be approximately 204 km.

88. The Court notes that the Parties are in agreement that the whole Romanian coast constitutes the relevant coast for the purposes of delimitation. The first segment of the Romanian coast, from the last point of the river boundary with Ukraine to the Sacalin Peninsula, has a dual characteristic in relation to Ukraine’s coast; it is an adjacent coast with regard to the Ukrainian coast lying to the north, and it is an opposite coast to the coast of the Crimean Peninsula. The whole coast of Romania abuts the area to be delimited. Taking the general direction of its coast the length of the relevant coast of Romania is approximately 248 km (see sketch-map No. 4, p. 94).

5.2. The Ukrainian Relevant Coast

89. The Court now turns to the issue of the Ukrainian relevant coast for the purpose of this delimitation. The Parties take different views on it.

90. Romania asserts that the Ukrainian coast is characterized by a number of deep indentations and reverses its course sharply several times, with segments facing one another. From the land/river border with Romania, the Ukrainian coast proceeds broadly northwards for a short
distance and then in a north-easterly direction until the Nistru/Dniester Firth. The point where its southern bank meets the coast (referred to by Romania as “Point S”), according to Romania, marks the end of that part of Ukraine’s coast which has a relation of adjacency with the Romanian coast. From this point, the Ukrainian coast changes direction proceeding in a north-north-easterly direction until it reaches Odessa. At Odessa it initially goes north and then turns eastwards until the coast reaches the Dnieper Firth. From here the general direction of the coast is first a southerly one, and then, from the bottom of the Yahorlits’ka Gulf, the direction is an easterly one, until it comes to the bottom of the Karkinits’ka Gulf. The coast then turns back on itself sharply, extending south-westwards along the southern coast of the Karkinits’ka Gulf, until it reaches Cape Tarkhankut. The last sector comprises the coast of Crimea between Cape Tarkhankut and Cape Sarych, which is concave, its general direction being interrupted by a significant protrusion, the westernmost point of which is Cape Khersones. According to Romania, the Ukrainian coast is composed of eight distinct segments, determined by marked changes in the direction of the coast.

91. Romania argues that the segments of the Ukrainian coast situated to the north of the line running from Point S to Cape Tarkhankut do not project on the area of delimitation or “have a relationship of either adjacency or oppositeness with the Romanian coast” and therefore are irrelevant for the delimitation. In particular Romania maintains that the coastline of the Karkinits’ka Gulf, immediately north of the Crimean Peninsula, should not be counted as a relevant coast, nor “can a closing line drawn across or anywhere within the Karkinits’ka Gulf be treated as a surrogate for its irrelevant coast”. Romania adds that such projections as are made by this northern coast are in fact overtaken by the westward projections of the Ukrainian coast from Cape Tarkhankut to Cape Sarych.

92. Romania states that “Serpents’ Island does not form part of the coastal configuration of the Parties; it constitutes merely a small maritime feature situated at a considerable distance out to sea from the coasts of the Parties”.

93. Thus, in Romania’s view, the relevant Ukrainian coast runs between the last point of the land/river border between Romania and Ukraine and Point S, and on the western-facing coast of the Crimean Peninsula, runs between Cape Tarkhankut and Cape Sarych.

The total length of the relevant Ukrainian coast, as perceived by Romania, is 388.14 km (baselines 292.63 km).

94. Ukraine contends that its own relevant coast is comprised of three distinct sectors each of which generates an entitlement to a continental shelf and an exclusive economic zone in the area subject to delimitation. The first sector extends from the border with Romania until a point located just north of Odessa. In the second sector, north of Odessa, the Ukrainian coast turns to the east and comprises the south-facing littoral along the north-western part of the Black Sea. The coast then extends into the Karkinits’ka Gulf. The third sector comprises the western coast of the Crimean Peninsula from the easternmost point of the Karkinits’ka Gulf to Cape Sarych. (Both Parties agree that Ukraine’s coast east of Cape Sarych is not relevant to the present dispute.) This portion of Ukraine’s coast is characterized by the indentation created by the Karkinits’ka Gulf and by the less pronounced Gulf of Kalamits’ka. All three sectors of Ukraine’s coast generate 200-nautical-mile entitlements which extend over the entire area to be delimited with Romania.

95. Ukraine disagrees that the part of its coast from Point S to Cape Tarkhankut (630 km long) should be excluded from the relevant coast of Ukraine, as claimed by Romania. It affirms that the seaward extensions of the Ukrainian coastal fronts, including the part of Ukraine’s coast between Point S and Cape Tarkhankut, “converge in a southerly direction”. Ukraine points out that its south-facing coast, which Romania seeks to suppress, “generates a 200-nautical-mile entitlement throughout the area of concern in this case”. Ukraine adds that its entire south-facing coast generates “a 200 nautical mile continental shelf/EEZ entitlement that extends well south of the parallel of latitude of the Romanian/Bulgarian border”, i.e., projecting into the area subject to delimitation with Romania. Thus Ukraine contends that its coast from Point S to Cape Tarkhankut is relevant for the purposes of the delimitation between the Parties.

96. Ukraine claims that Serpents’ Island “forms part of the geographical context and its coast constitutes part of Ukraine’s relevant coasts”.

97. Ukraine concludes that the total length of its relevant coast is 1,058 km (coastal façade 684 km; baselines 664 km).

98. The Court notes that both Parties consider the coast of the Crimean Peninsula between Cape Tarkhankut and Cape Sarych, as well as the Ukrainian coast from their common territorial boundary running for a short distance in a north and subsequently in a north-easterly direction until the Nistru/Dniester Firth (Romania designates this point as Point S) as the relevant Ukrainian coast. Their disagreement concerns the coast extending from this point until Cape Tarkhankut.

99. The Court, in considering the issue in dispute, would recall two principles underpinning its jurisprudence on this issue: first, that the “land dominates the sea” in such a way that coastal projections in the
seaward direction generate maritime claims (North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969, p. 51, para. 96); second, that the coast, in order to be considered as relevant for the purpose of the delimitation, must generate projections which overlap with projections from the coast of the other Party. Consequently “the submarine extension of any part of the coast of one Party which, because of its geographic situation, cannot overlap with the extension of the coast of the other, is to be excluded from further consideration by the Court” (Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982, p. 61, para. 75).

100. The Court therefore cannot accept Ukraine’s contention that the coasts of Karkinits’ka Gulf form part of the relevant coast. The coasts of this gulf face each other and their submarine extension cannot overlap with the extensions of Romania’s coast. The coasts of Karkinits’ka Gulf do not project in the area to be delimited. Therefore, these coasts are excluded from further consideration by the Court. The coastline of Yahotyts’ka Gulf and Dnieper Firth is to be excluded for the same reason.

It is to be noted that the Court has drawn a line at the entrance of Karkinits’ka Gulf from Cape Priboiny (which is the north-western tip of Tarkhankuts’ky Peninsula, slightly north of Cape Tarkhankut) to the point that marks the eastern end of the portion of the Ukrainian northern coast that faces the area to be delimited. This point (whose co-ordinates are approximately 46° 04′ 38″ N and 32° 28′ 48″ E) lies at the intersection of the meridian passing through Cape Priboiny with the northern coast of Karkinits’ka Gulf, east of Zalizny Port. The Court has found it useful to do so with respect to such a significant feature as Karkinits’ka Gulf, in order to make clear both what coasts will not be under consideration and what waters will not be regarded as falling within the relevant area. However, the Court does not include this line in the calculation of the total length of the Ukrainian relevant coasts, as the line “replaces” the coasts of Karkinits’ka Gulf which, again, do not themselves project on the area to be delimited and thus do not generate any entitlement to the continental shelf and the exclusive economic zone in that area. Consequently, the line does not generate any entitlement.

101. As for the remaining sectors of the Ukrainian coast between Point S and Cape Tarkhankut, the Court observes that the north-western part of the Black Sea (where the delimitation is to be carried out) in its widest part measures slightly more than 200 nautical miles and its extent from north to south does not exceed 200 nautical miles. As a result of this geographical configuration, Ukraine’s south-facing coast generates projections which overlap with the maritime projections of the Romanian coast. Therefore, the Court considers these sectors of Ukraine’s coast as relevant (see sketch-map No. 4).

102. The coast of Serpents’ Island is so short that it makes no real difference to the overall length of the relevant coasts of the Parties. The Court will later examine whether Serpents’ Island is of relevance for the choice of base points (see paragraph 149 below).

103. The length of the relevant coast of Ukraine is approximately 705 km.

*   *

104. The Court notes that on the basis of its determination of what constitutes the relevant coasts, the ratio for the coastal lengths between Romania and Ukraine is approximately 1:2.8.

105. The second aspect mentioned by the Court in terms of the role of relevant coasts in the context of the third stage of the delimitation process (see paragraph 78 above) will be dealt with below in Section 11.

6. Relevant Maritime Area

106. Romania maintains that the relevant area in the north is bordered by the line running from Point S to Cape Tarkhankut. In the south, the area is bordered by the line equidistant between the adjacent Romanian and Bulgarian coasts, the median line between the opposite Romanian and Turkish coasts and the delimitation line agreed upon by the USSR and Turkey, to which agreement Ukraine has succeeded. In the south-east the area is bordered by the meridian uniting Cape Sarych with the delimitation boundary between Ukraine and Turkey. In the west and in the east the limits of the area are formed by the Romanian and Ukrainian relevant coasts.

107. According to Romania, the relevant area means all of the waters generated by projections from the relevant coasts, whether or not claimed by the other State. Romania states that there are three points of disagreement between the Parties as to the relevant area. First, Romania asserts that the coasts looking on to the area north of the line between Point S and Cape Tarkhankut are all Ukrainian, and that none of them are relevant to the delimitation. Second, it states that the south-western limit is represented by the equidistance line between the adjacent Romanian and Bulgarian coasts and that to move the line south of this equidistance line could prejudice potential interests of Bulgaria in this maritime area. Third, Romania claims that the south-eastern triangle lying between Ukraine and Turkey also forms part of the relevant area because it is within a 200-mile projection from the Romanian coasts (see sketch-map No. 2).
108. Ukraine contends that the western limit of the relevant area corresponds to the Romanian coastline between the land boundaries with Bulgaria and Ukraine and the stretch of the Ukrainian coast extending from the border with Romania until a point located just north of Odessa. In the north, the relevant area is bordered by the south-facing Ukrainian coast. In the east, the relevant area is bordered by the west-facing coast of the Crimean Peninsula terminating at Cape Sarych. The southern limit of the relevant area is a line drawn perpendicular from the mainland coast from the point where the Bulgarian/Romanian land border reaches the Black Sea until a point between the Romanian and Ukrainian coasts where the interests of third States potentially come into play. This point is then connected to Cape Sarych by a straight line which represents the south-eastern limit of the relevant area.

109. Ukraine contends, as to the three points of disagreement, that all of its south-facing coast between Point S and Cape Tarkhankut generates maritime entitlements to a distance of 200 nautical miles and that this maritime area, accordingly, forms part of the relevant area. Ukraine further argues that the relevant area should include a sliver of maritime area situated between the hypothetical equidistance line between Romania and Bulgaria and a straight line connecting the endpoint of the Romanian/Bulgarian land boundary and a potential tripoint with Bulgaria and/or Turkey. Finally, according to Ukraine, a large triangle lying between Ukraine and Turkey has already been subject to a prior delimitation between the former Soviet Union and Turkey to which Ukraine has succeeded and therefore does not form part of the relevant area (see sketch-map No. 3, p. 92).

110. The Court observes that the legal concept of the “relevant area” has to be taken into account as part of the methodology of maritime delimitation. In the first place, depending on the configuration of the relevant coasts in the general geographical context and the methods for the construction of their seaward projections, the relevant area may include certain maritime spaces and exclude others which are not germane to the case in hand.

Secondly, the relevant area is pertinent to checking disproportionality. This will be done as the final phase of the methodology. The purpose of delimitation is not to apportion equal shares of the area, nor indeed proportional shares. The test of disproportionality is not in itself a method of delimitation. It is rather a means of checking whether the delimitation line arrived at by other means needs adjustment because of a significant disproportionality in the ratios between the maritime areas which would fall to one party or other by virtue of the delimitation line arrived at by other means, and the lengths of their respective coasts.

111. The Court further observes that for the purposes of this final exercise in the delimitation process the calculation of the relevant area does not purport to be precise and is approximate. The object of delimitation is to achieve a delimitation that is equitable, not an equal apportionment of maritime areas (North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969, p. 22, para. 18; Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway), Judgment, I.C.J. Reports 1993, p. 67, para. 64).

112. The Court notes that the delimitation will occur within the enclosed Black Sea, with Romania being both adjacent to, and opposite Ukraine, and with Bulgaria and Turkey lying to the south. It will stay north of any area where third party interests could become involved.

113. As for the area in the north disputed by the Parties as a relevant area, as explained above (see paragraph 101) the Court has taken the view that the section of the Ukrainian coast situated to the north of the line running from Point S to Cape Tarkhankut is a relevant coast for the purpose of the delimitation exercise. Accordingly, the area lying immediately south of this coast, but excluding Karkinits'ka Gulf at the mouth of which the Court has drawn a line (see paragraph 100 above), falls within the delimitation area.

114. The Court turns now to the southern limit of the relevant area. The Parties hold different views as to whether the south-western and south-eastern “triangles” should be included in the relevant area (see paragraphs 107 and 109 above and sketch-map Nos. 2 and 3, pp. 91-92). The Court notes that in both these triangles the maritime entitlements of Romania and Ukraine overlap. The Court is also aware that in the south-western triangle, as well as in the small area in the western corner of the south-eastern triangle, entitlements of third parties may come into play. However where areas are included solely for the purpose of approximate identification of overlapping entitlements of the Parties to the case, which may be deemed to constitute the relevant area (and which in due course will play a part in the final stage testing for disproportionality), third party entitlements cannot be affected. Third party entitlements would only be relevant if the delimitation between Romania and Ukraine were to affect them.

In light of these considerations, and without prejudice to the position of any third State regarding its entitlements in this area, the Court finds it appropriate in the circumstances of this case to include both the south-western and the south-eastern triangles in its calculation of the relevant area (see sketch-map No. 5, p. 102).
7. Delimitation Methodology

115. When called upon to delimit the continental shelf or exclusive economic zones, or to draw a single delimitation line, the Court proceeds in defined stages.

116. These separate stages, broadly explained in the case concerning Continental Shelf (Libyan Arab Jamahiriya/Malta) (Judgment, I.C.J. Reports 1985, p. 46, para. 60), have in recent decades been specified with precision. First, the Court will establish a provisional delimitation line, using methods that are geometrically objective and also appropriate for the geography of the area in which the delimitation is to take place. So far as delimitation between adjacent coasts is concerned, an equidistance line will be drawn unless there are compelling reasons that make this unfeasible in the particular case (see Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), Judgment, I.C.J. Reports 2007 (II), p. 745, para. 281). So far as opposite coasts are concerned, the provisional delimitation line will consist of a median line between the two coasts. No legal consequences flow from the use of the terms “median line” and “equidistance line” since the method of delimitation is the same for both.

117. Equidistance and median lines are to be constructed from the most appropriate points on the coasts of the two States concerned, with particular attention being paid to those protuberant coastal points situated nearest to the area to the delimited. The Court considers elsewhere (see paragraphs 135-137 below) the extent to which the Court may, when constructing a single-purpose delimitation line, deviate from the base points selected by the Parties for their territorial seas. When construction of a provisional equidistance line between adjacent States is called for, the Court will in mind considerations relating to both Parties’ coastlines when choosing its own base points for this purpose. The line thus adopted is heavily dependent on the physical geography and the most seaward points of the two coasts.

118. In keeping with its settled jurisprudence on maritime delimitation, the first stage of the Court’s approach is to establish the provisional equidistance line. At this initial stage of the construction of the provisional equidistance line the Court is not yet concerned with any relevant circumstances that may obtain and the line is plotted on strictly geometrical criteria on the basis of objective data.

119. In the present case the Court will thus begin by drawing a provisional equidistance line between the adjacent coasts of Romania and Ukraine, which will then continue as a median line between their opposite coasts.

120. The course of the final line should result in an equitable solution (Articles 74 and 83 of UNCLOS). Therefore, the Court will at the next, second stage consider whether there are factors calling for the adjustment or shifting of the provisional equidistance line in order to achieve an equitable result (Land and Maritime Boundary between Cameroon and...
The Court has also made clear that when the line to be drawn covers several zones of coincident jurisdictions, “the so-called equitable principles/relevant circumstances method may usefully be applied, as in these maritime zones this method is also suited to achieving an equitable result” (Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), Judgment, I.C.J. Reports 2007 (II), p. 741, para. 271).

121. This is the second part of the delimitation exercise to which the Court will turn, having first established the provisional equidistance line.

122. Finally, and at a third stage, the Court will verify that the line (a provisional equidistance line which may or may not have been adjusted by taking into account the relevant circumstances) does not, as it stands, lead to an inequitable result by reason of any marked disproportion between the ratio of the respective coastal lengths and the ratio between the relevant maritime area of each State by reference to the delimitation line (see paragraphs 214-215). A final check for an equitable outcome entails a confirmation that no great disproportionality of maritime areas is evident by comparison to the ratio of coastal lengths.

This is not to suggest that these respective areas should be proportionate to coastal lengths — as the Court has said “the sharing out of the area is therefore the consequence of the delimitation, not vice versa” (Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway), Judgment, I.C.J. Reports 1993, p. 67, para. 64).

8. ESTABLISHMENT OF THE PROVISIONAL EQUIDISTANCE LINE

8.1. Selection of Base Points

123. Romania contends that the base points to take into account in constructing the provisional equidistance line between the adjacent coasts of Romania and Ukraine are, on the Romanian coast, the seaward end of the Sulina dyke, and on the Ukrainian coast, a point on the island of Kubansky and Cape Burnas. In addition, in Romania’s view, the base points on the opposite coasts of Romania and Ukraine are, on the Romanian coast, the seaward end of the Sulina dyke and the outer end of the Sacalin Peninsula, and on the Ukrainian coast, Capes Tarkhankut and Khersones. Romania points out that the Sacalin Peninsula and the most seaward point of the Sulina dyke are among the relevant points notified by Romania to the United Nations under Article 16 of UNCLOS for measuring the breadth of the territorial sea.

124. Romania argues that no account should be taken of Serpents’ Island as a base point for the purposes of constructing the provisional equidistance line. It claims that Serpents’ Island is a rock incapable of sustaining human habitation or economic life of its own, “therefore having no exclusive economic zone or continental shelf, as provided for in Article 121 (3) of the 1982 UNCLOS”. Romania further points out that when Ukraine notified the United Nations of the co-ordinates of its baselines used for measuring the breadth of its territorial sea, it made no reference at all to Serpents’ Island. In addition, it considers that using this island as a base point would result in an inordinate distortion of the coastline.

125. Ukraine contends for its part that the relevant base points for the construction of the provisional equidistance line are situated on the baselines of each of the Parties from which the breadth of their territorial sea is measured. Thus, on the Romanian coast, Ukraine has used the base points situated on the Sulina dyke and the Sacalin Peninsula. On its own coasts, it has taken as a reference “the base points situated on Serpents’ Island” and the tip of Cape Khersones. Ukraine indicates, however, that Romania’s use of a point situated at the seaward tip of the Sulina dyke has a huge effect on Romania’s provisional equidistance line. It also considers that

“The notion that a protruding, man-made structure can be given a full effect for purposes of plotting the provisional equidistance line, while a natural feature — an island [Serpents’ Island] — can simply be ignored does not comport with a proper application of the law or with equitable principles”.

126. Ukraine maintains that because Serpents’ Island has a coast, it follows that it has a baseline. As a result, it states that there are base points on that baseline that can be used for plotting the provisional equidistance line. It points out that, contrary to what Romania claims, “normal” baselines, defined as the low-water mark around the coast, do not have to be notified to the United Nations, as straight baselines have to be. Ukraine therefore contends that given its proximity to the Ukrainian mainland, Serpents’ Island should clearly be taken into account as one of the relevant base points for the construction of the provisional equidistance line. It notes that the belt of territorial sea which surrounds Serpents’ Island partly overlaps with the area of territorial sea bordering the Ukrainian mainland. Consequently, “[t]his island therefore represents what is commonly termed a coastal island”.

* *
127. In this stage of the delimitation exercise, the Court will identify the appropriate points on the Parties’ relevant coast or coasts which mark a significant change in the direction of the coast, in such a way that the geometry of the coastline covers not only the physical elements produced by geodynamics and the movements of the sea, but also any other material factors that are present.

128. The Court observes that in this instance, the geography shows that the capacity of the coasts to generate overlapping titles indicates the existence of two areas: in one case, the capacity of the Romanian coast of the Musura Bay to generate overlapping titles, indicating the possibility of defining the baseline from the seaward end of the dyke; in the other case, the capacity of the Romanian coast of the Black Sea to generate overlapping titles, indicating the possibility of defining the baseline from the point notified by Romania to the United Nations as a base point pursuant to Article 16 of UNCLOS.

129. On the Romanian coast from the border with Bulgaria, the Court will first consider the Sacalin Peninsula. This is the point at which the coast direction followed by the Romanian coast from the border with Bulgaria turns almost perpendicularly towards the north. At this place, the significance of the point is also determined by the differences in the geographical characteristics of the two countries. The point is significant to the extent that it marks the limit of the exclusive economic zone and the continental shelf, as well as the limit of the territorial sea.

130. The Court will next consider whether any point on the Romanian coast of the Musura Bay may serve as a base point. The southern headland of this bay is the most prominent point of the Romanian coast in the direction of the Crimea and is also situated in the area where the coasts of the two States are adjacent. These two characteristics, acting together, make this point a possible base point. However, because of the construction of the 7.5 km-long dyke out to sea, which according to the examination of the Court it appears advisable to choose either the seaward end of the dyke or the end where it adjoins the mainland.

131. In light of the fact that the breadth of the exclusive economic zone and the continental shelf is measured from the baseline from which the territorial sea is measured (UNCLOS, Arts. 57 and 76), theCourt first has to consider whether the point of the baseline could be regarded as "permanent grubbing works" forming part of the coastline, as defined by UNCLOS, or as "artificial islands" as defined by the same instrument. The Court will then have to determine whether such points should be considered as permanent base points.

132. The Court notes, however, that the functions of a dyke are different from those of a port: in this case, the Sulina dyke is used for protecting shipping destined for the mouth of the Danube and for the ports situated there. The difference between a port and a dyke extending seawards has previously been discussed in the travaux préparatoires of Article 8 of the Geneva Convention on the Territorial Sea and Contiguous Zone. In 1954, the Special Rapporteur of the ILC observed that...
The Court notes that the issue of determining the baseline for the purpose of measuring the breadth of the territorial sea and the continental shelf has been the subject of differing interpretations. The proceedings began with the submission of Romania’s notification of its territorial sea baselines under Article 12 of the United Nations Convention on the Law of the Sea (UNCLOS), with the line starting at the seaward end of the Sulina dyke and proceeding seaward to the 200 nautical mile limit. Ukraine contested this choice of base points.

The Court considered the relevance of the Sulina dyke as a base point for the purpose of the present delimitation, taking into account that the dyke is not a part of the Romanian mainland and is not an integral part of the Romanian territory. It noted that the dyke is a fixed point on the Romanian coast and serves as a natural boundary for the delimitation of the territorial sea and the continental shelf.

The Court concluded that the landward end of the Sulina dyke, where it joins the Romanian mainland, should be used as a base point for the establishment of the provisional equidistance line. This choice of base point was not contested by Ukraine.
The Court will now turn to identifying the relevant base points on Ukraine’s coast, starting with the sector of adjacent coasts.

The Court deems it appropriate in this first sector to use the south-eastern tip of Tsyganka Island on the Ukrainian side, which is the counterpart of the landward end of the Sulina dyke on the Romanian side. Its location is significant, because in this area of adjacency it is the most prominent point on the Ukrainian coast.

In this sector of adjacent coasts, the Court needs also to consider the relevance of the Ukrainian base point situated on the island of Kubansky as a base point for use in constructing the provisional equidistance line. The Court notes that this base point does not produce any effect on the equidistance line plotted by reference to the base point on Tsyganka Island on the Ukrainian coast and the base point on the landward end of the Sulina dyke on the Romanian coast. This base point is therefore to be regarded as irrelevant for the purposes of the present delimitation.

The Court will now consider the base points on the section of Ukraine’s coast opposite Romania’s coast.

It will start with Cape Tarkhankut, the most seaward point facing Romania’s coast on the Crimean coast. The Crimean coastline juts out significantly here, and its configuration makes this cape an appropriate choice as a relevant base point.

Cape Khersones, another point on the Crimean coast where the land protrudes into the sea, also juts out markedly, though less so than Cape Tarkhankut. This configuration is sufficient to justify choosing Cape Khersones as a relevant base point.

The Court therefore concludes that it will use Tsyganka Island (45° 13′ 23.1″ N and 29° 45′ 33.1″ E), Cape Tarkhankut (45° 20′ 50″ N and 32° 29′ 43″ E) and Cape Khersones (44° 35′ 04″ N and 33° 22′ 48″ E)3 as base points on the Ukrainian coast.

Serpents’ Island calls for specific attention in the determination of the provisional equidistance line. In connection with the selection of base points, the Court observes that there have been instances when coastal islands have been considered part of a State’s coast, in particular when a coast is made up of a cluster of fringe islands. Thus in one maritime delimitation arbitration, an international tribunal placed base points lying on the low water line of certain fringe islands considered to constitute part of the very coastline of one of the Parties (Award of the Arbitral Tribunal in the Second Stage of the Proceedings between Eritrea and Yemen (Maritime Delimitation), 17 December 1999, RIAA, Vol. XXII, pp. 367-368, paras. 139-146). However, Serpents’ Island, lying alone and some 20 nautical miles away from the mainland, is not one of a cluster of fringe islands constituting “the coast” of Ukraine.

To count Serpents’ Island as a relevant part of the coast would amount to grafting an extraneous element onto Ukraine’s coastline; the consequence would be a judicial refashioning of geography, which neither the law nor practice of maritime delimitation authorizes. The Court is thus of the view that Serpents’ Island cannot be taken to form part of Ukraine’s coastal configuration (cf. the islet of Filfla in the case concerning Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, ICJ Reports 1985, p. 13).

For this reason, the Court considers it inappropriate to select any base points on Serpents’ Island for the construction of a provisional equidistance line between the coasts of Romania and Ukraine. Further aspects relevant to Serpents’ Island are dealt with at paragraphs 179 to 188 below.

8.2. Construction of the Provisional Equidistance Line

Romania argues that the first segment of the maritime boundary delimiting the maritime areas of the two States situated beyond their territorial seas was established by successive agreements between Romania and the Soviet Union: from the final point of the boundary separating the territorial seas of the two States at 45° 05′ 21″ N and 30° 02′ 27″ E, the maritime boundary passes along the 12-nautical-mile arc of the circle around Serpents’ Island until it reaches a point situated on that arc at 45° 14′ 20″ N and 30° 29′ 12″ E (see Section 4). Romania contends that the maritime boundary beyond that point was never delimited between Romania and the USSR or Ukraine. Romania draws a provisional equidistance line from the final point of the land/river boundary between the two States taking into account the salient base points of the adjacent Romanian and Ukrainian coasts. These are: on the Romanian coast, the seaward end of the Sulina dyke; and on the Ukrainian coast, the island of Kubansky and Cape Burnas. As the point lying on the arc around Serpents’ Island at 45° 14′ 20″ N and 30° 29′ 12″ E, is not situated on the equidistance line, but about 2.5 nautical miles to the north, the delimitation of the maritime boundary beyond this point must, in Romania’s view, start by joining it to the provisional equidistance line. The line thus drawn passes through the point at 45° 11′ 59″ N and 30° 49′ 16″ E, situated practically midway between the 12-nautical-mile arc around Serpents’ Island and the tripoint as between the Romanian and Ukrainian adjacent coasts and the opposite Crimean coast, situated at 45° 09′ 45″ N and 31° 08′ 40″ E. Romania contends that, from this point southwards, the delimitation is governed by the opposite Romanian and Ukrainian coasts.

3 Co-ordinates provided by the Parties in Pulkovo datum.
151. Romania calculates the median line taking into account the salient base points on the relevant opposite coasts of the two States (the seaward end of the Sulina dyke and the outer end of the Sacalin Peninsula on the Romanian coast, and Capes Tarkhankut and Kharmaes on the Ukrainian coast). Romania’s equidistance line in the sector of opposite coasts thus coincides with the segment of the median line running from, in the north, the tripoint as between the Romanian and Ukrainian adjacent coasts and the opposite Crimea coast to, in the south, the point beyond which the interests of third States may be affected, which Romania situates at 43° 26′ 50″ N and 31° 20′ 10″ E.

* * *

152. Ukraine maintains that the provisional equidistance line must be constructed by reference to the base points on each Party’s baselines from which the breadth of its territorial sea is measured. Thus, on the Romanian side, Ukraine uses the base points at the seaward end of the Sulina dyke and on the Sacalin Peninsula. On its own side, it uses the base points on Serpents’ Island and at the tip of Cape Khersones. The provisional equidistance line advocated by Ukraine starts at the point of intersection of the territorial seas of the Parties identified in Article 1 of the 2003 State Border Regime Treaty (45° 05′ 21″ N and 30° 02′ 27″ E). The line then runs in a southerly direction until the point at 44° 48′ 24″ N and 30° 10′ 56″ E, after which it turns to run in a southerly direction until the point at 43° 55′ 33″ N and 31° 23′ 26″ E and thereafter continues due south.

153. The Court recalls that the base points which must be used in constructing the provisional equidistance line are those situated on the Sacalin Peninsula and the landward end of the Sulina dyke on the Romanian coast, and Tsyganka Island, Cape Tarkhankut and Cape Khersones on the Ukrainian coast.

154. In its initial segment the provisional equidistance line between the Romanian and Ukrainian adjacent coasts is controlled by base points located on the landward end of the Sulina dyke on the Romanian coast and south-eastern tip of Tsyganka Island on the Ukrainian coast. It runs in a south-easterly direction, from a point lying midway between these two base points, until Point A (with co-ordinates 44° 46′ 38.7″ N and 30° 58′ 37.3″ E) where it becomes affected by a base point located on the Sacalin Peninsula on the Romanian coast. At Point A the equidistance line slightly changes direction and continues to Point B (with co-ordinates 44° 44′ 13.4″ N and 31° 10′ 27.7″ E) where it becomes affected by the base point located on Cape Tarkhankut on Ukraine’s opposite coasts.

At Point B the equidistance line turns south-south-east and continues to Point C (with co-ordinates 44° 02′ 53.0″ N and 31° 24′ 35.0″ E), calculated with reference to base points on the Sacalin Peninsula on the Romanian coast and Capes Tarkhankut and Khersones on the Ukrainian coast. From Point C the equidistance line, starting at an azimuth of 185° 23′ 54.5″, runs in a southerly direction. This line remains governed by the base points on the Sacalin Peninsula on the Romanian coast and Cape Khersones on the Ukrainian coast.

(For the construction of the equidistance line see sketch-maps Nos. 6 and 7, pp. 114-115.)

9. RELEVANT CIRCUMSTANCES

155. As the Court indicated above (paragraphs 120-121), once the provisional equidistance line has been drawn, it shall “then [consider] whether there are factors calling for the adjustment or shifting of that line in order to achieve an “equitable result”” (Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002, p. 441, para. 288). Such factors have usually been referred to in the jurisprudence of the Court, since the North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands) cases, as the relevant circumstances (Judgment, I.C.J. Reports 1969, p. 53, para. 53). Their function is to verify that the provisional equidistance line, drawn by the geometrical method from the determined base points on the coasts of the Parties is not, in light of the particular circumstances of the case, perceived as inequitable. If such would be the case, the Court should adjust the line in order to achieve the “equitable solution” as required by Articles 74, paragraph 1, and 83, paragraph 1, of UNCLOS.

156. The Parties suggested and discussed several factors which they consider as the possible relevant circumstances of the case. They arrive at different conclusions. Romania argues that its provisional equidistance line achieves the equitable result and thus does not require any adjustment. Ukraine, on the other hand, submits that there are relevant circumstances which call for the adjustment of its provisional equidistance line “by moving the provisional line closer to the Romanian coast”.

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* The geographical co-ordinates used by the Parties for the drawing of the equidistance lines proposed by them are given by reference to Pulkovo datum. The Court, for its part, has chosen to use WGS 84 datum. The positions of Points A, B and C are given by reference to that geodetic datum. The equidistance line described in this paragraph is a geodetic line and the azimuth given is a geodetic azimuth based on WGS 84 datum.
157. Before addressing the relevant circumstances referred to by the Parties, the Court wishes to recall that the provisional equidistance line it has drawn in Section 8 above does not coincide with the provisional lines drawn either by Ukraine or Romania. Therefore, it is this line, drawn by the Court, and not by Romania or Ukraine, which will be in the focus of the Court’s attention when analysing what the Parties consider to be the relevant circumstances of the case.

9.1. Disproportion between Lengths of Coasts

158. The circumstance which Ukraine invokes in order to justify its claim that the provisional equidistance line should be adjusted by moving the delimitation line closer to Romania’s coast is the disparity between the length of the Parties’ coasts abutting on the delimitation area.

159. Romania acknowledges that the general configuration of the coasts may constitute, given the particular geographical context, a relevant circumstance that can be taken into consideration with a view to adjusting the equidistance line. However, with regard specifically to any disproportion between the lengths of the Parties’ coasts, Romania notes that in a maritime delimitation it is rare for the disparities between the Parties’ coasts to feature as a relevant circumstance. Moreover, in the present case, there is no manifest disparity in the respective coastal lengths of Romania and Ukraine.

160. Romania adds that in any event proportionality should be dealt with “only after having identified the line resulting from the application of the equitable principles/special circumstances approach”.

161. In conclusion Romania is of the view that the alleged “geographical predominance of Ukraine in the area” and “the disparity between coastal lengths” of the Parties should not be considered relevant circumstances in the case.

162. With regard to the role which may be played by the coastal configuration, Ukraine states that there is a broad margin of appreciation as to its scope as a relevant circumstance. In the circumstances of the current case, Ukraine argues that the coastal configuration clearly shows the geographical predominance of Ukraine in the relevant area which also finds an expression in terms of coastal length: the Ukrainian relevant coast is more than four times longer than the coast of Romania. Ukraine notes that in almost all maritime delimitation cases dealt with by international tribunals, “comparison of the lengths of the relevant coasts has occupied a quite significant place and even played a decisive role in a number of the decisions taken”. Thus, according to Ukraine, the marked
163. The Court observes that the respective length of coasts can play no role in identifying the equidistance line which has been provisionally established. Delimitation is a function which is different from the apportionment of resources or areas (see North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969, p. 22, para. 18). There is no principle of proportionality as such which bears on the initial establishment of the provisional equidistance line.

164. Where disparities in the lengths of coasts are particularly marked, the Court may choose to treat that fact of geography as a relevant circumstance that would require some adjustments to the provisional equidistance line to be made.

165. In the case concerning Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria; Equatorial Guinea intervening), the Court acknowledged “that a substantial difference in the lengths of the parties' respective coastlines may be a factor to be taken into consideration in order to adjust or shift the provisional delimitation line” (Judgment, I.C.J. Report 2002, p. 446, para. 301; emphasis added), although it found that in the circumstances there was no reason to shift the equidistance line.

166. In the case concerning Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway), the Court found that the disparity between the lengths of the coasts of Jan Mayen and Greenland (approximately 1:9) constituted a “special circumstance” requiring modification of the provisional median line, by moving it closer to the coast of Jan Mayen, to avoid inequitable results for both the continental shelf and the fisheries zone. The Court stated that:

“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.” (Judgment, I.C.J. Reports 1993, p. 69, para. 69.)

Then it recalled its observation from the Continental Shelf (Libyan Arab Jamahiriya/Malta) case:

“If such a use of proportionality were right, it is difficult indeed to see what room would be left for any other consideration; for it would be at once the principle of entitlement to continental shelf disproportion between lengths of the Parties’ coasts is a relevant circumstance to be taken into account in the construction of a delimitation line and should result in a shifting of the provisional equidistance line in order to produce an equitable result.

* * *

163. The Court observes that the respective length of coasts can play no role in identifying the equidistance line which has been provisionally established. Delimitation is a function which is different from the apportionment of resources or areas (see North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969, p. 22, para. 18). There is no principle of proportionality as such which bears on the initial establishment of the provisional equidistance line.

164. Where disparities in the lengths of coasts are particularly marked, the Court may choose to treat that fact of geography as a relevant circumstance that would require some adjustments to the provisional equidistance line to be made.

165. In the case concerning Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria; Equatorial Guinea intervening), the Court acknowledged “that a substantial difference in the lengths of the parties’ respective coastlines may be a factor to be taken into consideration in order to adjust or shift the provisional delimitation line” (Judgment, I.C.J. Report 2002, p. 446, para. 301; emphasis added), although it found that in the circumstances there was no reason to shift the equidistance line.

166. In the case concerning Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway), the Court found that the disparity between the lengths of the coasts of Jan Mayen and Greenland (approximately 1:9) constituted a “special circumstance” requiring modification of the provisional median line, by moving it closer to the coast of Jan Mayen, to avoid inequitable results for both the continental shelf and the fisheries zone. The Court stated that:

“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.” (Judgment, I.C.J. Reports 1993, p. 69, para. 69.)

Then it recalled its observation from the Continental Shelf (Libyan Arab Jamahiriya/Malta) case:

“If such a use of proportionality were right, it is difficult indeed to see what room would be left for any other consideration; for it would be at once the principle of entitlement to continental shelf
that would require it to adjust the provisional equidistant line at this juncture. Although there is no doubt, however, that the use of the method of putting that principle into operation.

In the latter case, the Court was of the view that the difference in the length of the relevant coasts of Malta and Libya (being in ratio 1:8) "is so great as to justify the adjustment of the median line. According to the Court further notes that it cannot disregard the fact that the boundary between the respective claims in the Black Sea is also a relevant circumstance. In this case, the Chamber considered that "in certain circumstances, the appropriate consequences may be drawn from any inequalities in the extent of the coasts of two States into the same area of delimitation" (ibid., p. 313, para. 157; emphasis added). However, it must be kept in mind that the Chamber did so in the context of discussing the concept of an "equitable" criterion for the delimitation of the Black Sea's continental shelf and the exclusive economic zones. Romania contends that all the delimitation agreements concluded in the Black Sea used equidistance as the method for delimitation of the continental shelf and the exclusive economic zones. Romania adds that the lines of delimitation established by these agreements are based on a different basis of delimitation. The Chamber's views on this subject may be summed up by observing that a maritime delimitation cannot be established by a direct comparison of the respective lengths of the coasts belonging to the parties in the relevant area, but it is equally certain that a substantial disproportion to the lengths of those coasts that resulted from a delimitation effected on a different basis would constitute a circumstance calling for an appropriate correction. (Ibid., p. 323, para. 185; emphasis added.)

In the present case, however, the Court sees no such particularly marked disparities between the relevant coasts of Ukraine and Romania that would require it to adjust the provisional equidistant line at this juncture. Although there is no doubt, however, that the use of the method of putting that principle into operation.

In the latter case, the Court was of the view that the difference in the length of the relevant coasts of Malta and Libya (being in ratio 1:8) "is so great as to justify the adjustment of the median line. According to the Court further notes that it cannot disregard the fact that the boundary between the respective claims in the Black Sea is also a relevant circumstance. In this case, the Chamber considered that "in certain circumstances, the appropriate consequences may be drawn from any inequalities in the extent of the coasts of two States into the same area of delimitation" (ibid., p. 313, para. 157; emphasis added). However, it must be kept in mind that the Chamber did so in the context of discussing the concept of an "equitable" criterion for the delimitation of the Black Sea's continental shelf and the exclusive economic zones. Romania contends that all the delimitation agreements concluded in the Black Sea used equidistance as the method for delimitation of the continental shelf and the exclusive economic zones. Romania adds that the lines of delimitation established by these agreements are based on a different basis of delimitation. The Chamber's views on this subject may be summed up by observing that a maritime delimitation cannot be established by a direct comparison of the respective lengths of the coasts belonging to the parties in the relevant area, but it is equally certain that a substantial disproportion to the lengths of those coasts that resulted from a delimitation effected on a different basis would constitute a circumstance calling for an appropriate correction. (Ibid., p. 323, para. 185; emphasis added.)
nature. Ukraine therefore considers that the enclosed character of the Black Sea "is not by itself a circumstance which ought to be regarded as relevant for delimitation purposes" and has no bearing on the method of delimitation to be applied in the present proceedings.

173. Ukraine further notes that in general terms, bilateral agreements cannot affect the rights of third parties and, as such, the existing maritime delimitation agreements in the Black Sea cannot influence the present dispute.

Ukraine states that only in a limited sense can the presence of third States in the vicinity of the area to be delimited be considered a relevant circumstance. However, this has nothing to do with the choice of the actual method of delimitation or the character of a sea (whether or not it is enclosed). According to Ukraine, the presence of third States may be relevant only to the extent that the Court may have to take precautions in identifying a precise endpoint of the delimitation line so as to avoid potential prejudice to States situated on the periphery of the delimitation area.

174. The Court recalls that it has intimated earlier, when it briefly described the delimitation methodology, that it would establish a provisional equidistance line (see paragraph 116 above). This choice was not dictated by the fact that in all the delimitation agreements concerning the Black Sea this method was used.

175. Two delimitation agreements concerning the Black Sea were brought to the attention of the Court. The first agreement, the Agreement concerning the Delimitation of the Continental Shelf in the Black Sea, was concluded between Turkey and the USSR on 23 June 1978. Some eight years later, they agreed, through an Exchange of Notes dated 23 December 1986 and 6 February 1987, that the continental shelf boundary agreed in their 1978 Agreement would also constitute the boundary between their exclusive economic zones. The westernmost segment of the line, between two points with co-ordinates 43° 20′ 43″ N and 32° 00′ 00″ E and co-ordinates 43° 26′ 59″ N and 31° 20′ 48″ E, respectively, remained undefined and to be settled subsequently at a convenient time. After the dissolution of the USSR at the end of 1991, the 1978 Agreement and the Agreement reached through the Exchange of Notes remained in force not only for the Russian Federation, as the State continuing the international legal personality of the former USSR, but also the successor States of the USSR bordering the Black Sea, Ukraine being one of them.

176. The second agreement is the Agreement between Turkey and Bulgaria on the determination of the boundary in the mouth area of the Rezovska/Mutludere River and delimitation of the maritime areas between the two States in the Black Sea, signed on 4 December 1997. The drawing of the delimitation line of the continental shelf and the exclusive economic zone further to the north-east direction, between geographical point 43° 19′ 54″ N and 31° 06′ 33″ E and geographical point 43° 26′ 49″ N and 31° 20′ 43″ E, was left open for subsequent negotiations at a suitable time.

177. The Court will bear in mind the agreed maritime delimitations between Turkey and Bulgaria, as well as between Turkey and Ukraine, when considering the endpoint of the single maritime boundary it is asked to draw in the present case (see Section 10 below).

178. The Court nevertheless considers that, in the light of the above-mentioned delimitation agreements and the enclosed nature of the Black Sea, no adjustment to the equidistance line as provisionally drawn is called for.

9.3. The Presence of Serpents' Island in the Area of Delimitation

179. The Parties disagree as to the proper characterization of Serpents' Island and the role this maritime feature should play in the delimitation of the continental shelf and the Parties' exclusive economic zones in the Black Sea.

180. Romania maintains that Serpents' Island is entitled to no more than a 12-nautical-mile territorial sea, and that it cannot be used as a base point in drawing a delimitation line beyond the 12-mile limit. Romania claims that Serpents' Island is a rock incapable of sustaining human habitation or economic life of its own, and therefore has no exclusive economic zone or continental shelf, as provided for in Article 121, paragraph 3, of the 1982 UNCLOS. According to Romania, Serpents' Island qualifies as a "rock" because: it is a rocky formation in the geomorphologic sense; it is devoid of natural water sources and virtually devoid of soil, vegetation and fauna. Romania claims that human survival on the island is dependent on supplies, especially of water, from elsewhere and that the natural conditions there do not support the development of economic activities. It adds that "[t]he presence of some individuals... because they have to perform an official duty such as maintaining a lighthouse, does not amount to sustained 'human habitation'".

181. Romania further argues that Serpents' Island does not form part of the coastal configuration of the Parties and that its coast cannot therefore be included among Ukraine’s relevant coasts for purposes of the delimitation.

182. Romania nevertheless admits that in the present case the presence of Serpents' Island "with its already agreed belt of 12-nautical-mile territorial sea" might be a relevant circumstance. It asserts that under international jurisprudence and State practice, small islands, irrespective of their legal characterization, have frequently been given very reduced or...
no effect in the delimitation of the continental shelf, exclusive economic zone or other maritime zones due to the inequitable effect they would produce. Thus, contends Romania, in the present case the provisional equidistance line should be drawn between the relevant mainland coasts of the Parties, with minor maritime formations only being considered at a later stage as possible relevant circumstances. Romania states that Serpents’ Island, given its location, could be considered as a relevant circumstance only in the sector of the delimitation area where the coasts are adjacent (in other words, the provisional equidistance line would have to be shifted so as to take into consideration the maritime boundary along the 12-nautical-mile arc around Serpents’ Island, which “cannot generate maritime zones beyond 12 nautical miles”). Owing to its remoteness from the Ukrainian coast of Crimea, Serpents’ Island cannot, according to Romania, play any role in the delimitation in the area where the coasts are opposite. In short, Romania considers that, although Serpents’ Island may qualify as a “special circumstance”, it should not be given any effect beyond 12 nautical miles.

* 183. Ukraine argues that Serpents’ Island has a baseline which generates base points for the construction of the provisional equidistance line. Thus, in Ukraine’s view, the coast of the island constitutes part of Ukraine’s relevant coasts for purposes of the delimitation and cannot be reduced to just a relevant circumstance to be considered only at the second stage of the delimitation process after the provisional equidistance line has been established.

184. According to Ukraine, Serpents’ Island is indisputably an “island” under Article 121, paragraph 2, of UNCLOS, rather than a “rock”. Ukraine contends that the evidence shows that Serpents’ Island can readily sustain human habitation and that it is well established that it can sustain an economic life of its own. In particular, the island has vegetation and a sufficient supply of fresh water. Ukraine further asserts that Serpents’ Island “is an island with appropriate buildings and accommodation for an active population”. Ukraine also argues that paragraph 3 of Article 121 is not relevant to this delimitation because that paragraph is not concerned with questions of delimitation but is, rather, an entitlement provision that has no practical application with respect to a maritime area that is, in any event, within the 200-mile limit of the exclusive economic zone and continental shelf of a mainland coast.

* 185. In determining the maritime boundary line, in default of any delimitation agreement within the meaning of UNCLOS Articles 74 and 83, the Court may, should relevant circumstances so suggest, adjust the provisional equidistance line to ensure an equitable result. In this phase, the Court may be called upon to decide whether this line should be adjusted because of the presence of small islands in its vicinity. As the jurisprudence has indicated, the Court may on occasion decide not to take account of very small islands or decide not to give them their full potential entitlement to maritime zones, should such an approach have a disproportionate effect on the delimitation line under consideration (see Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985, p. 48, para. 64; Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), Merits, Judgment, I.C.J. Reports 2001, p. 104, para. 219; Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), Judgment, I.C.J. Reports 2007 (II), pp. 751 et seq., paras. 302 et seq.).

186. The Court recalls that it has already determined that Serpents’ Island cannot serve as a base point for the construction of the provisional equidistance line between the coasts of the Parties, that it has drawn in the first stage of this delimitation process, since it does not form part of the general configuration of the coast (see paragraph 149 above). The Court must now, at the second stage of the delimitation, ascertain whether the presence of Serpents’ Island in the maritime delimitation area constitutes a relevant circumstance calling for an adjustment of the provisional equidistance line.

187. With respect to the geography of the north-western part of the Black Sea, the Court has taken due regard of the fact that Ukraine’s coast lies on the west, north and east of this area. The Court notes that all of the areas subject to delimitation in this case are located in the exclusive economic zone and the continental shelf generated by the mainland coasts of the Parties and are moreover within 200 nautical miles of Ukraine’s mainland coast. The Court observes that Serpents’ Island is situated approximately 20 nautical miles to the east of Ukraine’s mainland coast in the area of the Danube delta (see paragraph 16 above). Given this geographical configuration and in the context of the delimitation with Romania, any continental shelf and exclusive economic zone entitlements possibly generated by Serpents’ Island could not project further than the entitlements generated by Ukraine’s mainland coast because of the southern limit of the delimitation area as identified by the Court (see paragraph 114 and sketch-map No. 5, p. 102). Further, any possible entitlements generated by Serpents’ Island in an eastward direction are fully subsumed by the entitlements generated by the western and eastern mainland coasts of Ukraine itself. The Court also notes that Ukraine itself, even though it considered Serpents’ Island to fall under Article 121, paragraph 2, of UNCLOS, did not extend the relevant area beyond the limit generated by its mainland coast, as a conse-
189. The Court further recalls that a 12-nautical-mile territorial sea was attributed to Serpents' Island pursuant to agreements between the Parties. It concludes that, in the context of the delimitation in this case, other than that stemming from the role of the 12-nautical-mile arc of its territorial sea.

190. Ukraine argues that in 1993, 2001 and 2003 it licensed activities relating to the exploration of oil and gas deposits within the continental shelf/exclusive economic zone area claimed by Romania. It adds that prior to 2001, Romania never protested Ukraine's oil and gas activities in areas now claimed by Romania in the proceedings before the Court.

191. Ukraine further argues that the exclusive economic zone and continental shelf boundary defined in the Black Sea (see sequence of the presence of Serpents' Island in the area of delimitation (see sketch-map No. 3, p. 92). In the light of these factors, the Court concludes that the presence of Serpents' Island does not call for an adjustment of the provisional equidistance line.

192. With regard to the notion of a critical date introduced by Romania, the Court notes that, in the context of the delimitation, it is the date of Romania's Application: 16 September 2004.

193. Romania does not consider that State activities in the relevant area, namely licences for the exploration and exploitation of oil and gas, constitute relevant circumstances. As a matter of legal principle, "State activities" cannot be used as a delimitation criterion. In order to come within the context of maritime delimitation, "State activities" prior to the critical date may be relevant, and that they must be sufficient to prove that a tacit agreement or modus vivendi exists. According to Romania, the "State activities" presented by Ukraine do not reveal the existence of a "de facto" line.
that the Agreement’s provisions regarding the existence of the dispute were a mere confirmation of a factual situation that had already existed for a long time. Thus any oil-related practice discussed in the present proceedings does not require a response from the Court.

Since the Court does not consider that the above-mentioned State activities are relevant to the present case, the issue of critical date discussed in the present proceedings does not require a response from the Court.

195. Romania concludes that Ukraine’s oil concessions practice offers no support to the latter’s claimed delimitation for the following reasons. First, the area covered by the Ukrainian concessions, in its view, irrelevant in the present proceedings as the dispute had already crystallized by that date.

196. With regard to fishing activities, Romania contests that the practice has any bearing on the maritime delimitation in the present case since neither Party economically exploits the natural resources in the area in question. Moreover, Romania consistently objected to Ukrainian fishing activities.

197. The Court recalls that it had earlier concluded that there is no agreement in force between the Parties delimiting the continental shelf and the exclusive economic zones of the Parties (see paragraph 76 above). It further notes that Ukraine is not relying on any activities involving the exclusive economic zones of the Parties or the continental shelf for any role as a relevant circumstance in the present case. For its part, Romania argues that its maritime entitlements, in particular the Salina dyke, are exclusively on the continental shelf in the area in question. In short, according to Romania, the maritime areas of the Parties have not been delimited, and thus there is no need to consider any activities involving such areas.

198. The Court does not see a particular role for the State activities invoked above in this maritime delimitation. As the Arbitral Tribunal in the case between Barbados and Trinidad and Tobago observed, “resource-related criteria have been treated more cautiously by the decisions of international courts and tribunals, which have not generally applied this factor as a relevant circumstance” (Award of 11 April 2006, RIAA, Vol. XXVII, p. 214, para. 241).

9.5. Any Cutting Off Effect

199. Romania contends that its proposed maritime boundary does not cut off the entitlements to the continental shelf and to the exclusive economic zones of either Romania or Ukraine. The area attributed to each Party does not encroach on the natural prolongation of the other.

200. According to Ukraine, Romania’s line results in a two-fold cut-off of Ukraine’s territorial sea and exclusive economic zone, which includes the area north of the Danube. Ukraine argues that Romania’s delimitation line leads to a cut-off of its coast in the north of the Danube, which is in the area of Ukraine’s maritime entitlements. In particular, the area in the northern sector of the Black Sea is characterized by the presence of a large number of islands, and the maritime branch of the Danube is of secondary importance as an international waterway. In such circumstances, the Court does not see a particular role for the State activities invoked above in this maritime delimitation. Moreover, the Court does not consider Romania’s line to be “likely to entail catastrophic repercussions for the livelihood and economic well-being of the population” (Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America), Judgment, I.C.J. Reports 1984, p. 342, para. 27).

201. The Court does not see a particular role for the State activities invoked above in this maritime delimitation. As the Arbitral Tribunal in the case between Barbados and Trinidad and Tobago observed, “resource-related criteria have been treated more cautiously by the decisions of international courts and tribunals, which have not generally applied this factor as a relevant circumstance” (Award of 11 April 2006, RIAA, Vol. XXVII, p. 214, para. 241).
above the land boundary — it also produces a cut-off effect on the projection of Ukraine’s south-facing coast lying beyond Odessa”.

Ukraine argues that its line fully respects the principle of non-encroachment. It reflects the geographical fact that “Ukraine’s coast fronting the area to be delimited projects in essentially three directions while Romania’s coast projects basically in a single direction — south-eastwards”.

201. The Court observes that the delimitation lines proposed by the Parties, in particular their first segments, each significantly curtail the entitlement of the other Party to the continental shelf and the exclusive economic zone. The Romanian line obstructs the entitlement of Ukraine generated by its coast adjacent to that of Romania, the entitlement further strengthened by the northern coast of Ukraine. At the same time, the Ukrainian line restricts the entitlement of Romania generated by its coast, in particular its first sector between the Sulina dyke and the Sacalin Peninsula.

By contrast, the provisional equidistance line drawn by the Court avoids such a drawback as it allows the adjacent coasts of the Parties to produce their effects, in terms of maritime entitlements, in a reasonable and mutually balanced way. That being so, the Court sees no reason to adjust the provisional equidistance line on this ground.

9.6. The Security Considerations of the Parties

202. Romania asserts that there is no evidence to suggest that the delimitation advanced by it would adversely affect Ukraine’s security interests, including Serpents’ Island, which has a belt of maritime space of 12 nautical miles.

In Romania’s view, Ukraine’s delimitation line runs unreasonably close to the Romanian coast and thus encroaches on the security interests of Romania.

203. Ukraine claims that its line in no way compromises any Romanian security interests because Ukraine’s delimitation line accords to Romania areas of continental shelf and exclusive economic zone off its coastline. In this regard Ukraine refers to “the predominant interest Ukraine has for security and other matters as a function of its geographical position along this part of the Black Sea on three sides of the coast” and maintains that Ukraine has been the only Party to police the area and to prevent illegal fishing and other activities in that area. According to Ukraine, its claim is consistent with this aspect of the conduct of the Parties, whereas Romania’s claim is not.

* * *

204. The Court confines itself to two observations. First, the legitimate security considerations of the Parties may play a role in determining the final delimitation line (see Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985, p. 42, para. 51). Second, in the present case however, the provisional equidistance line it has drawn substantially differs from the lines drawn either by Romania or Ukraine. The provisional equidistance line determined by the Court fully respects the legitimate security interests of either Party. Therefore, there is no need to adjust the line on the basis of this consideration.

10. The Line of Delimitation

205. The Court takes note of the fact that Article 1 of the 2003 State Border Regime Treaty situates the meeting point of the territorial seas of the Parties at 45°05′21″ N and 30°02′27″ E. This suffices for the fixing of the starting-point.

Romania and Ukraine have both indicated, in considerable detail, the course that their respective delimitation lines would then follow beyond the point fixed by Article 1 of the 2003 State Border Regime Treaty (see paragraph 13 above and sketch-map No. 1, p. 69). The Court notes that the Parties’ positions differ in this regard.

206. The delimitation line decided by the Court, for which neither the seaward end of the Sulina dyke nor Serpents’ Island is taken as a base point, begins at Point 1 and follows the 12-nautical-mile arc around Serpents’ Island until it intersects with the line equidistant from Romania’s and Ukraine’s adjacent coasts, as defined above; from there, it follows that line until it becomes affected by base points on the opposite coasts of Romania and Ukraine. From this turning point the delimitation line runs along the line equidistant from Romania’s and Ukraine’s opposite coasts (for the course of the equidistance line see paragraph 154 above).

207. Romania maintains that the endpoint of the delimitation line is situated at co ordinates 43°26′50″ N and 31°20′10″ E (Point Z). It asserts that drawing the delimitation line up to Point Z does not affect any possible entitlements of third countries to maritime areas, as Point Z is “practically the point equidistant to the Romanian, Ukrainian and Turkish coasts, and is farther to the Bulgarian coast”.

208. Ukraine argues that no endpoint of the delimitation should be
specified, so as to avoid any encroachment on possible entitlements of third States; the line would therefore end in an arrow. The line advocated by Ukraine continues from the point identified by it as Point 3 along the azimuth 156 until it reaches the point where the interests of third States potentially come into play.

209. The Court considers that the delimitation line follows the equidistance line in a southerly direction until the point beyond which the interests of third States may be affected.

11. The Disproportionality Test

210. The Court now turns to check that the result thus far arrived at, so far as the envisaged delimitation line is concerned, does not lead to any significant disproportionality by reference to the respective coastal lengths and the apportionment of areas that ensue. This Court agrees with the observation that

“it is disproportion rather than any general principle of proportionality which is the relevant criterion or factor . . . there can never be a question of completely refashioning nature . . . it is rather a question of remedying the disproportionality and inequitable effects produced by particular geographical configurations or features” (Anglo-French Continental Shelf Case, RIAA, Vol. XVIII, p. 58, para. 101).

211. The continental shelf and exclusive economic zone allocations are not to be assigned in proportion to length of respective coastlines. Rather, the Court will check, ex post facto, on the equitableness of the delimitation line it has constructed (Delimitation of the maritime boundary between Guinea and Guinea-Bissau, RIAA, Vol. XIX, pp. 183-184, paras. 94-95).

212. This checking can only be approximate. Diverse techniques have in the past been used for assessing coastal lengths, with no clear requirements of international law having been shown as to whether the real coastline should be followed, or baselines used, or whether or not coasts relating to internal waters should be excluded.

213. The Court cannot but observe that various tribunals, and the Court itself, have drawn different conclusions over the years as to what disparity in coastal lengths would constitute a significant disproportionality which suggested the delimitation line was inequitable and still required adjustment. This remains in each case a matter for the Court’s appreciation, which it will exercise by reference to the overall geography of the area.

214. In the present case the Court has measured the coasts according to their general direction. It has not used baselines suggested by the Parties for this measurement. Coastlines alongside waters lying behind gulfs or deep inlets have not been included for this purpose. These measurements are necessarily approximate given that the purpose of this final stage is to make sure there is no significant disproportionality.

215. It suffices for this third stage for the Court to note that the ratio of the respective coastal lengths for Romania and Ukraine, measured as described above, is approximately 1:2.8 and the ratio of the relevant area between Romania and Ukraine is approximately 1:2.1.

216. The Court is not of the view that this suggests that the line as constructed, and checked carefully for any relevant circumstances that might have warranted adjustment, requires any alteration.

12. The Maritime Boundary Delimiting the Continental Shelf and Exclusive Economic Zones

217. The Court observes that a maritime boundary delimiting the continental shelf and exclusive economic zones is not to be assimilated to a State boundary separating territories of States. The former defines the limits of maritime zones where under international law coastal States have certain sovereign rights for defined purposes. The latter defines the territorial limits of State sovereignty. Consequently, the Court considers that no confusion as to the nature of the maritime boundary delimiting the exclusive economic zone and the continental shelf arises and will thus employ this term.

218. The line of the maritime boundary established by the Court begins at Point 1, the point of intersection of the outer limit of the territorial sea of Romania with the territorial sea of Ukraine around Serpents’ Island as stipulated in Article 1 of the 2003 State Border Régime Treaty (see paragraph 28 above). From Point 1 it follows the arc of the 12-nautical-mile territorial sea of Serpents’ Island until the arc intersects at Point 2, with co-ordinates 45°03’18.5″ N and 30°09’24.6″ E, with a line equidistant from the adjacent coasts of Romania and Ukraine, plotted by reference to base points located on the landward end of the Sulina dyke and the south-eastern tip of Tsyganka Island. The maritime boundary from Point 2 continues along the equidistance line5 in a south-easterly direction until Point 3, with co-ordinates 44°58’37.3″ N and 30°58’37.3″ E (Point A of the provisional equidistance line), where the equidistance line becomes affected by a base point located on the Sacalin Peninsula.

5 For the description of the entire course of the equidistance line, see paragraph 154 above.
From Point 3 the maritime boundary follows the equidistance line in a south-easterly direction to Point 4, with co-ordinates 44° 44' 13.4" N and 31° 10' 27.7" E (Point B of the provisional equidistance line), where the equidistance line becomes affected by the base point located on Cape Tarkhankut on Ukraine’s opposite coast and turns south-south-east. From Point 4 the boundary traces the line equidistant from the opposite coasts of Romania and Ukraine until Point 5, with co-ordinates 44° 02' 53.0" N and 31° 24' 35.0" E (Point C of the provisional equidistance line), which is controlled by base points on the Sacalin Peninsula on the Romanian coast and Capes Tarkhankut and Kherisons on the Ukrainian coast, from where it continues along the equidistance line in a southerly direction starting at a geodetic azimuth of 185° 23' 54.5" until the maritime boundary reaches the area where the rights of third States may be affected (see sketch-maps Nos. 8 and 9, pp. 132-133).

The geographical co-ordinates for Points 2, 3, 4 and 5 of the single maritime boundary set out in this paragraph and in the operative clause (see paragraph 219) are given by reference to WGS 84 datum.

***

13. OPERATIVE CLAUSE

219. For these reasons,

THE COURT,

Unanimously,

Decides that starting from Point 1, as agreed by the Parties in Article 1 of the 2003 State Border Régime Treaty, the line of the single maritime boundary delimiting the continental shelf and the exclusive economic zones of Romania and Ukraine in the Black Sea shall follow the 12-nautical-mile arc of the territorial sea of Ukraine around Serpents’ Island until Point 2 (with co-ordinates 45° 03’ 18.5” N and 30° 09’ 24.6” E) where the arc intersects with the line equidistant from Romania’s and Ukraine’s adjacent coasts. From Point 2 the boundary line shall follow the equidistance line through Points 3 (with co-ordinates 44° 46’ 38.7” N and 31° 58’ 37.3” E) and 4 (with co-ordinates 44° 44’ 13.4” N and 31° 10’ 27.7” E) until it reaches Point 5 (with co-ordinates 44° 02’ 53.0” N and 31° 24’ 35.0” E). From Point 5 the maritime boundary line shall continue along the line equidistant from the opposite coasts of Romania and Ukraine in a southerly direction starting at a geodetic azimuth of 185° 23’ 54.5” until it reaches the area where the rights of third States may be affected.
Sketch-map No. 9:

Course of the maritime boundary

Mercator Projection

WGS 84

This sketch-map, on which the coasts are presented in simplified form, has been prepared for illustrative purposes only.
International Tribunal for the Law of the Sea

Dispute Concerning Delimitation of the Maritime Boundary Between Bangladesh and Myanmar, in the Bay of Bengal (Bangladesh/Myanmar)
Judgment of 14 March 2012

*ITLOS Reports*, vol. 12 (2012), paras. 225-297, 316-322
aside the usual method of drawing the maritime boundary between States has any basis in modern international law of the sea, the first step of which is to identify the provisional equidistance line”.

224. In Myanmar’s view, the angle-bisector method advanced by Bangladesh produces an inequitable result and Myanmar “firmly … reiterate[s] that no reason whatsoever justifies recourse to the ‘angle-bisector method’ in the present case”.

* * *

225. The Tribunal observes that article 74, paragraph 1, and article 83, paragraph 1, of the Convention stipulate that the delimitation of the exclusive economic zone and the continental shelf respectively must be effected on the basis of international law in order to achieve an equitable solution, without specifying the method to be applied.

226. International courts and tribunals have developed a body of case law on maritime delimitation which has reduced the elements of subjectivity and uncertainty in the determination of maritime boundaries and in the choice of methods employed to that end.

227. Beginning with the North Sea Continental Shelf cases, it was emphasized in the early cases that no method of delimitation is mandatory, and that the configuration of the coasts of the parties in relation to each other may render an equidistance line inequitable in certain situations. This position was first articulated with respect to the continental shelf, and was thereafter maintained with respect to the exclusive economic zone as well.

228. Over time, the absence of a settled method of delimitation prompted increased interest in enhancing the objectivity and predictability of the process. The varied geographic situations addressed in the early cases nevertheless confirmed that, even if the pendulum had swung too far away from the objective precision of equidistance, the use of equidistance alone could not ensure an equitable solution in each and every case. A method of delimitation suitable for general use would need to combine its constraints on subjectivity with the flexibility necessary to accommodate circumstances in a particular case that are relevant to maritime delimitation.

229. In the case concerning Maritime Delimitation in the Area between Greenland and Jan Mayen, the ICJ expressly articulated the approach of dividing the delimitation process into two stages, namely “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” (Judgment, I.C.J. Reports 1993, p. 38, at p. 61, para. 51). This general approach has proven to be suitable for use in most of the subsequent judicial and arbitral delimitations. As developed in those cases, it has come to be known as the equidistance/relevant circumstances method.


231. The Arbitral Tribunal in the Arbitration between Barbados and the Republic of Trinidad and Tobago, affirmed that “[t]he determination of the line of delimitation [...] normally follows a two-step approach”, involving the positing of a provisional line of equidistance and then examining it in the light of the relevant circumstances. The Arbitral Tribunal further pointed out that “while no method of delimitation can be considered of and by itself compulsory, and no court or tribunal has so held, the need to avoid subjective determinations requires that the method used start with a measure of certainty that equidistance positively ensures, subject to its subsequent correction if justified” (Decision of 11 April 2006, RIAA, Vol. XXVII, p. 147, at p.214, para. 242, and at p. 230, para. 306).
232. Similarly, the Arbitral Tribunal in the case between Guyana and Suriname noted:

The case law of the International Court of Justice and arbitral jurisprudence as well as State practice are at one in holding that the delimitation process should, in appropriate cases, begin by positing a provisional equidistance line which may be adjusted in the light of relevant circumstances in order to achieve an equitable solution (Arbitration between Guyana and Suriname, Award of 17 September 2007, ILM, Vol. 47 (2008), p. 116, at p. 213, para. 342).

233. In the Black Sea case, the ICJ built on the evolution of the jurisprudence on maritime delimitation. In that case, the ICJ gave a description of the three-stage methodology which it applied. At the first stage, it established a provisional equidistance line, using methods that are geometrically objective and also appropriate for the geography of the area to be delimited. “So far as delimitation between adjacent coasts is concerned, an equidistance line will be drawn unless there are compelling reasons that make this unfeasible in the particular case” (Maritime Delimitation in the Black Sea (Romania v. Ukraine), Judgment, I.C.J. Reports 2009, p. 61, at p. 101, para. 116). At the second stage, the ICJ ascertained whether “there are factors calling for the adjustment or shifting of the provisional equidistance line in order to achieve an equitable result” (ibid., at pp. 101, para. 120). At the third stage, it verified that the delimitation line did not lead to “an inequitable result by reason of any marked disproportion between the ratio of the respective coastal lengths and the ratio between the relevant maritime area of each State by reference to the delimitation line” (ibid., at p. 103, para. 122).

234. The Tribunal notes that, as an alternative to the equidistance/relevant circumstances method, where recourse to it has not been possible or appropriate, international courts and tribunals have applied the angle-bisector method, which is in effect an approximation of the equidistance method. The angle-bisector method was applied in cases preceding the Libyan Arab Jamahiriya/Malta judgment, namely, Continental Shelf (Tunisia/Libyan Arab Jamahiriya) (Judgment, I.C.J. Reports 1982, p. 18, at p. 94, para. 133 (C) (3)), Delimitation of the Maritime Boundary in the Gulf of Maine Area (Judgment, I.C.J. Reports 1984, p. 246, at p. 333, para. 213), and Delimitation of the Maritime Boundary between Guinea and Guinea-Bissau (Decision of 14 February 1985, ILR, Vol. 77, p. 635, at pp. 683-685, paras. 108-111). It was more recently applied in the case concerning Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras) (Judgment, I.C.J. Reports 2007, p. 659, at p. 741, para. 272 and at p. 746, para. 287).

235. The Tribunal observes that the issue of which method should be followed in drawing the maritime delimitation line should be considered in light of the circumstances of each case. The goal of achieving an equitable result must be the paramount consideration guiding the action of the Tribunal in this connection. Therefore the method to be followed should be one that, under the prevailing geographic realities and the particular circumstances of each case, can lead to an equitable result.

236. When the angle bisector method is applied, the terminus of the land boundary and the generalization of the direction of the respective coasts of the Parties from that terminus determine the angle and therefore the direction of the bisector. Different hypotheses as to the general direction of the respective coasts of the Parties from the terminus of the land boundary will often produce different angles and bisectors.

237. Bangladesh’s approach of constructing the angle at the terminus of the land boundary between the Parties with reference to the ends of their respective relevant coasts produces a markedly different bisector once it is recognized that Myanmar’s relevant coast extends to Cape Negrais, as decided by the Tribunal in paragraph 203. The resultant bisector fails to give adequate effect to the southward projection of the coast of Bangladesh.

238. The Tribunal notes that jurisprudence has developed in favour of the equidistance/relevant circumstances method. This is the method adopted by
international courts and tribunals in the majority of the delimitation cases that have come before them.

239. The Tribunal finds that in the present case the appropriate method to be applied for delimiting the exclusive economic zone and the continental shelf between Bangladesh and Myanmar is the equidistance/relevant circumstances method.

240. In applying this method to the drawing of the delimitation line in the present case, the Tribunal, taking into account the jurisprudence of international courts and tribunals on this matter, will follow the three stage-approach, as developed in the most recent case law on the subject. Accordingly, the Tribunal will proceed in the following stages: at the first stage it will construct a provisional equidistance line, based on the geography of the Parties' coasts and mathematical calculations. Once the provisional equidistance line has been drawn, it will proceed to the second stage of the process, which consists of determining whether there are any relevant circumstances requiring adjustment of the provisional equidistance line; if so, it will make an adjustment that produces an equitable result. At the third and final stage in this process the Tribunal will check whether the line, as adjusted, results in any significant disproportion between the ratio of the respective coastal lengths and the ratio of the relevant maritime areas allocated to each Party.

Establishment of the provisional equidistance line

Selection of base points

241. The Tribunal will now proceed with the construction of its own provisional equidistance line. The first step to be taken in this regard is to select the base points for the construction of that line.

242. Bangladesh did not identify any base points, because it did not construct a provisional equidistance line and therefore saw no need to select base points on the Bangladesh or Myanmar coasts.

243. Myanmar identified two relevant base points on the coast of Bangladesh "representing the most advanced part of the land (low water line) into the sea". These two base points are:

- (B1) the closest point to the starting-point of the maritime boundary (Point A) located on the low water line of Bangladesh's coast, base point β1 (co-ordinates 20°43'28.1"N, 92°19'40.1"E) […]; and
- (B2) the more stable point located on Bangladesh coast nearest to the land boundary with India, base point β2 (co-ordinates 21° 38' 57.4" N, 89° 14' 47.6" E).

244. Myanmar points out that base point β2 is, according to Bangladesh, located on a coast characterized by a very active morpho-dynamism. Myanmar notes that Bangladesh "expresses concern that 'the location of base point β2 this year might be very different from its location next year'". Myanmar adds that "it is difficult to detect any change in the location of β2 in the sixteen years from 1973 to 1989". Myanmar observes that satellite images show that the β2 area is quite stable.

245. Myanmar identifies three base points on its own coast and describes them as follows:

- (μ1) at the mouth of the Naaf River, the closest point of the starting-point of the maritime boundary (Point A) located on the low water line of Myanmar's coast, base point μ1 (co-ordinates 20° 41' 28.2" N, 92° 22' 47.8" E) […]
- (μ2) Kyaukphünde (Sataparokia) Point, located on the landward/low water line most seaward near Kyaukphünde Village, base point μ2 (co-ordinates 20° 33' 02.5" N, 92° 31' 17.6" E) […].
- (μ3) at the mouth of the May Yu River (close to May Yu Point), base point μ3 (co-ordinates 20° 14' 31.0" N, 92° 43' 27.8" E) […].

246. Myanmar asserts that any base points on Bangladesh's mainland coast and coastal islands could be considered legally appropriate base points, but because β1 is nearer to the provisional equidistance line, the other potential
base points are not relevant. Myanmar notes that on its own side the same is true of base points on the coastal features south of base point μ3. These potential base points on the coasts were eliminated on the basis of the objective criterion of distance.

247. Myanmar states that several other base points were eliminated for legal reasons. With reference to South Talpatty, Myanmar explains that it could have been:

a potential source of relevant base points because of its relatively seaward location. Yet, as a legal matter, South Talpatty cannot be a source of base points for two reasons. First, the sovereignty of this feature is disputed between Bangladesh and India. Second, [...] it is not clear whether the coastal feature - which may have existed in 1973 - still exists.

248. According to Myanmar, there is a second example of a set of coastal features that are potential sources of relevant base points but were nonetheless excluded from the calculation of the equidistance line. These are “the low-tide elevations around the mouth of the Naaf River, the Cypress Sands, and Sitaparokia Patches, off Myanmar’s coast”.

249. Myanmar points out that “[n]either Party used base points on those low-tide elevations”, despite the fact that they are legitimate sources of base points for measuring the breadth of the territorial sea and are nearer to the territorial sea equidistance line than the base points on the mainland coasts. Myanmar explains that these low-tide elevations are also nearer the provisional equidistance line than either base point β1 or μ1. Myanmar states that “they cannot be used, as a legal matter,” for the purpose of constructing the provisional equidistance line.

250. Myanmar submits that Myanmar’s May Yu Island and Bangladesh’s St. Martin’s Island “must be eliminated as sources of base points”. Myanmar acknowledges that both features are legitimate sources of normal baselines for measuring the breadth of the territorial sea, and both would otherwise have provided the nearest base points, that is, the relevant base points, for the construction of the provisional equidistance line. Myanmar, however, concludes that “the technical qualities of these features cannot overcome their legal deficiencies”.

251. In the view of Myanmar, “the use of these anomalous features in the construction of the provisional equidistance line would create a line that would be [...] ‘wholly inconsistent with the dominant geographic realities in the area’”. Myanmar states that Bangladesh is correct in arguing that, if these islands were used in the construction of the provisional equidistance line, the entire course of that line would be determined by these two features alone.

252. Bangladesh maintains that:

Myanmar’s proposed equidistance line is also problematic because it is drawn on the basis of just four coastal base points, three on Myanmar’s coast and only one – base point β1 – on the Bangladesh coast, which Myanmar places very near the land boundary terminus between Bangladesh and Myanmar in the Naaf River.

253. According to Bangladesh, Myanmar “takes pains to make it appear as though it actually uses two Bangladesh base points in the plotting of the equidistance line”. Bangladesh contends that Myanmar does not “show the effect of alleged base point β2 on its proposed delimitation line, because it has none”. Bangladesh observes that “[b]ase point β2 never actually comes into play in Myanmar’s proposed delimitation”.

254. Bangladesh asserts that it would be remarkable to base a delimitation on a single coastal base point and that, after a review of the jurisprudence and State practice, Bangladesh was unable to find even one example where a delimitation extending so far from the coast was based on just one base point. Bangladesh concludes by noting that, “in the Nicaragua v. Honduras case, the ICJ drew a bisector precisely to avoid such a situation”.

255. In the view of Bangladesh, the lack of potential base points on the Bangladesh coast is a function of the concavity of that coast and that after
base point β₁, the coast recedes into the mouth of the Meghna estuary. It adds that there is thus nothing to counteract the effect of Myanmar’s coast south of the land boundary terminus and that the concavity of Bangladesh’s coast results in there being no protuberant coastal base points.

256. Bangladesh points out that the consequence can be seen in the effect of Myanmar’s equidistance line as it moves further and further from shore, becoming, as a result, increasingly prejudicial to Bangladesh, and increasingly inequitable.

257. Bangladesh contends that “[t]here is no legal basis for an a priori assumption that St. Martin’s Island should be ignored in the drawing of Myanmar’s equidistance line”. Bangladesh notes that St. Martin’s island “is a significant coastal feature that indisputably generates entitlement in the continental shelf and EEZ”. Bangladesh therefore concludes that “[t]here are thus no grounds, other than Myanmar’s self-interest, for excluding it in the plotting of a provisional equidistance line, where, in the first instance, all coastal features are included”.

258. Myanmar responds that five base points were sufficient in the Black Sea case to delimit a boundary stretching well over 100 nm from start to finish. It states that in other delimitations, especially those between adjacent coasts, even fewer base points have been used: three base points were used for the 170 nm western section of the boundary in the Delimitation of the Continental Shelf between United Kingdom of Great Britain and Northern Ireland, and the French Republic (Decision of 30 June 1977, RIAA, Vol. XVIII, p. 3, Annex, Technical Report to the Court, p. 126, at pp. 128-129), and just two base points were used to construct the provisional equidistance line in the case concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening) (Merits, Judgment, I.C.J. Reports 2002, p. 303, at p. 443, para. 292).

259. The Tribunal will first select the base points to be used for constructing the provisional equidistance line.

260. As noted in paragraph 242, Bangladesh did not identify any base points for the construction of a provisional equidistance line.

261. The Tribunal notes Bangladesh’s contentions that Myanmar does not show the effect on its proposed delimitation line of base point β₂, located on the southern tip of Mandabaria Island, near the land boundary between Bangladesh and India, because that point has none, and that base point β₂ never actually comes into play in Myanmar’s proposed delimitation.

262. The Tribunal further notes that the observation made by Bangladesh concerning Myanmar’s β₂ base point does not amount to a disagreement with the selection of that point; rather, it is a criticism by Bangladesh that Myanmar does not use that base point in its construction of the equidistance line.

263. The Tribunal notes that, while Bangladesh argues that the number of base points selected by Myanmar is insufficient for the construction of an equidistance line, Bangladesh does not question the five base points selected by Myanmar.

264. The Tribunal observes that, while coastal States are entitled to determine their base points for the purpose of delimitation, the Tribunal is not obliged, when called upon to delimit the maritime boundary between the parties to a dispute, to accept base points indicated by either or both of them. The Tribunal may establish its own base points, on the basis of the geographical facts of the case. As the ICJ stated in the Black Sea case:

[In […] the delimitation of the maritime areas involving two or more States, the Court should not base itself solely on the choice of base points made by one of those Parties. The Court must, when delimiting the continental shelf and the exclusive economic zones, select base points by reference to the physical geography of the relevant coasts (Maritime Delimitation in the Black Sea
Concerning the question whether St. Martin's Island could serve as the source of a base point, the Tribunal is of the view that, because it is located immediately in front of the mainland on Myanmar's side of the Parties' land boundary terminus in the Naaf River, the selection of a base point on St. Martin's Island would result in a line that blocks the seaward projection from Myanmar's coast. In the view of the Tribunal, this would result in an unwarranted distortion of the delimitation line, and amount to "a judicial refashioning of geography" (ibid., at p. 110, para. 149). For this reason, the Tribunal excludes St. Martin's Island as the source of any base point.

The Tribunal is satisfied that the five base points selected by Myanmar are the appropriate base points on the coasts of the Parties for constructing the provisional equidistance line. In addition, the Tribunal selects a new base point \( \mu_4 \), which is appropriate for the last segment of the provisional equidistance line. This base point is identified on the basis of the Admiralty Chart 817 and is situated on the southern tip of the island of Myay Ngu Kyun, at Boronga Point. Its coordinates are: 19° 48' 49.8" N, 93° 01' 33.6" E. The Tribunal will start the construction of a provisional equidistance line by using the following base points:

On the coast of Myanmar:
- \( \mu_1 \): 20° 41' 28.2" N, 92° 22' 47.8" E;
- \( \mu_2 \): 20° 33' 02.5" N, 92° 31' 17.6" E;
- \( \mu_3 \): 20° 14' 31.0" N, 92° 43' 27.8" E; and
- \( \mu_4 \): 19° 48' 49.8" N, 93° 01' 33.6" E.

On the coast of Bangladesh:
- \( \beta_1 \): 20° 43' 28.1" N, 92° 19' 40.1" E; and
- \( \beta_2 \): 21° 38' 57.4" N, 89° 14' 47.6" E.

In its written pleadings, Myanmar describes the last segment of its proposed delimitation as follows:

From Point G, the boundary line continues along the equidistance line in a south-west direction following a geodetic azimuth of 231° 50.9" until it reaches the area where the rights of a third State may be affected.

Bangladesh argues that this suggests that Myanmar's "proposed delimitation continues along a 232° line throughout its course, no matter where the rights of a third State may be determined to come into play, but that is not an accurate description of the line Myanmar purports to be drawing".

Bangladesh asserts that Myanmar's proposed Point Z coincides almost exactly with the location at which Myanmar's proposed equidistance line intersects with India's most recent claim line.
271. The Tribunal will now construct its provisional equidistance line from base points situated on the coasts of the Parties. For this purpose, it will employ the base points it identified in paragraph 266.

272. The provisional equidistance line starts at a point in the Naaf River lying midway between the closest base points on the coasts of the Parties, namely point β1 on the Bangladesh coast and point μ1 on the Myanmar coast. The coordinates of the starting point are 20° 42' 28.2" N, 92° 21' 14.0" E.

273. The provisional equidistance line within 200 nm from the baselines from which the territorial seas of the Parties are measured is defined by the following turning points at which the direction of the line changes and which are connected by geodetic lines:

- point T1 which is controlled by base points β1, μ1 and μ2 and which has the coordinates 20° 13' 06.3'' N, 92° 00' 07.6'' E;
- point T2 which is controlled by base points β1, μ2 and μ3 and which has the coordinates 19° 45' 36.7'' N, 91° 32' 38.1'' E; and
- point T3 which is controlled by base points β1, β2 and μ3 and which has the coordinates 18° 31' 12.5'' N, 89° 53' 44.9'' E.

274. From turning point T3, the course of the provisional equidistance line within 200 nm from the baselines of the Parties from which their territorial seas are measured comes under the influence of the additional new base point μ4, as identified by the Tribunal. From turning point T3, the provisional equidistance line follows a geodetic line starting at an azimuth of 202° 56' 22" until it reaches the limit of 200 nm.
Having drawn the provisional equidistance line, the Tribunal will now consider whether there are factors in the present case that may be considered relevant circumstances, calling for an adjustment of that line with a view to achieving an equitable solution. The Tribunal notes in this regard that the Parties differ on the issue of relevant circumstances.

Bangladesh points out three main geographical and geological features that characterize the present case and are relevant to the delimitation in question. The first of these is the "concave shape of Bangladesh’s coastline", extending from the land boundary terminus with India in the west to the land boundary terminus with Myanmar in the east. The Bangladesh coast is further marked by "a second concavity, that is a concavity within the overall concavity of its coastline". The second major geographical feature is St. Martin’s Island, a significant coastal island lying within 5 nm of the Bangladesh mainland. The third major distinguishing feature is the Bengal depositional system, which comprises “both the landmass of Bangladesh and its uninterrupted geological prolongation into and throughout the Bay of Bengal”.

Bangladesh maintains that “it is not possible to delimit the boundary in a manner that achieves an equitable solution without taking each of these three features duly into account”. In Bangladesh’s view, these features should be taken into account “as a relevant circumstance in fashioning an equitable delimitation within 200 miles, and should inform the delimitation of the outer continental shelf as between Bangladesh and Myanmar beyond 200 miles”.

For its part, Myanmar contends that “there does not exist any relevant circumstance that may lead to an adjustment of the provisional equidistance line”.

Relevant circumstances
Concavity and cut-off effect

279. Bangladesh argues that "[t]he effect of the double concavity is to push the two equidistance lines between Bangladesh and its neighbours together", and that it "is not only left with a wedge of maritime space that narrows dramatically to seaward but it is also stopped short of its 200-[nm] limit".

280. Bangladesh observes that "Myanmar deploys two, not entirely consistent, arguments to deny [the] relevance [of the concavity]", namely, first that "there is no appreciable concavity and, second, that the concavity is legally irrelevant in any event". Bangladesh is of the view that "[b]oth assertions are incorrect".

281. With respect to the first argument, Bangladesh points out that it contradicts what Myanmar said in its own Counter-Memorial, which expressly acknowledged the doubly concave nature of Bangladesh's coast.

282. As to the second argument, Bangladesh observes that the only ostensible jurisprudential basis for this claim of Myanmar is the ICJ's decision in Cameroon v. Nigeria. Bangladesh points out that while, in that case, the ICJ found expressly that the portion of the coast relevant to the delimitation was not concave, it also stated that "[t]he Court does not deny that the concavity of the coastline may be a circumstance relevant to the delimitation" (Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002, p. 303, at p. 445, para. 297).

283. Bangladesh submits that the cut-off effect is as prejudicial to it as was the cut-off effect to Germany in the North Sea cases and that "[t]he reality is then that equidistance threatens Bangladesh with a more severe cut-off than Germany".

284. Bangladesh also relies on the award in the case concerning Delimitation of the maritime boundary between Guinea and Guinea-Bissau, noting that, although in that case "[t]he equidistance lines between Guinea and its two neighbours did not fully cut Guinea off within 200 miles", [...] "the relief the tribunal gave Guinea is considerable, certainly far greater than anything that Bangladesh is seeking in this case".

285. Bangladesh draws attention to State practice in instances where a State is "pinched" in the middle of a concavity and would have been cut off, had the equidistance method been used, and "[t]he maritime boundaries that were ultimately agreed discarded equidistance in order to give the middle State access to its 200-[nm] limit". It refers in this regard to the 1975 agreed delimitation between Senegal and The Gambia on the coast of West Africa, the 1987 agreed boundaries in the Atlantic Ocean between Dominica and the French islands of Guadeloupe and Martinique, the 1984 agreement between France and Monaco, the 2009 memorandum of understanding between Malaysia and Brunei, and the 1990 agreement between Venezuela and Trinidad and Tobago.

286. In response to Myanmar's assertion that, as political compromises, "these agreements have no direct applicability to the questions of law now before the Tribunal", Bangladesh argues that "[i]t is impossible not to draw the conclusion that these agreements, collectively or individually, evidence a broad recognition by States in Africa, in Europe, in the Americas, and in the Caribbean that the equidistance method does not work in the case of States trapped in the middle of a concavity".

287. In relation to Myanmar's reference to "the practice in the region" – the 1978 agreements among India, Indonesia and Thailand in the Andaman Sea; the 1971 agreement among Indonesia, Malaysia and Thailand in the Northern Part of the Strait of Malacca; and the 1993 agreement among Myanmar, India and Thailand in the Andaman Sea – as support for the contention that cut-offs within 200 miles are common, Bangladesh maintains that these agreements do not support Myanmar's proposition.
While recognizing that it is a fact that the "coastlines of Bangladesh taken as a whole are concave", Myanmar states that "the resulting enclaving effect is not as dramatic as Bangladesh claims" and that "there does not exist any relevant circumstance that may lead to an adjustment of the provisional equidistance line". It observes in this regard that "[u]nless we completely refashion nature [...] this concavity cannot be seen as a circumstance calling for a shift of the equidistance line".

Myanmar submits that the test of proportionality – or, more precisely, the absence of excessive disproportionality – confirms the equitable character of the solution resulting from the provisional equidistance line. It further argues that this line drawn in the first stage of the equidistance/relevant circumstances method meets the requirement of an equitable solution imposed by articles 74 and 83 of the Convention. Therefore, it is not necessary to modify or adjust it in the two other stages.

The Tribunal will now consider whether the concavity of the coast of Bangladesh constitutes a relevant circumstance warranting an adjustment of the provisional equidistance line.

The Tribunal observes that the coast of Bangladesh, seen as a whole, is manifestly concave. In fact, Bangladesh's coast has been portrayed as a classic example of a concave coast. In the North Sea cases, the Federal Republic of Germany specifically invoked the geographical situation of Bangladesh (then East Pakistan) to illustrate the effect of a concave coast on the equidistance line (I.C.J. Pleadings, North Sea Continental Shelf, Vol. I, p. 42).

The Tribunal notes that in the delimitation of the exclusive economic zone and the continental shelf, concavity per se is not necessarily a relevant circumstance. However, when an equidistance line drawn between two States produces a cut-off effect on the maritime entitlement of one of those States, as a result of the concavity of the coast, then an adjustment of that line may be necessary in order to reach an equitable result.

The Tribunal further notes that, on account of the concavity of the coast in question, the provisional equidistance line it constructed in the present case does produce a cut-off effect on the maritime projection of Bangladesh and that the line if not adjusted would not result in achieving an equitable solution, as required by articles 74 and 83 of the Convention.

This problem has been recognized since the decision in the North Sea cases, in which the ICJ explained that "it has been seen in the case of concave or convex coastlines that if the equidistance method is employed, then the greater the irregularity and the further from the coastline the area to be delimitated, the more unreasonable are the results produced. So great an exaggeration of the consequences of a natural geographical feature must be remedied or compensated for as far as possible, being of itself creative of inequity" (North Sea Continental Shelf, Judgment, I.C.J. Reports 1969, p. 3, at p. 49, para. 89).

In this regard, the ICJ observed that "in the case of a concave or recessing coast [...], the effect of the use of the equidistance method is to pull the line of the boundary inwards, in the direction of the concavity", causing the area enclosed by the equidistance lines "to take the form approximately of a triangle with its apex to seaward and, as it was put on behalf of the Federal Republic, 'cutting off' the coastal State from the further areas of the continental shelf outside of and beyond this triangle" (ibid., at p. 17, para. 8).

Likewise, in the case concerning the Delimitation of the Maritime Boundary Between Guinea and Guinea-Bissau, the Arbitral Tribunal stated that "[w]hen in fact [...] there are three adjacent States along a concave coastline, the equidistance method has the other drawback of resulting in the middle country being enclaved by the other two and thus prevented from extending its maritime territory as far seaward as international law permits". (Decision of 14 February 1985, ILR, Vol. 77, p. 635, at p. 682, para. 104)
297. The Tribunal finds that the concavity of the coast of Bangladesh is a relevant circumstance in the present case, because the provisional equidistance line as drawn produces a cut-off effect on that coast requiring an adjustment of that line.

St. Martin's Island

298. Bangladesh argues that St. Martin’s Island is one of the important geographical features in the present case and that “[a]ny line of delimitation that would ignore [this island] is inherently and necessarily inequitable”.

299. Bangladesh maintains that “if, contrary to [its] view, equidistance is not rejected,” then St Martin’s Island must be given full weight in any solution based on an equidistance line and “that even this is not enough to achieve the equitable solution that is required by the 1982 Convention”.

300. Bangladesh submits that, “whether or not an island can be characterized as being ‘in front of’ one coast or another does not in itself determine whether it is a special or a relevant circumstance”. It refers in this regard to the Case concerning the Delimitation of the Continental Shelf between United Kingdom of Great Britain and Northern Ireland, and the French Republic, in which the Court of Arbitration observed that the pertinent question is whether an island would produce “an inequitable distortion of the equidistance line producing disproportionate effects on the areas of shelf accruing to the two States” (Decision of 30 June 1977, RIAA, Vol. XVIII, p. 3, at p. 113, para. 243).

301. Bangladesh submits that “St. Martin’s Island is as much in front of the Bangladesh coast as it is in front of Myanmar’s coast” and states that the case law supports this view. In this regard Bangladesh notes that Myanmar describes the French island of Ushant as being located in front of the French coast, when in fact Ushant lies 10 miles off France’s Brittany coast, further Bangladesh in the framework of the delimitation between continental masses, a result which, according to Myanmar, is manifestly disproportionate.

315. Myanmar argues that “if […] effect were to be given to St. Martin’s Island” in the delimitation of the exclusive economic zone and the continental shelf between Myanmar and Bangladesh, “this would produce a disproportionate result”, citing the Dubai/Sharjah Border Arbitration (Award of 19 October 1981, ILR, Vol. 91, p. 543, at p. 677), the case concerning the Continental Shelf (Libyan Arab Jamahiriya/Malta) (Judgment, I.C.J. Reports 1985, p. 13, at p. 48, para. 64), the case concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Merits, Judgment, I.C.J. Reports 2001, p. 40, at pp. 104-109, para. 219) and the Black Sea case (Maritime Delimitation in the Black Sea (Romania v. Ukraine), Judgment, I.C.J. Reports 2009, p. 61, at p. 122-128, para. 185).

* * *

316. The Tribunal will now consider whether St. Martin’s Island, in the circumstances of this case, should be considered a relevant circumstance warranting an adjustment of the provisional equidistance line.

317. The Tribunal observes that the effect to be given to an island in the delimitation of the maritime boundary in the exclusive economic zone and the continental shelf depends on the geographic realities and the circumstances of the specific case. There is no general rule in this respect. Each case is unique and requires specific treatment, the ultimate goal being to reach a solution that is equitable.

318. St. Martin’s Island is an important feature which could be considered a relevant circumstance in the present case. However, because of its location, giving effect to St. Martin’s Island in the delimitation of the exclusive economic zone and the continental shelf would result in a line blocking the seaward projection from Myanmar’s coast in a manner that would cause an unwarranted distortion of the delimitation line. The distorting effect of an island
on an equidistance line may increase substantially as the line moves beyond 12 nm from the coast.

319. For the foregoing reasons, the Tribunal concludes that St. Martin's Island is not a relevant circumstance and, accordingly, decides not to give any effect to it in drawing the delimitation line of the exclusive economic zone and the continental shelf.

*Bengal depositional system*

320. As regards the Bengal depositional system, Bangladesh states that the physical, geological and geomorphological connection between Bangladesh's land mass and the Bay of Bengal sea floor is so clear, so direct and so pertinent, that adopting a boundary in the area within 200 nm that would cut off Bangladesh, and deny it access to, and rights in the area beyond, would constitute a grievous inequity.

321. Myanmar rejects Bangladesh's contention that the Bengal depositional system is a relevant circumstance, stating that this is a "very curious" special circumstance. It points out that Bangladesh itself admits that within 200 nm entitlement is, by operation of article 76, paragraph 1, of the Convention, determined purely by reference to distance from the coast.

* * *

322. The Tribunal does not consider that the Bengal depositional system is relevant to the delimitation of the exclusive economic zone and the continental shelf within 200 nm. The location and direction of the single maritime boundary applicable both to the seabed and subsoil and to the superjacent waters within the 200 nm limit are to be determined on the basis of geography of the coasts of the Parties in relation to each other and not on the geology or geomorphology of the seabed of the delimitation area.
International Tribunal for the Law of the Sea

Joint Declaration of Judges Nelson, Chandrasekhararao and Cot, Dispute Concerning Delimitation of the Maritime Boundary Between Bangladesh and Myanmar, in the Bay of Bengal (Bangladesh/Myanmar) Judgment of 14 March 2012

*ITLOS Reports*, vol. 12 (2012)
The law of maritime delimitation of the EEZ and continental shelf has considerably developed over the past 25 years, thanks to the contribution of international courts and tribunals through their jurisprudence. The provisions of the Convention, articles 74 and 83, are imprecise to say the least. Courts and tribunals have progressively reduced the elements of subjectivity in the process of delimitation in order to further the reliability and predictability of decisions in this matter.

We consider that the International Tribunal for the Law of the Sea should welcome these developments and squarely embrace the methodology of maritime delimitation as it stands today, thus adding its contribution to the consolidation of the case law in this field.

It is not enough to pay lip service to these developments. The Tribunal must firmly uphold the three step approach as it has been formulated over the years.

The choice of a method of delimitation in a particular case must be considered in a strictly objective perspective and based on geographical considerations, in particular the general configuration of the coastline.

Priority is given today to the equidistance/relevant circumstances method. Resort to equidistance as a first step leads to a delimitation that is simple and precise. However complicated the coastline involved is, there is always one and only one equidistance line, whose construction results from geometry and can be produced through graphic and analytical methods. A provisional equidistance line is to be drawn, calculated by reference to adequate base points chosen along the continental coasts of both parties. As the International Court of Justice stated authoritatively in the Maritime Delimitation in the Black Sea (Romania v. Ukraine) Judgment, it is only if there are compelling reasons that make this unfeasible on objective geographical or geophysical grounds, such as the instability of the coastline, that one should contemplate another method of delimitation, for instance the angle bisector method.

Considerations of equity come into play only in the second phase of the delimitation, as they necessarily carry an important element of subjectivity. Relevant circumstances may call for an adjustment of the provisional equidistance line so as to ensure an equitable solution. Among the relevant circumstances considered by the case law is the concavity of the coastline with its eventual cut-off effect, of particular importance in the present case. Other relevant circumstances include the relative length of coasts, the presence of islands, considerations relating to economic resources, fisheries, security concerns and navigation.

The test of disproportionality in the third phase ensures that an equitable solution is the result of the delimitation process.

Application of these principles calls for consistency. One should not try to reintroduce other methods of delimitation when implementing the equidistance/relevant circumstances rule. It would amount to reintroducing the very elements of subjectivity progressively reduced over the years.

By reaffirming and respecting these basic principles, the Tribunal will hopefully bring a significant and positive contribution to the development of the law of maritime delimitation in the years to come.

(signed) L. Dolliver M. Nelson

(signed) P. Chandrasekhara Rao

(signed) Jean-Pierre Cot
International Tribunal for the Law of the Sea

Joint Declaration of Judges *ad hoc* Mensah and Oxman, Dispute Concerning Delimitation of the Maritime Boundary Between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar) Judgment of 14 March 2012

*ITLOS Reports*, vol. 12 (2012)
JOINT DECLARATION OF JUDGES AD HOC MENSAH AND OXMAN

1. We support the Judgment of the Tribunal. We wish to add some brief observations on a number of issues addressed therein.

**Navigation and right of access**

2. An important objective of maritime delimitation is to promote stability in the relations between neighbouring States regarding activities in their waters. This objective is also furthered by accommodating specific concerns regarding navigation and access rights. We consider that the statement of Bangladesh in response to the Tribunal’s question is very helpful in this regard, and we support the decision of the Tribunal to take note of the commitment by Bangladesh. With regard to the references to the agreement reached in 1974 in the statements set forth in paragraphs 173 and 174 of the Judgment, we observe that although the Tribunal’s delimitation of the territorial sea is not founded on the existence of an agreement between the Parties as argued by Bangladesh, the maritime boundary established by the Tribunal in the territorial sea is based on the equidistance line proposed by Bangladesh in these proceedings, and is essentially the same as that contemplated by the Agreed Minutes of 23 November 1974.

**Entitlement to a continental shelf beyond 200 nautical miles**

3. We agree with the Tribunal’s conclusion that there is no need in this case for the Tribunal to decline to delimit the continental shelf beyond 200 miles until such time as the Commission on the Limits of the Continental Shelf has made its recommendations and each Party has had the opportunity to consider its reaction. In this connection, we note that the Tribunal’s determination that each Party is entitled to a continental shelf beyond 200 miles, and that their entitlements overlap, does not entail an interpretation or application of article 76 of the Convention that is incompatible with the submission that either Party has made to the Commission regarding the outer limits of its continental shelf, as described in the respective executive summaries. Accordingly, the Judgment does not prejudice the right of each Party under paragraph 8 of article 76 to establish final and binding outer limits of its continental shelf on the basis of the recommendations of the Commission through the process prescribed by the Convention. This process is neither adjudicative nor adversarial.

**Delimitation of the Exclusive Economic Zone and the Continental Shelf**

4. The law applicable to delimitation of the exclusive economic zone and the continental shelf, as articulated and applied by international courts and tribunals, entails neither an unyielding insistence on mathematical certainty nor an unbounded quest for an equitable solution. The equidistance/relevant circumstances method of delimitation seeks to balance the need for objectivity and predictability with the need for sufficient flexibility to respond to circumstances relevant to a particular delimitation. Maintaining that balance requires that equidistance be qualified by relevant circumstances and that the scope of relevant circumstances be circumscribed.

5. Both Parties argued that a line that is equidistant from the nearest points on their respective coasts would not be appropriate in the geographic circumstances of this case. While Myanmar drew its proposed boundary on the basis of equidistance, it demonstrated that, given the size and position of St. Martin’s Island directly in front of Myanmar’s coast near the terminus of the land frontier, measuring an equidistance line from base points on that island would have a distorting effect that would block the seaward projection of Myanmar’s coast. Bangladesh, in turn, demonstrated that, because of the marked concavity of its coast, the equidistance line advocated by Myanmar, and even an equidistance line measured from St. Martin’s Island, would have the unwarranted effect of cutting off the seaward projection of the south-facing coast of Bangladesh.
6. This does not mean that resort to the angle-bisector method of delimitation is necessary. There is no difficulty in drawing a provisional equidistance line, the Parties' discussion of the azimuth, and each of them availed itself of that opportunity at length in its written and oral pleadings. While we do not think that this fact, in and of itself, obliges the Tribunal to consider or use this azimuth in its adjustment of the provisional equidistance line, the Parties' discussion of the azimuth undoubtedly facilitated evaluation of its suitability for that purpose.

7. In this case, the 215° azimuth, properly employed, can indeed provide an equitable solution to the problem posed by the provisional equidistance line. The Tribunal did not accept this contention, and determined that Myanmar's relevant coast extends to Cape Negrais, which would produce a significantly different bisector.

8. It is the relevant circumstance, namely the cut-off effect, and the need to give the coasts of both Parties their effects in a reasonable and balanced way, that dictate both the location and the direction of an adjustment to the provisional equidistance line. While no adjustment for relevant circumstances is immune to the risks of subjectivity, the focus on addressing the precise problem posed by the provisional equidistance line, and on the relationship of any adjustment to the relevant coasts of both Parties as they are, helps to discipline the process and to direct attention to the right questions.

9. Neither Party expressly addressed the issue of how an adjustment to the equidistance line should be made, and the Parties' discussion of the azimuth did not describe it as a variant of equidistance. It lacks the precision of equidistance, and is not the method of choice in this case. While the angle-bisector methodology, as noted in the Judgment, can change significantly depending on how it is constructed, the Tribunal did not accept this contention, and determined that Myanmar's relevant coast extends to Cape Negrais, which would produce a significantly different bisector.

10. In this case, the circumstances deemed relevant to adjustment of the provisional equidistance line are those from the configuration of the coasts of the Parties in relation to each other. With rare exceptions, other provisions of the Law of the Sea Convention are not relevant. Thus, as evidenced by the Tribunal's decision in this case, even if otherwise relevant, circumstances relating only to the seabed and subsoil might rarely if ever be regarded as relevant to a single maritime boundary that delimits both the continental shelf and the superjacent waters of the exclusive economic zone. The Tribunal observed that Bangladesh constructed its 215° bisector with reference to Bhiff Cape, which Bangladesh contended was the limit of Myanmar's relevant coast. The Tribunal did not accept this contention, and determined that Myanmar's relevant coast extends to Cape Negrais, which would produce a significantly different bisector.

11. No question of delimitation of the superjacent waters arises with respect to the continental shelf beyond 200 miles. With regard to that area, Bangladesh expressed the view that the Tribunal should undertake an evaluation of the relative strengths of the natural prolongations of the Parties, based on geological and related factors. Acceptance of this idea would, in our view, introduce a new element of difficulty and uncertainty into the process of maritime delimitation in this case. We are concerned that it could have an unsettling effect on the efforts of States to agree on delimitation of the continental shelf beyond 200 miles. Further, we think that such an exercise conflates the determination of the extent of entitlement under article 76 of the Convention with the delimitation of overlapping entitlements under article 83. The Tribunal rightly declined to do so.

12. The decision of the Tribunal to draw the provisional equidistance line without reference to base points on St. Martin's Island, and to use the 215° azimuth to adjust that line in the area south of the northern coast of Bangladesh, allows the coasts of both Parties to produce their effects in a context, to comment on the advantages and disadvantages of using that
reasonable and mutually balanced way in terms of entitlements to the exclusive economic zone and to the continental shelf. The Tribunal thus achieves a solution that is equitable in the circumstances of this case.

(signed)
Thomas A. Mensah

(signed)
Bernard H. Oxman
International Court of Justice

Territorial and Maritime Dispute
(Nicaragua v. Colombia)
Judgment

ments developed by the Parties, including the argument as to whether a delimitation of overlapping entitlements which involves an extended continental shelf of one party can affect a 200-nautical-mile entitlement to the continental shelf of another party.

131. The Court concludes that Nicaragua’s claim contained in its final submission I (3) cannot be upheld.

V. MARITIME BOUNDARY

1. The Task Now before the Court

132. In light of the decision it has taken regarding Nicaragua’s final submission I (3) (see paragraph 131 above), the Court must consider what maritime delimitation it is to effect. Leaving out of account any Nicaraguan claims to a continental shelf beyond 200 nautical miles means that there can be no question of determining a maritime boundary between the mainland coasts of the Parties, as these are significantly more than 400 nautical miles apart. There is, however, an overlap between Nicaragua’s entitlement to a continental shelf and exclusive economic zone extending to 200 nautical miles from its mainland coast and adjacent islands and Colombia’s entitlement to a continental shelf and exclusive economic zone derived from the islands over which the Court has held that Colombia has sovereignty (see paragraph 103 above).

133. The present case was brought before the Court by the Application of Nicaragua, not by special agreement between the Parties, and there has been no counter-claim by Colombia. It is, therefore, to the Nicaraguan Application and Nicaragua’s submissions that it is necessary to turn in order to determine what the Court is called upon to decide. In its Application, Nicaragua asked the Court “to determine the course of the single maritime boundary between the areas of continental shelf and exclusive economic zone appertaining respectively to Nicaragua and Colombia, in accordance with equitable principles and relevant circumstances recognized by general international law as applicable to such a delimitation of a single maritime boundary”.

This request was clearly broad enough to encompass the determination of a boundary between the continental shelf and exclusive economic zone generated by the Nicaraguan mainland and adjacent islands and the various maritime entitlements appertaining to the Colombian islands.

134. In its Reply, however, Nicaragua amended its submissions. In its final submissions, as has been seen, it sought not a single maritime bound-
2. Applicable Law

137. The Court must, therefore, determine the law applicable to this delimitation. The Court has already noted (paragraph 114 above) that, since Colombia is not party to UNCLOS, the Parties agree that the applicable law is customary international law.

138. The Parties are also agreed that several of the most important provisions of UNCLOS reflect customary international law. In particular, they agree that the provisions of Articles 74 and 83, on the delimitation of the exclusive economic zone and the continental shelf, and Article 121, on the legal régime of islands, are to be considered declaratory of customary international law.

Article 74, entitled “Delimitation of the exclusive economic zone between States with opposite or adjacent coasts”, provides that:

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

2. If no agreement can be reached within a reasonable period of time, the States concerned shall resort to the procedures provided for in Part XV.

3. Pending agreement as provided for in paragraph 1, the States concerned, in a spirit of understanding and co-operation, shall make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement. Such arrangements shall be without prejudice to the final delimitation.

4. Where there is an agreement in force between the States concerned, questions relating to the delimitation of the exclusive economic zone shall be determined in accordance with the provisions of that agreement.”

Article 83, entitled “Delimitation of the continental shelf between States with opposite or adjacent coasts”, is in the same terms as Article 74, save that where Article 74, paragraphs (1) and (4), refer to the exclusive economic zone, the corresponding paragraphs in Article 83 refer to the continental shelf.

Article 121, entitled “Regime of islands”, provides that:

1. An island is a naturally formed area of land, surrounded by water, which is above water at high tide.

2. Except as provided for in paragraph 3, the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf of an island are determined in accordance with the provisions of this Convention applicable to other land territory.
139. The Court has recognized that the principles of maritime delimitation enshrined in Articles 74 and 83 reflect customary international law (See Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), Merits, Judgment, I.C.J. Reports 2001, p. 91, paras. 167 et seq. In the same case it treated the legal definition of an island embodied in Article 121, paragraph 1, as part of customary international law (ibid., p. 91, para. 167 and p. 99, para. 195). It reached the same conclusion as regards Article 121, paragraph 2 (ibid., p. 97, para. 185). The Judgment in the Qatar v. Bahrain case did not specifically address paragraph 3 of Article 121. The Court observes, however, that the entitlement to maritime rights accorded to an island by the provisions of paragraph 2 is expressly limited by reference to the provisions of paragraph 3. By denying an exclusive economic zone and a continental shelf to rocks which cannot sustain human habitation or economic life of their own, paragraph 3 provides an essential link between the two mainland coasts. It maintains this position in connection with its current claim for a continental shelf which it claims mainland. Nicaragua’s entitlement to a continental shelf beyond 200 nautical miles is, therefore, limited to the relevant mainland coast. It maintains that only the relevant mainland coast should be considered in determining Nicaragua’s entitlement to a continental shelf. The Court therefore considers that the legal régime of islands set out in UNCLOS Article 121 forms an indivisible régime, all of which (as Colombia and Nicaragua recognize) has the status of customary international law. The Court will, therefore, begin by determining what are the relevant coasts of the Parties, namely, those coasts the projections of which overlap, because the task of delimitation consists in resolving the overlapping claims by drawing a line of separation between the maritime areas of their own shall have no exclusive economic zone or continental shelf.

140. It is well established that "the title of a State to the continental shelf extends all the way from the diminutive and to the exclusive economic zone is based on the coastal projection of the coastal land and extends "outside the three-mile limit of the outer edge of the continental shelf," and that the exclusive economic zone is based on the coastline of the coastal State. The Court, therefore, begins by determining what are the relevant coasts of the Parties, namely, those coasts the projections of which overlap.

141. Nicaragua estimates the total length of the exclusive economic zone of the islands of San Andrés, Providencia and Santa Catalina as 2 km. So far as the other maritime features are concerned, Nicaragua and the relevant coastal features must be treated as part of the relevant length of their west-facing coasts. Nicaragua’s position is that it is the part of the mainland coast of Colombia which faces west and north-west. Nicaragua advanced that position in connection with its initial claim for a single maritime boundary. The Court observes, however, that only the relevant mainland coast should be considered in determining Nicaragua’s entitlement to an exclusive economic zone.

142. The islands of San Andrés, Providencia and Santa Catalina are considered as islands of the mainland coast of Colombia. The Court observes, however, that only the west-facing coasts of those islands should be considered as the relevant coast, since only they project towards Nicaragua, and to treat the other coasts of the islands as the relevant coast would mean that the islands of San Andrés, Providencia and Santa Catalina would be considered as part of the relevant length of the Colombian coastal feature. The Court observes, however, that only the west-facing coasts of those islands should be considered as the relevant coast, since only they project towards Nicaragua, and to treat the other coasts of the islands as the relevant coast would mean that the islands of San Andrés, Providencia and Santa Catalina would be considered as part of the relevant length of the Colombian coastal feature.
148. Colombia’s position is that its mainland coast is irrelevant because it is more than 400 nautical miles from Nicaragua’s coast and thus cannot generate maritime entitlements which overlap with those of Nicaragua. Colombia maintains that the relevant Colombian coast is that of the Colombian islands. Its position about what part of those coasts is to be taken into account, however, is closely bound up with its view of what constitutes the relevant area (a subject which the Court considers below in paragraphs 155-166). Colombia’s initial position is that the relevant area in which the Court is called upon to effect a delimitation between overlapping entitlements is located between the west-facing coasts of the islands and the Nicaraguan mainland and islands, so that only the west-facing coasts of the Colombian islands would be relevant. However, Colombia argues, in the alternative, that if the area of overlapping entitlements includes the area to the east of the islands, extending as far as the line 200 nautical miles from the Nicaraguan baselines, then the entire coasts of the Colombian islands should be counted, since islands radiate maritime entitlement in all directions.

149. Colombia estimates the overall coastline of San Andrés, Providencia and Santa Catalina at 61.2 km. It also maintains that the coasts of the cays immediately adjacent to those three islands (Hayne’s Cay, Rock Cay and Johnny Cay, adjacent to San Andrés, and Basalt Cay, Palma Cay, Cangrejo Cay and Low Cay, adjacent to Providencia and Santa Catalina) are also relevant, thus adding a further 2.9 km. In addition, Colombia contends that the coastlines of Alburquerque (1.35 km), East-Southeast Cays (1.89 km), Roncador (1.35 km), Serrana (2.4 km), Serranilla (2.9 km) and Bajo Nuevo (0.4 km) are relevant, giving a total of 74.39 km. At certain stages during the hearings, Colombia also suggested that the coast of Quitasueño, calculated by a series of straight lines joining the features that Colombia claims are above water at high tide, constitutes part of Colombia’s relevant coast.

* * *

150. The Court recalls that, in order for a coast to be regarded as relevant for the purpose of a delimitation, it “must generate projections which overlap with projections from the coast of the other Party” (Maritime Delimitation in the Black Sea (Romania v. Ukraine), Judgment, I.C.J. Reports 2009, p. 97, para. 99) and that, in consequence, “the submarine extension of any part of the coast of one Party which, because of its geographic situation, cannot overlap with the extension of the coast of the other, is to be excluded from further consideration” (Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982, p. 61, para. 75).

151. In view of the Court’s decision regarding Nicaragua’s claim to a continental shelf on the basis of natural prolongation (see paragraph 131 above), the Court is concerned in the present proceedings only with those Colombian entitlements which overlap with the continental shelf and exclusive economic zone entitlements within 200 nautical miles of the Nicaraguan coast. Since the mainland coast of Colombia does not generate any entitlement in that area, it follows that it cannot be regarded as part of the relevant coast for present purposes. The relevant Colombian coast is thus confined to the coasts of the islands under Colombian sovereignty. Since the area of overlapping potential entitlements extends well to the east of the Colombian islands, the Court considers that it is the entire coastline of these islands, not merely the west-facing coasts, which has to be taken into account. The most important islands are obviously San Andrés, Providencia and Santa Catalina. For the purposes of calculating the relevant coasts of Providencia and Santa Catalina, those two features were joined with two short straight lines, so that the parts of the coast of each island (in the north-west of Providencia, in the area of San Juan Point, and in the south-east of Santa Catalina) which are immediately facing one another are not included in the relevant coast. The Court does not consider that the smaller cays (listed in paragraph 149 above), which are immediately adjacent to those islands, add to the length of the relevant coast. Following, as with the Nicaraguan coastline, the general direction of the coast, the Court therefore estimates the total length of the relevant coast of the three islands as 58 km.

152. The Court also considers that the coasts of Alburquerque Cays, East-Southeast Cays, Roncador and Serrana must be considered part of the relevant coast. Taken together, these add a further 7 km to the relevant Colombian coast, giving a total length of approximately 65 km. The Court has not, however, taken account of Serranilla and Bajo Nuevo for these purposes. These two features lie within an area that Colombia and Jamaica left undelimited in their 1993 Maritime Delimitation Treaty (United Nations, Treaty Series (UNTS), Vol. 1776, p. 27) in which there are potential third State entitlements. The Court has also disregarded, for these purposes, Quitasueño, whose features, as explained below (see paragraphs 181-183) are so small that they cannot make any difference to the length of Colombia’s coast.

153. The lengths of the relevant coasts are therefore 531 km (Nicaragua) and 65 km (Colombia), a ratio of approximately 1:8.2 in favour of Nicaragua. The relevant coasts as determined by the Court are depicted on sketch-map No. 6 (p. 681).

154. The second aspect mentioned by the Court in terms of the role of relevant coasts in the context of the third stage of the delimitation process (see paragraph 141 above and paragraphs 190 et seq. below) will be dealt with below in paragraphs 239 to 247 in the section dealing with the disproportionality test.
4. Relevant Maritime Area

155. The Court will next consider the extent of the relevant maritime area, again in the light of its decision regarding Nicaragua’s claim to a continental shelf beyond 200 nautical miles. In these circumstances, Nicaragua maintains that the relevant area is the entire area from the Nicaraguan coast, in the west, to a line 200 nautical miles from the Nicaraguan coast and islands, in the east. For Nicaragua, the southern boundary of the relevant area is formed by the demarcation lines agreed between Colombia and Panama and Colombia and Costa Rica (see paragraph 160 below) on the basis that, since Colombia has agreed with those States that it has no title to any maritime areas to the south of those lines, they do not fall within an area of overlapping entitlements. In the north, Nicaragua contends that the relevant area extends to the boundary between Nicaragua and Honduras, which was determined by the Court in its Judgment of 8 October 2007 (Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), Judgment, I.C.J. Reports 2007 (II), p. 659). The sketch-maps of the relevant area submitted by Nicaragua also excluded the Colombia-Jamaica “Joint Regime Area” (see paragraph 160 below), although at one point, during the oral proceedings, counsel for Nicaragua suggested that “the Joint Regime Area is part of the area that [the Court is] asked to delimit”. (See sketch-map No. 4: The relevant coasts and the relevant area according to Nicaragua, p. 676.)

* *

156. Colombia maintains that the relevant area is confined to the area between the west coasts of the Colombian islands and the Nicaraguan coast (see sketch-map No. 5: The relevant coasts and the relevant area according to Colombia, p. 677) bordered in the north by the boundary between Nicaragua and Honduras and in the south by the boundary between Colombia and Costa Rica (see paragraph 160 below). Colombia considers that its sovereignty over the islands bars any claim on the part of Nicaragua to maritime spaces to the east of Colombia’s islands.

* *

157. The Court recalls that, as it observed in the Maritime Delimitation in the Black Sea case, “the legal concept of the ‘relevant area’ has to be taken into account as part of the methodology of maritime delimitation” (Maritime Delimitation in the Black Sea (Romania v. Ukraine), Judgment, I.C.J. Reports 2009, p. 99, para. 110). Depending on the configuration of the relevant coasts in the general geographical context, the relevant area may include certain maritime spaces and exclude others which are not germane to the case in hand.
158. In addition, the relevant area is pertinent when the Court comes to verify whether the line which it has drawn produces a result which is disproportionate. In this context, however, the Court has repeatedly emphasized that: "The purpose of delimitation is not to apportion equal shares of the area, nor indeed proportional shares. The test of disproportionality is not in itself a method of delimitation. It is rather a means of checking whether the delimitation line arrived at by other means, be it a geographical line or one based on the lengths of the respective coasts, will be effective." (Application for Permission to Intervene, Judgment, I.C.J. Reports 1990, p. 124, para. 77.)

159. The calculation of the relevant area does not purport to be precise but is only approximate. The object of delimitation is to achieve a delimitation that is equitable, not an equal apportionment of maritime areas. (Anita Iby, "The Law of Delimitation in the Maritime Area Subject to International Law," 1979, 9th ed. p. 111; see also North Sea Continental Shelf (Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1985, p. 45.

160. The relevant area comprises that part of the maritime space in which the potential entitlements of the parties overlap. It is neither a geographical line nor one based on the lengths of the respective coasts, but is the product of the lengths of the respective coasts and the territorial claim of the respective parties. The relevant area, therefore, is the area in which the potential entitlements of the parties overlap. (Anita Iby, "The Law of Delimitation in the Maritime Area Subject to International Law," 1979, 9th ed. p. 111.)

161. The Court recalls the statement in its 2006 Judgment on Costa Rica's Application to intervene in the present proceedings that, in a maritime dispute, "a third State's interest will, as a matter of principle, be protected by the Court. The taking into account of all the coasts and territorial entitlements of any third States that may be affected by the delimitation line will not prejudice the position of any third State regarding its entitlements in this area." (Maritime Delimitation in the Black Sea (Romania v. Ukraine), Judgment, I.C.J. Reports 2009, p. 67, para. 77.)
162. The same considerations are applicable to the determination of the relevant area in the present case. The Court notes, with respect to third party entitlements, that the agreements between Colombia, on the one hand, and Costa Rica, Jamaica and Panama, on the other, concern the legal relations between the parties to each of those agreements, they are not inter alia inter partes so far as Nicaragua is concerned. Accordingly, none of those agreements affect the determination of the relevant area in question. As explained in the previous section, the relevant area is to be determined independently of the parties' entitlements and obligations, and the Court is not required to establish the delimitation line on the basis of those agreements.

163. The Court recalls that the relevant area cannot extend beyond the area in which the entitlements of both parties overlap. It follows that, in the absence of any entitlement claim by either party, the relevant area cannot extend beyond the area in which the entitlements of both parties overlap. Accordingly, if area A has no entitlement claim, the relevant area cannot extend beyond area A. Similarly, if area B has no entitlement claim, the relevant area cannot extend beyond area B. This principle applies both to the determination of the relevant area and to the determination of the entitlements generated by maritime features.

164. The Court therefore concludes that the boundary of the relevant area in the north follows the maritime boundary between Nicaragua and Honduras, laid down in the Court's Judgment of 8 October 2007 (Territorial and Maritime Dispute in the Caribbean Sea (Nicaragua v. Honduras), Judgment, I.C.J. Reports 2007 (II), p. 659), until it reaches latitude 16 degrees north. It then continues due east until it reaches the point at which the line 200 nautical miles from Nicaragua intersects with the line 12 nautical miles from Nicaragua.

165. In the south, the boundary of the relevant area begins at the point where the line 200 nautical miles from Nicaragua intersects with the line 12 nautical miles from Nicaragua. It follows the boundary of that area, skirting a line 12 nautical miles from Nicaragua.

166. The relevant area thus drawn has a size of approximately 290,290 square km. It is depicted on sketch-map No. 7 (p. 687).

5. Entitlements Generated by Maritime Features

A. San Andrés, Providencia and Santa Catalina

167. The Court finds it convenient at this point in its analysis to consider the entitlements generated by the various maritime features in the present case.

168. The Parties agree that San Andrés, Providencia and Santa Catalina are entitled to a territorial sea, exclusive economic zone and continental shelf. In principle, that entitlement is capable of extending up to 200 nautical miles in each direction. As explained in the previous section, that entitlement overlaps with the entitlement of Colombia in the eastern part of the relevant area, provided that the entitlement overlaps with the continental shelf of Nicaragua. Therefore, the extent of the overlap must be determined in light of the relevant area as defined by the Court, and the extent of the overlap will depend on the area in which the Parties have agreed to establish the boundaries.
173. Colombia maintains that Alburquerque Cays, East-Southeast Cays, Roncador, Serrana, Serranilla and Bajo Nuevo are islands which have the same maritime entitlements as any other land territory, including an entitlement to a territorial sea of 12 nautical miles, an exclusive economic zone and a continental shelf. Colombia points to the presence on Alburquerque (North Cay), East-Southeast Cays, Roncador, Serrana and Serranilla of housing for detachments of Colombian armed forces and other facilities, on several of the islands of communication facilities and heliports, and on some of them of activities by local fishermen. It maintains that all of the islands are capable of sustaining human habitation or economic life of their own and would thus fall outside the exception in Article 121, paragraph 3.

174. So far as the entitlement of each island to a territorial sea is concerned, Colombia denies that there is any basis in law for Nicaragua’s proposal that the territorial sea surrounding each island can be restricted to 3 nautical miles. Colombia maintains that the entitlement of an island, even one which falls within the exception stated in Article 121, paragraph 3, to a territorial sea is the same as that of any other land territory and that, in accordance with the customary international law principle now codified in Article 3 of UNCLOS, a State may establish a territorial sea of up to 12 nautical miles from its territory, something which Colombia has done. According to Colombia, where the entitlement to a territorial sea of one State overlaps with the entitlement of another State to a continental shelf and exclusive economic zone, the former must always prevail, because the sovereignty of a State over its territorial sea takes priority over the rights which a State enjoys over its continental shelf and exclusive economic zone.

175. The Court begins by recalling that Serranilla and Bajo Nuevo fall outside the relevant area as defined in the preceding section of the Judgment and that it is accordingly not called upon in the present proceedings to determine the scope of their maritime entitlements. The Court also notes that, in the area within 200 nautical miles of Nicaragua’s coasts, the 200-nautical-mile entitlements projecting from San Andrés, Providencia and Santa Catalina would in any event entirely overlap any similar entitlement found to appertain to Serranilla or Bajo Nuevo.

176. With regard to Alburquerque Cays, East-Southeast Cays, Roncador, Serrana, Serranilla and Bajo Nuevo, the starting-point is that

"[i]n accordance with Article 121, paragraph 2, of the 1982 Convention on the Law of the Sea, which reflects customary international law, islands, regardless of their size, in this respect enjoy the same status, and therefore generate the same maritime rights, as other land territory" (Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), Merits, Judgment, I.C.J. Reports 2001, p. 97, para. 185).

It inevitably follows that a comparatively small island may give an entitlement to a considerable maritime area. Moreover, even an island which falls within the exception stated in Article 121, paragraph 3, of UNCLOS is entitled to a territorial sea.

177. That entitlement to a territorial sea is the same as that of any other land territory. Whatever the position might have been in the past, international law today sets the breadth of the territorial sea which the coastal State has the right to establish at 12 nautical miles. Article 3 of UNCLOS reflects the current state of customary international law on this point. The Court notes that Colombia has established a 12-nautical-mile territorial sea in respect of all of its territories (as has Nicaragua). While the territorial sea of a State may be restricted, as envisaged in Article 15 of UNCLOS, in circumstances where it overlaps with the territorial sea of another State, there is no such overlap in the present case. Instead, the overlap is between the territorial sea entitlement of Colombia derived from each island and the entitlement of Nicaragua to a continental shelf and exclusive economic zone. The nature of those two entitlements is different. In accordance with long-established principles of customary international law, a coastal State possesses sovereignty over the sea bed and water column in its territorial sea (ibid., p. 93, para. 174). By contrast, coastal States enjoy specific rights, rather than sovereignty, with respect to the continental shelf and exclusive economic zone.

178. The Court has never restricted the right of a State to establish a territorial sea of 12 nautical miles around an island on the basis of an overlap with the continental shelf and exclusive economic zone entitlements of another State. In the case concerning Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), Nicaragua argued that the four small islands which the Court had held belonged to Honduras (Bobel Cay, South Cay, Savanna Cay and Port Royal Cay) should be accorded a territorial sea of only 3 nautical miles in order to prevent them having an inequitable effect on the entitlement of Nicaragua to a continental shelf and exclusive economic zone, whereas Honduras maintained that it was entitled to a 12-nautical-mile territorial sea around each island, save where that territorial sea overlapped with the territorial sea of one of Nicaragua’s territories. The Court found for Honduras on this point:

"The Court notes that by virtue of Article 3 of UNCLOS Honduras has the right to establish the breadth of its territorial sea up to a limit of 12 nautical miles be that for its mainland or for islands under
its sovereignty. In the current proceedings Honduras claims for the four islands in question a territorial sea of 12 nautical miles. The Court thus finds that, subject to any overlap between the territorial sea around Honduran islands and the territorial sea around Nicaraguan islands in the vicinity, Bobel Cay, Savanna Cay, Port Royal Cay and South Cay shall be accorded a territorial sea of 12 nautical miles.” (Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), Judgment, I.C.J. Reports 2007 (II), p. 751, para. 302; emphasis added.)

Other tribunals have adopted the same approach. For example, the Court of Arbitration in the Dubai-Sharjah Border Arbitration (1981) (International Law Reports (ILR), Vol. 91, p. 543) rejected Dubai’s submission that the territorial sea around the island of Abu Musa should be limited to 3 nautical miles. The Court of Arbitration held that “every island, no matter how small, has its belt of territorial sea” and that the extent of that belt was 12 nautical miles except where it overlapped with the territorial sea entitlement of another State (p. 674). Most recently, ITLOS held, in the Bay of Bengal case, that

“Bangladesh has the right to a 12-nautical-mile territorial sea around St. Martin’s Island in the area where such territorial sea no longer overlaps with Myanmar’s territorial sea. A conclusion to the contrary would result in giving more weight to the sovereign rights and jurisdiction of Myanmar in its exclusive economic zone and continental shelf than to the sovereignty of Bangladesh over its territorial sea.” (Dispute concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar), Judgment of 14 March 2012, ITLOS, pp. 55-56, para. 169.)

179. Since the entitlement to a 12-nautical-mile territorial sea became established in international law, those judgments and awards in which small islands have been accorded a territorial sea of less than 12 nautical miles have invariably involved either an overlap between the territorial sea entitlements of States (e.g., the treatment accorded by the Court to the island of Qit’at Jaradah in Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), Merits, Judgment, I.C.J. Reports 2001, p. 109, para. 219) or the presence of a historic or agreed boundary (e.g., the treatment of the island of Alcatraz by the Court of Arbitration in the Guinea-Guinea Bissau Maritime Delimitation Case (1985), RIAA, Vol. XIX, p. 190 (French); ILR, Vol. 77, p. 635 (English)).

180. The Court cannot, therefore, accept Nicaragua’s submission that an equitable solution can be achieved by drawing a 3-nautical-mile enclave around each of these islands. It concludes that Roncador, Serrana, the Alburquerque Cays and East-Southeast Cays are each entitled to a territorial sea of 12 nautical miles, irrespective of whether they fall within the exception stated in Article 121, paragraph 3, of UNCLOS. Whether or not any of these islands falls within the scope of that exception is therefore relevant only to the extent that it is necessary to determine if they are entitled to a continental shelf and exclusive economic zone. In that context, the Court notes that the whole of the relevant area lies within 200 nautical miles of one or more of the islands of San Andrés, Providencia or Santa Catalina, each of which — the Parties agree — is entitled to a continental shelf and exclusive economic zone. The Court recalls that, faced with a similar situation in respect of Serpents’ Island in the Maritime Delimitation in the Black Sea case, it considered it unnecessary to determine whether that island fell within paragraph 2 or paragraph 3 of Article 121 of UNCLOS (Maritime Delimitation in the Black Sea (Romania v. Ukraine), Judgment, I.C.J. Reports 2009, pp. 122-123, para. 187). In the present case, the Court similarly concludes that it is not necessary to determine the precise status of the smaller islands, since any entitlement to maritime spaces which they might generate within the relevant area (outside the territorial sea) would entirely overlap with the entitlement to a continental shelf and exclusive economic zone generated by the islands of San Andrés, Providencia and Santa Catalina.

C. Quitasueño

181. The Court has already set out (paragraphs 27-38 above) the reasons which lead it to find that one of the features at Quitasueño, namely QS 32, is above water at high tide and thus constitutes an island within the definition embodied in Article 121, paragraph 1, of UNCLOS and that the other 53 features identified at Quitasueño are low-tide elevations. The Court must now consider what entitlement to a maritime space Colombia derives from its title to QS 32.

182. For the reasons already given (paragraphs 176-180 above), Colombia is entitled to a territorial sea of 12 nautical miles around QS 32. Moreover, in measuring that territorial sea, Colombia is entitled to rely upon the rule stated in Article 13 of UNCLOS:

“Low-tide elevations

1. A low-tide elevation is a naturally formed area of land which is surrounded by and above water at low tide but submerged at high tide. Where a low-tide elevation is situated wholly or partly at a distance not exceeding the breadth of the territorial sea from the mainland or an island, the low-water line on that elevation may be used as the baseline for measuring the breadth of the territorial sea.

2. Where a low-tide elevation is wholly situated at a distance exceeding the breadth of the territorial sea from the mainland or an island, it has no territorial sea of its own.”
not feasible. The Nicaraguan coast (including the Nicaraguan islands) and the west-facing coasts of the islands of San Andrés, Providencia and Santa Catalina, as well as the Alburquerque Cays, stand in a relationship of opposite coasts at a distance which is nowhere less than 65 nautical miles (the distance from Little Corn Island to the Alburquerque Cays). There is no difficulty in constructing a provisional line equidistant from base points on these two coasts. The question is not whether the construction of such a line is feasible but whether it is appropriate as a starting-point for the delimitation. That question arises because of the unusual circumstance that a large part of the relevant area lies to the east of the principal Colombian islands and, hence, behind the Colombian baseline from which a provisional median line would have to be measured.

196. The Court recognizes that the existence of overlapping potential entitlements to the east of the principal Colombian islands, and thus behind the base points on the Colombian side from which the provisional equidistance/median line is to be constructed, may be a relevant circumstance requiring adjustment or shifting of the provisional median line. The same is true of the considerable disparity of coastal lengths. These are factors which have to be considered in the second stage of the delimitation process; they do not justify discarding the entire methodology and substituting an approach in which the starting-point is the construction of enclaves for each island, rather than the construction of a provisional median line. The construction of a provisional median line in the method normally employed by the Court is nothing more than a first step and in no way prejudices the ultimate solution which must be designed to achieve an equitable result. As the Court said in the Maritime Delimitation in the Black Sea case:

“At this initial stage of the construction of the provisional equidistance line the Court is not yet concerned with any relevant circumstances that may obtain and the line is plotted on strictly geometrical criteria on the basis of objective data.” (Maritime Delimitation in the Black Sea (Romania v. Ukraine), Judgment, I.C.J. Reports 2009, p. 101, para. 118.)

197. The various considerations advanced by Nicaragua in support of a different methodology are factors which the Court will have to take into account in the second stage of the process, when it will consider whether those factors call for adjustment or shifting of the provisional median line and, if so, in what way. Following this approach does not preclude very substantial adjustment to, or shifting of, the provisional line in an appropriate case, nor does it preclude the use of enclaving in those areas where the use of such a technique is needed to achieve an equitable result. By contrast, the approach suggested by Nicaragua entails starting with a solution in which what Nicaragua perceives as the most relevant considerations have already been taken into account and in which the outcome is to a large extent pre-ordained.

198. The Court does not consider that the award of the Court of Arbitration in the Anglo-French Continental Shelf case calls for the Court to abandon its usual methodology. That award, which was rendered in 1977 and thus some time before the Court established the methodology which it now employs in cases of maritime delimitation, was concerned with a quite different geographical context from that in the present case, a point to which the Court will return. It began with the construction of a provisional equidistance/median line between the two mainland coasts and then enclave the Channel Islands because they were located on the “wrong” side of that line (Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic (1977), RIAA, Vol. XVIII, p. 88, para. 183; ILR, Vol. 54, p. 96). For present purposes, however, what is important is that the Court of Arbitration did not employ enclaving as an alternative methodology to the construction of a provisional equidistance/median line, but rather used it in conjunction with such a line.

199. Accordingly, the Court will proceed in the present case, in accordance with its standard method, in three stages, beginning with the construction of a provisional median line.

7. Determination of Base Points and Construction of the Provisional Median Line

200. The Court will thus begin with the construction of a provisional median line between the Nicaraguan coast and the western coasts of the relevant Colombian islands, which are opposite to the Nicaraguan coast. This task requires the Court to determine which coasts are to be taken into account and, in consequence, what base points are to be used in the construction of the line. In this connection, the Court notes that Nicaragua has not notified the Court of any base points on its coast. By contrast, Colombia has indicated on maps the location of the base points which it has used in the construction of its proposed median line (without, however, providing their co-ordinates) (see sketch-map No. 3: Delimitation claimed by Colombia, p. 673). Those base points include two base points on Alburquerque Cays, several base points on the west coast of San Andrés and Providencia, one base point on Low Cay, a small cay to the north of Santa Catalina, and several base points on Quitasueño. As the Court noted in the Maritime Delimitation in the Black Sea case:

“In . . . the delimitation of the maritime areas involving two or more States, the Court should not base itself solely on the choice of base points made by one of those Parties. The Court must, when delimiting the continental shelf and exclusive economic zones, select base points by reference to the physical geography of the relevant coasts.” (Maritime Delimitation in the Black Sea (Romania v. Ukraine), Judgment, I.C.J. Reports 2009, p. 108, para. 137.)

The Court will accordingly proceed to construct its provisional median line by reference to the base points which it considers appropriate.

201. The Court has already decided that the islands adjacent to the Nicaraguan coast are part of the relevant coast and contribute to the
baselines from which Nicaragua’s entitlements to a continental shelf and exclusive economic zone are to be measured (see paragraph 145). Since the islands are located further east than the Nicaraguan mainland, they will contribute all of the base points for the construction of the provisional median line. For that purpose, the Court will use base points located on Edinburgh Reef, Muerto Cay, Miskitos Cays, Ned Thomas Cay, Roca Tyra, Little Corn Island and Great Corn Island.

202. So far as the Colombian coast is concerned, the Court considers that Quitasuño should not contribute to the construction of the provisional median line. The part of Quitasuño which is undoubtedly above water at high tide is a minuscule feature, barely 1 square m in dimension. When placing base points on very small maritime features would distort the relevant geography, it is appropriate to disregard them in the construction of a provisional median line. In the Maritime Delimitation in the Black Sea case, for example, the Court held that it was inappropriate to select any base point on Serpents’ Island (which, at 0.17 square km was very much larger than the part of Quitasuño which is above water at high tide), because it lay alone and at a distance of some 20 nautical miles from the mainland coast of Ukraine, and its use as a part of the relevant coast “would amount to grafting an extraneous element onto Ukraine’s coastline; the consequence would be a judicial refashioning of geography, which neither the law nor practice of maritime delimitation authorizes” (Maritime Delimitation in the Black Sea (Romania v. Ukraine), Judgment, I.C.J. Reports 2009, p. 110, para. 149). These considerations apply with even greater force to Quitasuño. In addition to being a tiny feature, it is 38 nautical miles from Santa Catalina and its use in the construction of the provisional median line would push that line significantly closer to Nicaragua.

Colombia did not place a base point upon Serrana. The Court’s decision not to place a base point upon Quitasuño means, however, that it must consider whether one should be placed upon Serrana. Although larger than Quitasuño, Serrana is also a comparatively small feature, whose considerable distance from any of the other Colombian islands means that placing a base point upon it would have a marked effect upon the course of the provisional median line which would be out of all proportion to its size and importance. In the Court’s view, no base point should be placed on Serrana.

The Court also considers that there should be no base point on Low Cay, a small uninhabited feature near Santa Catalina.

203. The base points on the Colombian side will, therefore, be located on Santa Catalina, Providencia and San Andrés islands and on Alburquerque Cays.

204. The provisional median line constructed from these two sets of base points is, therefore, controlled in the north by the Nicaraguan base points on Edinburgh Reef, Muerto Cay and Miskitos Cays and Colom-
Para. 499). The Arbitration Tribunal in the Barbados/Trinidad and Tobago case referred to proportionality being used as "a final check upon the equity of a tentative delimitation to ensure that the result is not tainted by some form of gross disproportion" (Tribunal Award of 11 April 2006, RIAA, Vol. XXVII, p. 214, para. 522; emphasis added). The Tribunal in that case went on to state that this process "does not require the drawing of a delimitation line in a manner that is mathematically determined by the exact ratio of the lengths of the relevant coastlines. Although mathematically correct, Delimitation usually requires by reference only to any mathematical formula but is a matter which can be answered only in the light of all the circumstances of the particular case." (RIAA, Vol. XXVII, p. 235, para. 328; ILR, Vol. 139, p. 547.)

242. The Court thus considers that its task, at this third stage, is not to attempt to achieve even an approximate correlation between the ratio of the relevant coastlines and the length of the boundaries drawn. Rather, it is to consider the fairness of the division of the area in question, taking into account all the circumstances, including the relative lengths of the Parties' relevant coasts and the relevant area as a whole. The degree of adjustment called for by any given disparity in the relevant lengths of the coastlines is a matter for the Court's judgment in the light of all the circumstances of the particular case. (RIAA, Vol. XXVII, p. 255, para. 328; ILR, Vol. 139, para. 547.)

243. Application of the adjusted line described in the previous section of the Judgment has the effect of dividing the relevant area between the Parties in a ratio of approximately 1:3.44 in favour of Nicaragua. The Court concludes that, taking account of all the circumstances of the present case, this disproportion is not such as to create an inequitable result.

VI. Nicaragua's Request for a Declaration

248. In addition to its claims regarding a maritime boundary, Nicaragua's Application reserved "the right to claim compensation for elements of unjust enrichment consequent upon Colombia's unjust enrichment, consequent upon Colombia's possession of the islands of San Andres and Providencia as well as the rights and maritime spaces of Nicaragua's national territory and vessels licensed by Nicaragua. In its final sub-

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176. The Court thus concludes that the starting-point of the maritime boundary between the Parties is the intersection of the parallel of latitude passing through Boundary Marker No. 1 with the low-water line.

VI. THE COURSE OF THE MARITIME BOUNDARY FROM POINT A

177. Having concluded that an agreed single maritime boundary exists between the Parties, and that that boundary starts at the intersection of the parallel of latitude passing through Boundary Marker No. 1 with the low-water line, and continues for 80 nautical miles along that parallel, the Court will now determine the course of the maritime boundary from that point on.

178. While Chile has signed and ratified UNCLOS, Peru is not a party to this instrument. Both Parties claim 200-nautical-mile maritime entitlements. Neither Party claims an extended continental shelf in the area with which this case is concerned. Chile’s claim consists of a 12-nautical-mile territorial sea and an exclusive economic zone and continental shelf extending to 200 nautical miles from the coast. Peru claims a 200-nautical-mile “maritime domain”. Peru’s Agent formally declared on behalf of his Government that “[t]he term ‘maritime domain’ used in [Peru’s] Constitution is applied in a manner consistent with the maritime zones set out in the 1982 Convention”. The Court takes note of this declaration which expresses a formal undertaking by Peru.

179. The Court proceeds on the basis of the provisions of Articles 74, paragraph 1, and 83, paragraph 1, of UNCLOS which, as the Court has recognized, reflect customary international law (Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), Merits, Judgment, I.C.J. Reports 2001, p. 91, para. 167; Territorial and Maritime Dispute (Nicaragua v. Colombia), Judgment, I.C.J. Reports 2012 (II), p. 674, para. 139). The texts of these provisions are identical, the only difference being that Article 74 refers to the exclusive economic zone and Article 83 to the continental shelf. They read as follows:

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

180. The methodology which the Court usually employs in seeking an equitable solution involves three stages. In the first, it constructs a provisional equidistance line unless there are compelling reasons preventing that. At the second stage, it considers whether there are relevant circumstances which may call for an adjustment of that line to achieve an equitable result. At the third stage, the Court conducts a disproportionality test in which it assesses whether the effect of the line, as adjusted, is such that the Parties’ respective shares of the relevant area are markedly disproportionate to the lengths of their relevant coasts (Maritime Delimitation in the Black Sea (Romania v. Ukraine), Judgment, I.C.J. Reports 2009, pp. 101-103, paras. 115-122; Territorial and Maritime Dispute (Nicaragua v. Colombia), Judgment, I.C.J. Reports 2012 (II), pp. 695-696, paras. 190-193).
181. In the present case, Peru proposed that the three-step approach be followed in the delimitation of the maritime boundary between the two States. Peru makes the three following points. First, the relevant coasts and the relevant area within which the delimitation is to be effected are circumscribed by the coasts of each Party lying within 200 nautical miles of the starting-point of their land boundary. The construction of a provisional equidistance line within that area is a straightforward exercise. Secondly, there are no special circumstances calling for an adjustment of the provisional equidistance line and it therefore represents an equitable maritime delimitation: the resulting line effects an equal division of the Parties’ overlapping maritime entitlements and does not result in any undue encroachment on the projections of their respective coasts or any cut-off effect. Thirdly, the application of the element of proportionality as an ex post facto test confirms the equitable nature of the equidistance line.

182. Chile advanced no arguments on this matter. Its position throughout the proceedings was that the Parties had already delimited the whole maritime area in dispute, by agreement, in 1952, and that, accordingly, no maritime delimitation should be performed by the Court.

183. In the present case, the delimitation of the maritime area must begin at the endpoint of the agreed maritime boundary which the Court has determined is 80 nautical miles long (Point A). In practice, a number of delimitations begin not at the low-water line but at a point further seaward, as a result of a pre-existing agreement between the parties (Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America), Judgment, I.C.J. Reports 1984, pp. 332-333, para. 212; Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002, pp. 431-432, paras. 268-269; Maritime Delimitation in the Black Sea (Romania v. Ukraine), Judgment, I.C.J. Reports 2009, p. 130, para. 218). The situation the Court faces is, however, unusual in that the starting-point for the delimitation in this case is much further from the coast: 80 nautical miles from the closest point on the Chilean coast and about 45 nautical miles from the closest point on the Peruvian coast.

184. The usual methodology applied by the Court has the aim of achieving an equitable solution. In terms of that methodology, the Court now proceeds to the construction of a provisional equidistance line which starts at the endpoint of the existing maritime boundary (Point A).

185. In order to construct such a line, the Court first selects appropriate base points. In view of the location of Point A at a distance of 80 nautical miles from the coast along the parallel, the nearest initial base point on the Chilean coast will be situated near the starting-point of the maritime boundary between Chile and Peru, and on the Peruvian coast at a point where the arc of a circle with an 80-nautical-mile radius from Point A intersects with the Peruvian coast. For the purpose of constructing a provisional equidistance line, only those points on the Peruvian coast which are more than 80 nautical miles from Point A can be matched with points at an equivalent distance on the Chilean coast. The arc of a circle indicated on sketch-map No. 3 is used to identify the first Peruvian base point. Further base points for the construction of the provisional
equidistance line have been selected as the most seaward coastal points “situated nearest to the area to be delimited” (Maritime Delimitation in the Black Sea (Romania v. Ukraine), Judgment, I.C.J. Reports 2009, p. 101, para. 117). These base points are situated to the north-west of the initial base point on the Peruvian coast and south of the initial base point on the Chilean coast. No points on the Peruvian coast which lie to the south-east of that initial point on that coast can be matched with points on the Chilean coast, as they are all situated less than 80 nautical miles from Point A (see sketch-map No. 3: Construction of the provisional equidistance line).

186. The provisional equidistance line thus constructed runs in a general south-west direction, almost in a straight line, reflecting the smooth character of the two coasts, until it reaches the 200-nautical-mile limit measured from the Chilean baselines (Point B). Seaward of this point the 200-nautical-mile projections of the Parties’ coasts no longer overlap.

187. Before continuing the application of the usual methodology, the Court recalls that, in its second submission, Peru requested the Court to adjudge and declare that, beyond the point where the common maritime boundary ends, Peru is entitled to exercise sovereign rights over a maritime area lying out to a distance of 200 nautical miles from its baselines (see paragraphs 14 to 15 above). This claim is in relation to the area in a darker shade of blue in sketch-map No. 2 (see paragraph 22 above).

188. Peru contends that, in the maritime area beyond 200 nautical miles from the Chilean coast but within 200 nautical miles of its own coast, it has the rights which are accorded to a coastal State by general international law and that Chile has no such rights.

Chile in response contends that the 1952 Santiago Declaration establishes a single lateral limit for all maritime areas of its States parties whether actual or prospective, invoking the reference in paragraph II of the Declaration to “a minimum distance of 200 nautical miles”.

189. Since the Court has already concluded that the agreed boundary line along the parallel of latitude ends at 80 nautical miles from the coast, the foundation for the Chilean argument does not exist. Moreover, since the Court has decided that it will proceed with the delimitation of the overlapping maritime entitlements of the Parties by drawing an equidistance line, Peru’s second submission has become moot and the Court need not rule on it.

190. After Point B (see paragraph 186 above), the 200-nautical-mile limits of the Parties’ maritime entitlements delimited on the basis of equidistance no longer overlap. The Court observes that, from Point B, the 200-nautical-mile limit of Chile’s maritime entitlement runs in a generally southward direction. The final segment of the maritime boundary therefore proceeds from Point B to Point C, where the 200-nautical-mile limits of the Parties’ maritime entitlements intersect.