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ARTICLES

The Tuniso-Libyan Continental Shelf Case

by Douglas C. Hodgson*

I. INTRODUCTION

The 1982 Judgment of the International Court of Justice in the *Case Concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*¹ (Judgment) is only the second continental shelf boundary dispute to have been settled by judicial means since that Court laid down the principles of customary international law governing continental shelf delimitation in the *North Sea Continental Shelf Cases*.² In its opinion, the Court has traced the historic evolution of the continental shelf concept from the Truman Proclamation of 1945³ through the 1958 Geneva Convention on the Continental Shelf,⁴ the 1969 *North Sea Continental Shelf Cases*, and the 1977 *Franco-British Arbitration on the Delimitation of the Continental Shelf*⁵ (*Franco-British Arbitration*), up to the

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¹ *Concerning the Continental Shelf (Tunisia v. Libyan Arab Jamahiriya)*, 1982 I.C.J. 18 (Judgment of Feb. 24, 1982). The Court was composed of the following judges: Acting President Elias; Judges Lachs, Morozov, Nagendra Singh, Mosler, Ago, Sette-Camara, El-Khani, Schwebel, Forster, Gros and Oda; and Judges *ad hoc* Jiménez 'de Arécha and Evensen.

² *North Sea Continental Shelf (W. Ger. v. Den.; W. Ger. v. Neth.)*, 1969 I.C.J. 3 (Judgment of Feb. 20, 1969).

³ Proclamation No. 2667, 10 Fed. Reg. 12,303 (1945).

⁴ Convention on the Continental Shelf, Apr. 29, 1958, 15 U.S.T. 471, T.I.A.S. No. 5578, 499 U.N.T.S. 311 [hereinafter cited as the 1958 Convention].

⁵ Arbitration Between the United Kingdom of Great Britain and Northern Ireland and the French Republic on the Delimitation of the Continental Shelf (U.K. v. Fr.), reprinted in 18 I.L.M. 397 (1979) (Decision of June 30, 1977) [hereinafter cited as the 1977 *Franco-British Arbitration*]. See Bowett, *The Arbitration Between the United Kingdom and France Concerning the Continental Shelf Boundary in the English Channel and South-Western Approaches*, 49 BRIT. Y.B. INT'L L. 1 (1978); Colson, *The United Kingdom-France Continental Shelf Arbitration*, 72 AM. J. INT'L L. 95 (1978) [hereinafter cited as Colson,

Draft Convention of the Third Law of the Sea Conference,⁶ as well as the concept's evolution in state practice.⁷ Since the Court has further developed some of the principles and rules which it identified fifteen years ago as relevant to continental shelf delimitation, its recent decision should be of special interest to jurists and governments concerned with maritime delimitations of this nature.

The present case is primarily concerned with lateral delimitation of the continental shelf between the adjacent coastal states of Tunisia and Libya.⁸ This paper will discuss the more salient features of the Judgment as well as provide an analysis of its shortcomings.

II. BACKGROUND

Tunisia and Libya had never succeeded in concluding a formal agreement delimiting any part of the continental shelf situate off their respective coasts (or any other maritime boundary for that matter). It is appropriate at this point to briefly describe the general area of continental shelf the Court was concerned with in its opinion and, for this purpose, three maps appearing in it⁹ have been incorporated within the text of this paper. Both Tunisia and Libya are situate on the northern coast of Africa and front on the Mediterranean Sea. As can be seen in Map 1, Libya lies to the east and southeast of Tunisia and the Court was of the view that the area in which a continental shelf delimitation would have to be effected is "that lying, very broadly, to the north of the coast on each side of Ras Ajdir [being the point on the coast at which the land frontier between the two parties commences], bounded on the west by part of the Tunisian coast, but unconfined on the east by any visible feature or agreed delimitation line."¹⁰ With respect to seaward limits, neither party had concluded a delimitation agreement with Malta,¹¹ although Tunisia

U.K.-France Arbitration]; Colson, *The United Kingdom-France Continental Shelf Arbitration: Interpretive Decision of March 1978*, 73 AM. J. INT'L L. 112 (1979) [hereinafter cited as Colson, *Interpretive Decision*].

⁶ Draft Convention on the Law of the Sea, Informal Text of Aug. 1980, U.N. Doc. A/CONF. 62/WP. 10/Rev. 3, reprinted in 19 I.L.M. 1129 (1980) [hereinafter cited as Draft Convention].

⁷ See, e.g., *infra* notes 124-27 and accompanying text.

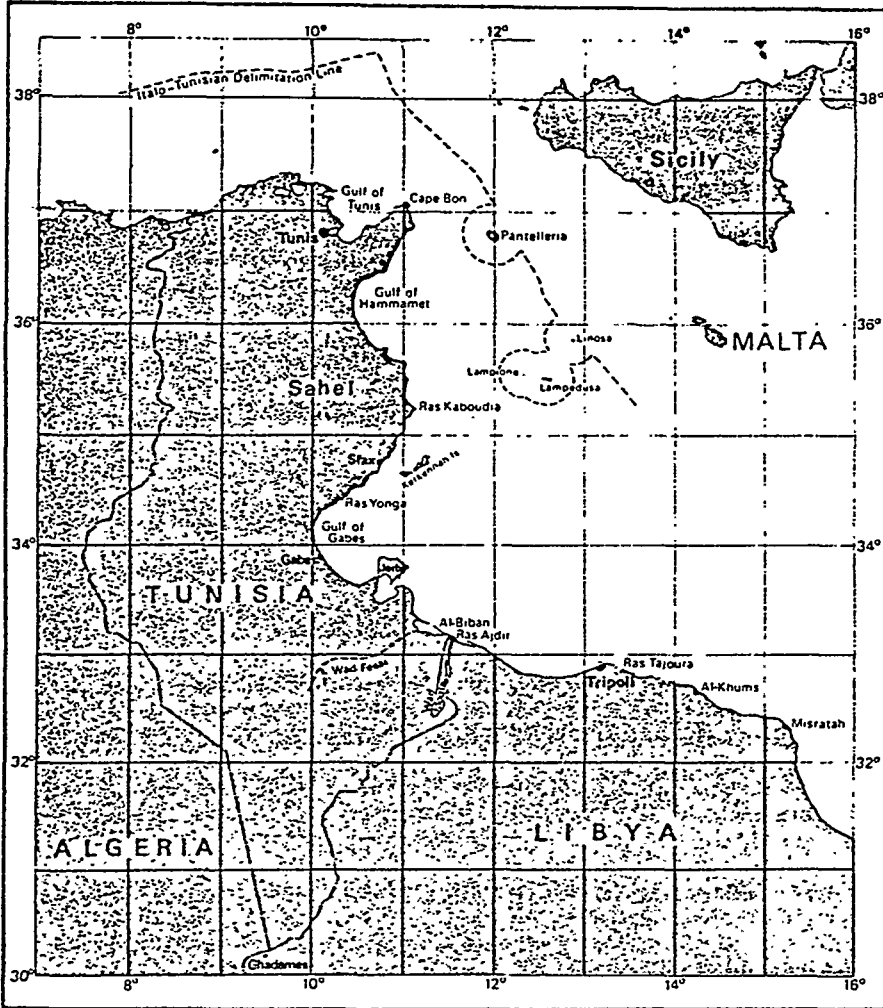
⁸ Grisel, *The Lateral Boundaries of the Continental Shelf*, 64 AM. J. INT'L L. 562 (1970); Hodgson, *The Delimitation of Maritime Boundaries Between Opposite and Adjacent States Through the Economic Zone and the Continental Shelf* (paper delivered at the Law of the Sea Institute Annual Meeting, Mexico City, 1979).

⁹ 1982 I.C.J. at 36, 81 and 90.

¹⁰ *Id.* at 35, para. 20.

¹¹ A Special Agreement was entered into by Libya and Malta on May 23, 1976 and entered into force on Mar. 20, 1982. Special Agreement for the Submission to the International Court of Justice of a Continental Shelf Dispute (Libya v. Malta), reprinted in 21

had concluded such an agreement with Italy in 1971 primarily on a median-line basis.¹² The course of the Italo-Tunisian Delimitation Line affecting the delimitation of the continental shelf between the two states is reproduced in Map 1.



Map No. 1

I.L.M. 971 (1982) (notified to the I.C.J. on July 26, 1982). Article I requests the I.C.J. to decide what principles and rules of international law are applicable to the delimitation of the areas of the continental shelf which appertain respectively to Libya and Malta, and how such principles and rules can be applied by the two parties in practice in order that they may, without difficulty, delimit such areas by agreement. By order of July 27, 1982, the I.C.J. fixed April 26, 1983, as the time limit for the filing of Memorials by Libya and Malta.

¹² 1982 I.C.J. at 35, para. 20.

Notwithstanding the absence of mutually agreed maritime boundaries, both Tunisia and Libya had granted concessions pursuant to domestic legislation for the purposes of exploration and exploitation in respect of shelf areas regarded by each of them as appertaining to itself. Tunisia granted its first offshore concession in 1964¹³ while Libya granted its first such concession in 1968.¹⁴ A considerable amount of drilling took place subsequently which resulted in several productive wells. A concession granted by Tunisia in 1972 was expressed to be bounded on the southeast by part of the equidistance line pending an agreement between Tunisia and Libya defining the limit of their respective jurisdictions over the continental shelf.¹⁵ In 1974, Libya granted a concession the western boundary of which was constituted by a line drawn from Ras Ajdir where the land boundary commences at an inclination of approximately 26° to the meridian which corresponded roughly to a perpendicular drawn seawards from the coast at Ras Ajdir.¹⁶ This Libyan concession boundary coincided with the eastern boundary of a 1966 Tunisian concession.¹⁷ However, since the 26° line lay to the west of the equidistance line, an overlapping of claims resulted. In the wake of protests in 1976 by Tunisia and Libya at each other's activities in the disputed area, a Special Agreement was signed by both states at Tunis on June 10, 1977, which referred the matter to the International Court of Justice for settlement and established the scope of the Court's task.¹⁸

Pursuant to article 1 of the Special Agreement, the Court's first assigned task was to state the "principles and rules of international law which may be applied for the delimitation of the area of the continental shelf" appertaining to each of the two parties respectively.¹⁹ Article 1 fur-

¹³ *Id.* at 35, para. 21.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* at 37, para. 21.

¹⁷ *Id.* at 71, para. 96.

¹⁸ Special Agreement Between the Republic of Tunisia and the Socialist People's Libyan Arab Jamahiriya for the Submission of the Question of the Continental Shelf Between the Two Countries to the International Court of Justice, June 10, 1977, Tunisia-Libya, reprinted in 18 I.L.M. 49 (1979) (notified to the I.C.J. on Dec. 1, 1978) [hereinafter cited as the Special Agreement].

¹⁹ *Id.* at 51. The full text of article 1 of the Special Agreement is as follows:

The Court is requested to render its Judgment in the following matter:

What are the principles and rules of international law which may be applied for the delimitation of the area of the continental shelf appertaining to the Republic of Tunisia and to the area of the continental shelf appertaining to the Socialist People's Libyan Arab Jamahiriya and, in rendering its decision, to take account of equitable principles and the relevant circumstances which characterize the area, as well as the recent trends in the Third Conference on the Law of the Sea.

Also, the Court is further requested to specify precisely the practical way in

thermore expressly called upon the Court in rendering its decision to take account of "equitable principles and the relevant circumstances which characterize the area, as well as the recent trends in the Third [United Nations] Conference on the Law of the Sea."²⁰ Although the first two factors, "equitable principles" and "relevant circumstances which characterize the area," appeared in the *North Sea Continental Shelf Cases* in which the Court held that international law required delimitation to be effected "in accordance with equitable principles, and taking account of all the relevant circumstances,"²¹ the third factor, "the new accepted trends" in the Third United Nations Conference on the Law of the Sea, introduced an additional criterion for decision. A further provision in article 1 of the Special Agreement requested the Court to clarify the "practical way in which the aforesaid principles and rules apply" to the delimitation to enable the experts of both parties to delimit the relevant areas without any difficulties.²² Tunisia and Libya thereby vested in the Court the right to choose the delimitation method(s) to be applied. In this respect, the Court's assigned task under the Special Agreement would appear to differ from its role in the *North Sea Continental Shelf Cases* and the Court of Arbitration's mandate in the 1977 *Franco-British Arbitration*. In the *North Sea Continental Shelf Cases*, the parties expressly reserved to themselves the right to choose the delimitation method(s), calling on the Court only to indicate what principles and rules of international law were applicable in the light of which the delimitation method could eventually be chosen.²³ In the *Franco-British Arbitration*, however, the Court of Arbitration was not asked to declare the legal principles relative to the delimitation but to decide the actual course of the continental shelf boundary and to actually draw the boundary on a chart.²⁴ Pursuant to other articles contained in the Special Agreement, Tunisia and Libya bound themselves to comply with the Court's Judgment and to put into effect the relevant principles and rules indicated by the Court through the eventual conclusion of a bilateral treaty.²⁵

which the aforesaid principles and rules apply in this particular situation so as to enable the experts of the two countries to delimit those areas without any difficulties.

²⁰ *Id.*

²¹ 1969 I.C.J. at 53, para. 101(c)(1).

²² See Special Agreement, *supra* note 18, at 51.

²³ 1969 I.C.J. at 13, para. 2.

²⁴ 1977 *Franco-British Arbitration*, 18 I.L.M. at 408, para. 1.

²⁵ Special Agreement, *supra* note 18, at 51. Articles 2 and 3 of the Special Agreement provide:

Article 2

Immediately following the delivery of the judgment by the Court, the two Parties shall meet to put into effect these principles and rules to determine the line of delimitation of the area of the continental shelf appertaining to each of the

III. THE SUBMISSIONS

Having set the stage with a brief discussion of the nature and history of the dispute and of the Special Agreement, the basic submissions presented by each party to the Court must be analyzed.²⁶ Other submissions not presented under this rubric will appear later in this paper in their proper context.

Both parties emphasized the importance of natural prolongation in their respective submissions, but maintained opposing viewpoints in several important areas. In its Memorial, Tunisia urged that the delimitation must not encroach upon the area within which it possessed historic rights.²⁷ Libya, on the other hand, took the position in its Counter-Memorial that the fishing rights claimed by Tunisia as historic rights were in any event irrelevant to the delimitation.²⁸ Tunisia further maintained that the delimitation should take account of all the relevant circumstances which characterize the area. In particular, Tunisia argued that their eastern coast is marked by the presence of a body of islands, islets and low-tide elevations which form a constituent part of the Tunisian littoral (reminiscent of the "skjaergaard" along the coasts of Norway referred to in the 1951 *Anglo-Norwegian Fisheries Case*²⁹). The Tunisian submissions also focused on the configurations of the coasts of the two parties, including the irregularities of the Tunisian coast caused by numerous concavities and convexities.³⁰ Tunisia relied on physical geography to support its contention that the natural prolongation of Tunisia is oriented west-east while that of Libya is southwest-northeast.³¹

Libya, however, submitted that the direction of natural prolongation is determined primarily by the geological relationship of the continental shelf to the continent, and not by the accidental direction of any part of the coast.³² Moreover, Libya regarded the continental shelf off the coast

two countries, with a view to the conclusion of a treaty in this matter.

Article 3

In the event that the agreement mentioned in Article 2 is not reached within a period of three months, renewable by mutual agreement, from the date of delivery of the Court's Judgment, the two Parties shall together go back to the Court and request such explanations or clarifications as may facilitate the task of the two delegations, to arrive at the line separating the two areas of the continental shelf, and the two Parties shall comply with the judgment of the Court and with its explanations and clarifications.

²⁶ See 1982 I.C.J. at 26-34, paras. 15 and 16 for a summary of the submissions of the two parties in the course of both the written and oral proceedings.

²⁷ *Id.* at 26, para. 15.

²⁸ *Id.* at 31, para. 15.

²⁹ Fisheries Case (U.K. v. Nor.), 1951 I.C.J. 116 (Judgment of Dec. 18, 1951).

³⁰ 1982 I.C.J. at 26, para. 15.

³¹ *Id.*

³² *Id.* at 29, para. 15.

of North Africa as a prolongation to the north of the African continent and was therefore of the view that the delimitation method must reflect such northward prolongation.³³ Another noteworthy aspect of the Libyan Memorial was the Libyan effort to discredit the appropriateness of the equidistance method in the present case. Libya submitted: (1) that the parties were not obligated to apply the equidistance method either by treaty or customary international law; (2) that the equidistance method is not necessarily equitable since its application under particular circumstances may lead to inequitable results; and, (3) that, in the present case, given the particular geographical configuration, the equidistance method would result in an inequitable continental shelf delimitation.³⁴

IV. THE AREA TO BE DELIMITED

To facilitate a better understanding of the Court's reasoning, it will be useful to briefly set out, with reference to Map 1, a description of the geography of the area deemed by the Court to be relevant for the purposes of the delimitation.

As can be seen in Map 1, Ras Ajdir marks the point at which the land frontier between Libya and Tunisia commences on the coast. Following the Tuniso-Libyan littoral in a westerly direction, the coast runs generally in a northwesterly direction for some distance on both sides of Ras Ajdir. After passing the island of Jerba which forms a convexity of the Tunisian littoral, one enters the concavity of the Gulf of Gabes which is followed by a section of coastline running in a northeasterly direction to Ras Kaboudia. These irregularities characterizing the Tunisian coast, resulting from a series of concavities and convexities and in numerous changes of direction compared with the regularity of the Libyan coast, represent a prominent geographical feature of the area under consideration.

The Court resolved that for the purposes of the delimitation of the continental shelf between the parties, only a portion of the coast of each party could be considered relevant. The Court found that Ras Kaboudia, located on the Tunisian coast, and Ras Tajoura, on the Libyan coast (both of which are marked on Map 1), represent points on the Tuniso-Libyan littoral "beyond which the coast in question no longer has a relationship with the coast of the other Party relevant for submarine delimitation."³⁵ In other words, those sea-bed areas off the coasts beyond those points cannot be considered to overlap with each other and therefore cannot be deemed relevant to the delimitation. With regard to determining

³³ *Id.*

³⁴ *Id.* at 29-30, para. 15.

³⁵ *Id.* at 61-62, para. 75.

seaward boundaries of the relevant delimitation area, the Court defined them solely for the purpose of employing the criterion of proportionality. The decision is without prejudice to the rights of other states, such as Malta, which may be asserted in the northeastern part of that area. In the opinion of the Court, the parallel of latitude passing through Ras Kaboudia on the Tunisian coast and the meridian of longitude passing through Ras Tajoura on the Libyan coast together constitute convenient and appropriate seaward limits of the respective shelf areas to be compared under the proportionality criterion.³⁶

V. THE PRINCIPLES AND RULES OF INTERNATIONAL LAW APPLICABLE TO THE DELIMITATION

Under article 1 of the Special Agreement, the Court's first task was to indicate the principles and rules of international law applicable for the delimitation of the area of the continental shelf appertaining to each of the two parties respectively.³⁷ The submissions of both parties as well as the Special Agreement reveal a substantial measure of agreement between them as to the principles and rules of international law applicable to a delimitation of a continental shelf appertaining to two adjacent states when, as is the case here, the states are not parties to the 1958 Geneva Convention on the Continental Shelf.³⁸ For both states, the Court's 1969 Judgment in the *North Sea Continental Shelf Cases* represents the *locus classicus* for the applicable principles and rules. Both parties considered that, as in those cases, the present delimitation had 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 other³⁹

A. *The Role of Natural Prolongation*

Although the natural prolongation concept was considered controlling by both parties, each differed in their argument before the Court as to how the concept should be applied to the particular circumstances prevailing in the relevant delimitation area. Libya contended that natural

³⁶ *Id.* at 91, para. 130.

³⁷ Special Agreement, *supra* note 18, at 51.

³⁸ 1958 Convention, *supra* note 4.

³⁹ 1969 I.C.J. at 53, para. 101(c)(1).

prolongation is determinable as a matter of scientific fact by the application of geological criteria and that equitable principles, therefore, are irrelevant in identifying appurtenant continental shelf.⁴⁰ Tunisia countered by maintaining that the satisfaction of equitable principles in a particular geographical situation is part of the process of identifying the natural prolongation.⁴¹ The Court rejected both arguments, pointing out that while the natural prolongation concept indeed defined the location of the shelf rights of the coastal state, the concept was not necessarily sufficient to determine the precise extent of the rights of one state in an adjacency situation with another state.⁴² In other words, the appurtenance of a shelf area to a coastal state is one thing, while the determination of its limits is quite another. Moreover, it is not possible in all cases to make a precise determination as to what constitutes each party's natural prolongation. The Court was of the view that:

It would be a mistake to suppose that it will in all cases, or even in the majority of them, be possible or appropriate to establish that the natural prolongation of one State extends, in relation to the natural prolongation of another State, just so far and no farther, so that the two prolongations meet along an easily defined line.⁴³

The Court's rejoinder to Tunisia's contention was that the satisfaction of equitable principles is of "cardinal importance" in the delimitation process and that, although identification of natural prolongation may, in certain geographical circumstances, have an important role to play in defining an equitable delimitation, the two considerations must not be placed on a "plane of equality."⁴⁴

B. Third United Nations Conference on the Law of the Sea

In fulfillment of its duty laid down by article 1 of the Special Agreement to take account of the new accepted trends in the Third United Nations Conference on the Law of the Sea (UNCLOS III) in rendering its decision,⁴⁵ the Court addressed itself to the question of whether the principles and rules of international law applicable to the delimitation had been affected by such trends. The Court was primarily concerned with the concept of natural prolongation. The parties themselves considered the provisions of the Draft Convention on the Law of the Sea, particularly articles 76 and 83, as possibly incorporating "new accepted

⁴⁰ 1982 I.C.J. at 29, para. 15.

⁴¹ *Id.* at 44, para. 39.

⁴² *Id.* at 47, para. 44.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ Special Agreement, *supra* note 18, at 51.

trends.”⁴⁶ The Court considered that, in so far as the definition of the continental shelf in the legal context contained in paragraph 1 of article 76 repeats the term “natural prolongation,” no new element has been introduced.⁴⁷ Paragraph 1 of article 76 does provide for a second basis of the legal title of a coastal state to continental shelf rights—the distance of 200 nautical miles from the territorial sea baselines in the case of shelf-poor coastal states⁴⁸—which departs from the principle that natural prolongation is the exclusive basis of such title. However, the Court reasoned that since the parties had relied on natural prolongation and had failed to advance an argument based on the “distance” basis of title, article 76 could not be construed to provide any new delimitation criterion in the instant case.⁴⁹ With regard to paragraph 1 of article 83 dealing with shelf delimitation between opposite or adjacent coastal states, the Court noted the absence of specific criteria which could guide such states in the striving for an “equitable solution.”⁵⁰ The Court’s analysis, therefore, dismissed the “new accepted trends” in the context of UNCLOS III as a ground for decision.

C. *The Significance of Sea-Bed Features*

The Court next considered the geological and physical features of the sea-bed area deemed relevant for the delimitation, particularly from the standpoint of their potential effect in determining a division between the natural prolongations of Tunisia and Libya. Briefly, this sea-bed area was acknowledged to belong to a broader submarine region referred to by the parties as the Pelagian Block.⁵¹ Both parties agreed in the course of the

⁴⁶ Draft Convention, *supra* note 6, at 1131. Article 76, paragraph 1 provides: 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.

Id. at 1172. Article 83, paragraph 1 provides:

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.

Id. at 1174.

⁴⁷ 1982 I.C.J. at 48, para. 48.

⁴⁸ Draft Convention, *supra* note 46.

⁴⁹ 1982 I.C.J. at 48-49, para. 48.

⁵⁰ For the discussion by the Court of the UNCLOS III trends, see *id.* at 48-49, paras. 48-50.

⁵¹ *Id.* at 41, para. 32.

proceedings that the Pelagian Block encompassed land areas in eastern Tunisia and northern Libya.⁵² One of the submissions advanced by Libya emphasized that geology confirmed the northward natural prolongation of the African landmass under the sea and that the delimitation line must therefore reflect this northward prolongation.⁵³ Despite the considerable evidence adduced by geologists on both sides, however, the Court concluded that it is not possible for legal purposes to delimit the respective shelf areas of the two parties "by reference solely or mainly to geological considerations."⁵⁴ As a result, the Libyan contention respecting the geologically determined northward prolongation was not upheld by the Court.

Tunisia, on the other hand, urged that the natural prolongation of Tunisia is oriented west-east while that of Libya is southwest-northeast.⁵⁵ To support this contention, Tunisia pointed to a number of features as having possible relevance to the identification of the respective natural prolongations of the two parties. The Tripolitanian Furrow, a submarine valley prolonging the Gulf of Gabes in an easterly direction opposite the Libyan coast,⁵⁶ was put forward by Tunisia as a possible natural submarine boundary between its shelf area and that of Libya.⁵⁷ In the view of Tunisia, Libya's natural prolongation extended in a northeasterly direction only as far as the Furrow.⁵⁸ Libya sought in argument to minimize the importance of such features relied on by Tunisia and claimed that the shelf area within the Pelagian Block is an area of unbroken unity.⁵⁹ As for the features relied on by Tunisia, the Court found that the only feature of consequence was the Tripolitanian Furrow which "does not display any really marked relief until it has run considerably further to the east than the area relevant to the delimitation."⁶⁰ None of the features relied on by Tunisia, then, could be regarded as interrupting the continuity of the seabed of the Pelagian Block as the common natural prolongation of the territories of both parties so as to constitute a natural submarine boundary. In other words, two separate continental shelves or natural prolongations could not be discerned from the physical structure of the sea-bed of the Pelagian Block. By virtue of this finding that Libya and Tunisia both derive continental shelf title from a single, common natural prolongation/continental shelf constituted by the the Pelagian Block, the determina-

⁵² *Id.*

⁵³ *Id.* at 29 and 31, para. 15. *See also id.* at 52, para. 57.

⁵⁴ *Id.* at 53, para. 61.

⁵⁵ *Id.* at 26 and 28, para. 15.

⁵⁶ *Id.* at 41, para. 32.

⁵⁷ *Id.* at 56, para. 64.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* at 57, para. 66.

tion of the extent of the shelf areas appertaining to each party would have to be made by other criteria.

In sum, the principles and rules of international law deemed by the Court applicable for the delimitation are as follows:

(1) The delimitation is to be effected in accordance with equitable principles, and taking account of all relevant circumstances;

(2) The area relevant for the delimitation constitutes a single continental shelf as the natural prolongation of the land territory of both Parties, so that in the present case, no criterion for delimitation of shelf areas can be derived from the principle of natural prolongation as such; [and],

(3) In the particular geographical circumstances of the present case, the physical structure of the continental shelf areas is not such as to determine an equitable line of delimitation.⁶¹

VI. EQUITABLE PRINCIPLES

In reaching its decision, the Court was bound to consider the question of the equitable principles applicable to the delimitation pursuant to both the Special Agreement (Article 1) and customary international law as laid down in the *North Sea Continental Shelf Cases*.⁶² The Court engaged in an interesting discourse on what it regarded as the role of equitable principles. For Tunisia, the phrase "equitable principles" had definite substance in the sense that in order for a delimitation to be considered equitable it must respect and "faithfully reflect" the particular geographical circumstances.⁶³ As stated in the Tunisian Counter-Memorial, "a balance must be established between the various [relevant] circumstances, in order to arrive at an equitable result, without refashioning nature."⁶⁴ Libya countered that a delimitation which respects the physical facts of natural prolongation could not be considered inequitable; equitable principles being irrelevant to the identification of appurtenant continental shelf based on natural prolongation.⁶⁵ Nevertheless, the Court found the concept of natural prolongation to be inapplicable in the present case, at least with respect to a lateral continental shelf delimitation.⁶⁶ Since natural prolongation could not be a dispositive factor in determining an equitable delimitation line, "equitable principles" would assume, in the words of the Court, "primordial importance" in the deter-

⁶¹ *Id.* at 92, para. 133(A)(1-3).

⁶² 1969 I.C.J. at 53, para. 101(c)(1).

⁶³ 1982 I.C.J. at 58, para. 69.

⁶⁴ *Id.* at 27, para. 15.

⁶⁵ *Id.* at 59, para. 69.

⁶⁶ See *supra* notes 42-44 and accompanying text.

mination of such line.⁶⁷

The Court concurred in the Libyan submission that whether the application of a particular delimitation method is in accordance with equitable principles is to be tested by its results:

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. . . . [T]he 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.⁶⁸

The Court took pains to distinguish between the application of equitable principles and a decision *ex aequo et bono*, where the Court will deliver, on consent of both parties, what it regards as a fair and reasonable settlement without being bound by a strict application of legal rules.⁶⁹ The parties had not bestowed this special jurisdiction upon the Court pursuant to article 38, paragraph 2, of the Statute of the Court and, accordingly, it considered itself bound to apply equitable principles "as part of international law."⁷⁰ The Court's decision as to what it regarded as an equitable delimitation line and its rationale for the decision has arguably blurred the distinction it sought so carefully to draw.

VII. RELEVANT CIRCUMSTANCES

Article 1 of the Special Agreement also required the Court to ascertain and weigh "the relevant circumstances which characterize the area" in reaching its decision.⁷¹ Even in the absence of such provision, however, the Court would have had, *proprio motu*, to take account of "relevant circumstances" on the basis of the equitable principle laid down in the *North Sea Continental Shelf Cases* requiring all relevant circumstances to be taken into account.⁷²

Although both parties' respective conceptions of the "relevant circumstances" largely differed, they agreed that the general configuration of their coasts should be taken into account. Tunisia regarded as relevant

⁶⁷ 1982 I.C.J. at 60, para. 72.

⁶⁸ *Id.* at 59, para. 70.

⁶⁹ *Id.* at 60, para. 71.

⁷⁰ *Id.*

⁷¹ Special Agreement, *supra* note 18, at 51.

⁷² 1969 I.C.J. at 53, para. 101(c)(1).

circumstances: (1) the irregularity of the Tunisian coast compared to the general regularity of the Libyan coast; (2) the presence of islands, islets and low-tide elevations forming part of the eastern Tunisian coast; and, (3) certain historic rights.⁷³ For its part, Libya regarded as relevant: (1) the general configuration of the coasts of both parties; (2) the essential unity of the relevant shelf area and the existence of petroleum deposits therein; and, (3) certain domestic legislation enacted by both parties relating to fishing, the territorial sea, and petroleum concessions.⁷⁴

A. *Coastal Configuration, the Gulf of Gabes and the Position of the Kerkennah Islands*

The Court concurred in the view of both parties that the coastal configuration must be considered and concluded that the sudden change in direction of the Tunisian littoral in the Gulf of Gabes constituted one of the relevant circumstances which characterizes the area.⁷⁵ The Court, however, rejected the Libyan contention that the Kerkennah Islands situate off the eastern Tunisian coast (marked on Map 1) should be completely excluded from consideration on the ground that "the existence and position of the Kerkennah Islands and surrounding low-tide elevations . . . are material."⁷⁶ The Court noted their size (180 square kilometers), their location (approximately eighteen kilometers east of the Tunisian mainland), and the fact that they are separated from the mainland by relatively shallow waters in reaching its conclusion that they constitute a circumstance relevant for the delimitation to which "some" effect must therefore be attributed.⁷⁷

B. *The "Three-Line" Coincidence*

A third feature of consequence in the Court's view was the position of the land frontier between Tunisia and Libya which had been definitively established pursuant to a 1910 treaty.⁷⁸ The Court relied upon this stable land frontier in view of the absence of any formal agreement between Tunisia and Libya on lateral maritime delimitation, and in view of Article 1 of the 1958 Geneva Convention on the Continental Shelf which defined the inner limit of the "continental shelf" in terms of the seaward limit of the territorial sea.⁷⁹ Since the lateral delimitation of the continen-

⁷³ 1982 I.C.J. at 26-27, para. 15. See also *id.* at 62, para. 76.

⁷⁴ *Id.* at 62-63, paras. 76-77.

⁷⁵ *Id.* at 63, para. 78.

⁷⁶ *Id.* at 64, para. 79.

⁷⁷ *Id.* at 63-64, para. 79.

⁷⁸ *Id.* at 65-66, paras. 83-85.

⁷⁹ 1958 Convention, *supra* note 4. The definition of "continental shelf" provided by

tal shelf should start, then, from the outer limit of the territorial sea, absence of a mutually agreed lateral delimitation of the territorial sea would pose problems which, in the view of the Court, could largely be circumvented by recognizing the relevance of the land boundary starting point—Ras Ajdir—as a basic point of reference in determining the delimitation line.⁸⁰ In this sense, the Court considered the point of intersection of the land frontier with the coastline as a relevant circumstance for the delimitation of the continental shelf between the two parties.

The importance attributed by the Court to Ras Ajdir in this respect was based partly upon the fact that it was the starting point for a 1913 lateral delimitation line (the mutuality of which is questionable from Tunisia's viewpoint) between Libyan and Tunisian sponge-banks drawn perpendicularly to the general direction of the coastline at Ras Ajdir (where the land boundary commences).⁸¹ To use the Court's terminology, this "perpendicular" delimitation line "became a sort of tacit *modus vivendi*" or "*de facto* maritime limit" although it could not reasonably be considered to constitute a recognized *de jure* maritime boundary for all purposes between the two parties.⁸² However, considering the complete absence of formally agreed upon maritime boundaries between the two parties and the absence of protest by either party to the "perpendicular" delimitation line over a long period, the Court saw in such line a possible historical justification for the choice of the delimitation method it ultimately adopted in the area of shelf immediately adjacent to Ras Ajdir.

Moreover, the perpendicular delimitation line corresponded approximately to another *de facto* line drawn from Ras Ajdir at an angle of 26° east of north upon which both parties had relied in granting concessions for the offshore exploration and exploitation of oil and gas. A 1966 Tunisian concession was bounded on the southeast by a stepped line the angle of which lay on a straight line at a bearing of approximately 26° to the meridian.⁸³ In 1968, Libya granted a concession in which the northwestern boundary coincided with the southeastern boundary of the 1966

article 1 is as follows:

For the purpose of these articles, the term "continental shelf" is used as referring (a) to the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 meters or, beyond that limit, to where the depth of the subjacent waters admits of the exploitation of the natural resources of the said areas; (b) to the seabed and subsoil of similar submarine areas adjacent to the coasts of islands.

This definition was considered by the Court to reflect customary law in the *North Sea Continental Shelf Cases*. 1969 I.C.J. at 39, para. 63.

⁸⁰ 1982 I.C.J. at 66, paras. 85-86.

⁸¹ *Id.* at 70, para. 93.

⁸² *Id.* at 70-71, paras. 93-95.

⁸³ *Id.* at 71, para. 96.

Tunisian concession.⁸⁴ The northwestern boundaries of subsequent Libyan concessions followed this same line which, in the view of the Court, resulted in “the appearance on the map of a *de facto* line dividing concession areas which were the subject of active claims, in the sense that exploration activities were authorized by one Party, without interference, or protests (until 1976), by the other.”⁸⁵

The Court sought to justify its finding that this 26° line of adjoining concessions constitutes a “circumstance of great relevance for the delimitation.”⁸⁶ The Court considered that the 26° line had been “tacitly respected for a number of years”⁸⁷ and implied that the parties themselves may be taken to have considered the 26° line equitable.⁸⁸ The Court also pointed out that the 26° line was intended by the parties to delimit the eastward and westward boundaries of petroleum concessions—continental shelf petroleum being the basis of the dispute.⁸⁹ Furthermore, the coincidence of the 26° line of adjoining concessions and the earlier perpendicular delimitation line noted above (also drawn from Ras Ajdir at an inclination of approximately 26° east of north for the purpose of delimiting sponge-banks), and the fact that a continuation of the general direction of the land boundary from Ras Ajdir seawards would be roughly perpendicular to the general direction of the coast at that point, were considered by the Court as relevant in selecting an equitable delimitation line.⁹⁰

C. Proportionality

In its pleadings, Tunisia had submitted that the delimitation must not encroach upon the area off the Tunisian coast within which Tunisia possesses “well-established historic rights” deriving from long-established fishing activities of its nationals.⁹¹ After some discussion, the Court did not pass on the validity of Tunisia’s historic rights on the ground that the delimitation method ultimately adopted by the Court “is such that the delimitation line will undoubtedly leave Tunisia in the full and undisturbed exercise of those rights.”⁹² Nevertheless, the question of Tunisia’s historic rights arose in a related context. Libya and Tunisia agreed on the need to take into account “the element of a reasonable degree of propor-

⁸⁴ *Id.*

⁸⁵ *Id.* at 84, para. 117.

⁸⁶ *Id.* at 71, para. 96.

⁸⁷ *Id.*

⁸⁸ *Id.* at 84, para. 118.

⁸⁹ *Id.*

⁹⁰ *Id.* at 84-85, para. 119.

⁹¹ *Id.* at 26-27, para. 15.

⁹² *Id.* at 77, para. 105.

tionality . . . between the extent of the continental shelf areas appertaining to the coastal State and the length of its coast."⁹³ They differed, however, on whether all areas of the sea-bed below low-water mark are to be compared in assessing proportionality. For the purpose of comparing areas of continental shelf in the light of the proportionality criterion, Tunisia contended that sea-bed areas lying beneath internal and territorial waters must be excluded from consideration.⁹⁴ Tunisia relied on the definition of continental shelf contained in Article 1 of the 1958 Geneva Convention on the Continental Shelf⁹⁵ as support for the proposition that the continental shelf, in a legal context, excluded sea-bed areas under the territorial sea and internal waters.⁹⁶

Libya argued that the entire area of sea-bed beyond the low-water mark of both parties must be taken into account.⁹⁷ Libya's contention in this respect was no doubt motivated by its opposition to the system of straight baselines employed by Tunisia which were drawn to the Kerkenah Islands and across the Gulf of Gabes so as to constitute the enclosed waters as internal waters. Although Tunisia sought to justify the position of these straight baselines by the historical link between the areas they enclosed and the Tunisian mainland, Libya refused to recognize straight baselines for delimitation purposes. The Court rejected Tunisia's argument for exclusion from consideration of sea-bed areas under internal and territorial waters in assessing proportionality on the ground that the issue was not one of definition but rather of proportionality, which is related to the lengths of the respective coasts of the two parties and not to straight baselines. In the words of the Court:

[S]ince it is a question of proportionality, the only absolute requirement of equity is that one should compare like with like. If the shelf areas below the low-water mark of the relevant coasts of Libya are compared with those around the relevant coasts of Tunisia, the resultant comparison will, in the view of the Court, make it possible to determine the equitable character of a line of delimitation.⁹⁸

Therefore, Libya's contention for a comparison between the more extensive sea-bed areas prevailed.

Tunisia had also advanced the argument in its pleadings that, in appropriate cases, economic factors may be included as relevant circumstances in the delimitation process, pointing to its relative poverty in

⁹³ 1969 I.C.J. at 54, para. 101(D)(3).

⁹⁴ 1982 I.C.J. at 75, para. 102.

⁹⁵ 1958 Convention, *supra* note 79.

⁹⁶ 1982 I.C.J. at 74, para. 101.

⁹⁷ *Id.* at 71, para. 97.

⁹⁸ *Id.* at 76, para. 104.

terms of natural resources.⁹⁹ The Court, however, considered such factors "virtually extraneous" for the purposes of delimitation, although it did state that the presence of oil-wells in an area to be delimited may be an element to be taken into account depending on the circumstances.¹⁰⁰ Indeed, in the *North Sea Continental Shelf Cases*, the Court stated that the factors to be taken into account in the course of delimitation negotiations are to include "so far as known or readily ascertainable, the physical and geological structure, and natural resources, of the continental shelf areas involved."¹⁰¹

Therefore, the circumstances considered relevant by the Court in achieving an equitable delimitation are as follows:

[1] The general configuration of the coasts of the Parties, and in particular the marked change in direction of the Tunisian coastline between Ras Ajdir and Ras Kaboudia;

[2] The existence and position of the Kerkennah Islands;

[3] The land frontier between the Parties, and their conduct prior to 1974 in the grant of petroleum concessions, resulting in the employment of a line seawards from Ras Ajdir at an angle of approximately 26° east of the meridian, which line corresponds to the line perpendicular to the coast at the frontier point which had in the past been observed as a *de facto* maritime limit;

[4] 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 the relevant part of its coast, measured in the general direction of the coastlines, account being taken for this purpose of the effects, actual or prospective, of any other continental shelf delimitation between States in the same region.¹⁰²

VIII. THE COURSE OF THE BOUNDARY

After having laid down what it considered to be the principles and rules of international law applicable to the delimitation and taking into account the relevant circumstances which it had identified, the Court

⁹⁹ *Id.* at 77, para. 106.

¹⁰⁰ *Id.* at 77-78, paras. 106-107.

¹⁰¹ 1969 I.C.J. at 54, para. 101(D)(2). *But see* the Separate Opinion of President Bustamante Y Rivero, *id.* at 60, para. 5, in which he states that the delimitation of any continental shelf is not in principle subject to the location of natural resources located therein. *See also* Smith, *A Geographical Primer to Maritime Boundary-Making*, 12 OCEAN DEV. & INT'L L. 1, 7-8 (1982), where the author provides an example of a marine boundary being drawn in consideration of the extent and location of resources (the distinct jut in the Danish-German negotiated line indicating that the two states took into account Denmark's existing oil fields).

¹⁰² 1982 I.C.J. at 93, para. 133(B).

clarified the practical method for the application of these principles and rules so as to enable the experts of both parties to delimit the areas of continental shelf appertaining to each state. The Court regarded its task in this respect as one involving "such a degree of precision that the only task remaining will be the technical one making possible the drafting of a treaty incorporating the result of the work of the experts entrusted with the drawing of the delimitation line."¹⁰³ Although the Court acknowledged that the actual drawing of the delimitation line was a function reserved to the parties for incorporation into a treaty pursuant to Article 2 of the Special Agreement,¹⁰⁴ it nevertheless considered (arguably exceeding its jurisdiction) that it was not prevented from indicating the course of the boundary which would result from the application of the practical methods ultimately prescribed for the parties. The Court reasoned that it would not be possible for it to take into account as a relevant circumstance the proportionality criterion unless it were first able to define the course of the boundary dividing shelf areas appertaining to each party.¹⁰⁵

Prior to indicating the delimitation methods deemed equitable in the circumstances, the Court briefly considered the delimitation methods proposed by each of the parties. Libya's method was based on the direction of the relevant natural prolongation and it urged that the delimitation line must be consistent with the northerly direction of the natural prolongation of the African continental landmass.¹⁰⁶ Libya conceded, however, that equity required the taking into account of certain relevant geographical circumstances, particularly the marked change in the direction of the Tunisian coastline in the Gulf of Gabes.¹⁰⁷ This would cause the strictly northward direction of the Libyan delimitation line to veer to the northeast to coincide with such a change in the direction of the Tunisian coastline. The course of the line resulting from the Libyan method of delimitation can be seen on Map 2. As noted above,¹⁰⁸ however, the Court rejected the basis used for the Libyan delimitation method:

For its part, Tunisia proposed delimitation methods of two types resulting in a series of delimitation lines running in a northeasterly direction off the Libyan coast (refer to Map 2). The first group of methods involved defining the natural prolongation of both parties on the basis of geological, geophysical and bathymetric data which, in the view of the Court, "do not . . . add up to 'relevant circumstances' on which a delimi-

¹⁰³ *Id.* at 78, para. 108.

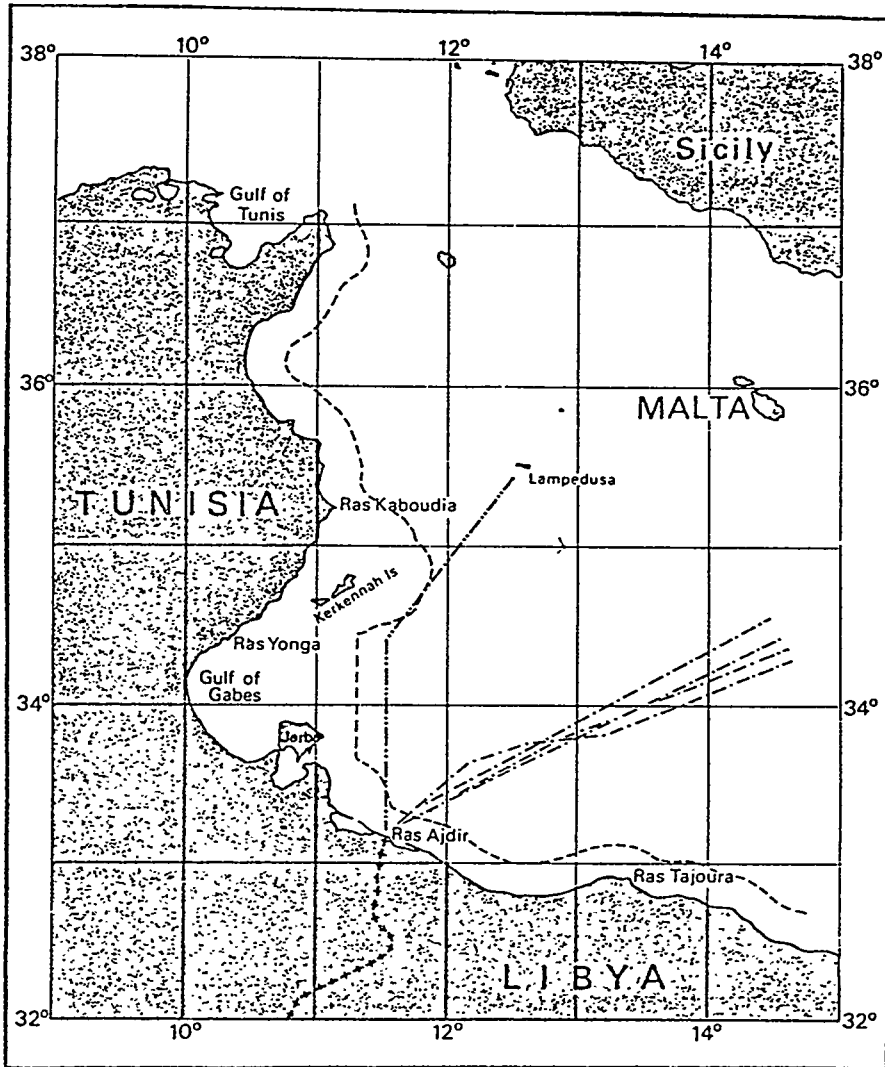
¹⁰⁴ *Id.* See *supra* note 25 for the full text of article 2 of the Special Agreement.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 80, para. 111.

¹⁰⁷ *Id.*

¹⁰⁸ See *supra* notes 53-54 and accompanying text.



Map No. 2

- Limit of territorial waters claimed by each Party.
- Line resulting from Libyan method of delimitation.
- Sheaf of lines resulting from Tunisian methods of delimitation.

tation of the kind proposed by Tunisia could be based."¹⁰⁹ The second group of methods involved a geometrical approach based on the configurations of the coasts of the two parties resulting in delimitation lines similar to those of the first group. The Tunisian delimitation methods of the second group were also rejected by the Court. These methods did not give sufficient weight to other circumstances considered by the Court to be of greater relevance,¹¹⁰ such as the 26° line of adjoining petroleum concessions discussed above.¹¹¹

Having disposed of the delimitation methods proposed by the parties themselves, the Court set out to propose and justify its own method. To begin with, the Court did not consider the area relevant to the delimitation to be an area of such "geographical homogeneity" as to justify the application of only one delimitation method throughout.¹¹² Indeed, its predecessor in the *North Sea Continental Shelf Cases* had remarked:

[N]o objection need be felt to the idea of effecting a delimitation of adjoining continental shelf areas by the concurrent use of various methods . . . [T]he 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 application of equitable principles, a reasonable result is arrived at.¹¹³

In the instant case, the Court felt the relevant circumstances necessitated the division of the area under consideration into two sectors of continental shelf for the purpose of delimitation.¹¹⁴ The shelf areas close to the coasts of the two parties would therefore be treated differently from the shelf areas located further offshore; one delimitation method would be employed up to a given distance from the coast whereupon a second delimitation method would be utilized.

A. *The First Sector*

With respect to the shelf areas closer to the coasts of the two parties (i.e., the first sector), the Court placed considerable weight on the 26° line of adjoining petroleum concessions. Since the continental shelf begins, for legal purposes,¹¹⁵ at the outer limit of the territorial sea, the delimitation line's point of commencement must be located on such outer limit. In the

¹⁰⁹ 1982 I.C.J. at 80, para. 113.

¹¹⁰ *Id.*

¹¹¹ *Id.* at 83-84, para. 117.

¹¹² *Id.* at 82, para. 114.

¹¹³ 1969 I.C.J. at 49, para. 90.

¹¹⁴ 1982 I.C.J. at 82, para. 114.

¹¹⁵ 1958 Convention, *supra* note 79.

absence of a lateral boundary dividing the territorial seas of the two parties, the point of commencement was considered by the Court to be located at the point where the outer limit of the territorial sea of the parties is intersected by a straight line drawn from where the land frontier commences at Ras Ajdir running at a bearing of approximately 26° east of north.¹¹⁶ Such line corresponds to the northwestern boundary of various Libyan petroleum concessions and to the southeastern boundary of the 1966 Tunisian petroleum concession.¹¹⁷ From this commencement/intersection point located on the outer limit of the territorial sea, the Court judged the line of delimitation of continental shelf areas between the parties to run northeast throughout the first sector at the same bearing of 26° east of north until the line intersects the parallel of latitude passing through the most westerly point of the Tunisian coastline under consideration which is also the most westerly point of the Gulf of Gabes.¹¹⁸ The significance of the most westerly point of the Gulf of Gabes is that it represents the point at which a radical change takes place in the general direction of the Tunisian coastline. Indeed, the Court regarded this change in direction as one of the relevant circumstances to be taken into account in achieving an equitable delimitation.¹¹⁹ The effect of this directional change in coastline would be a corresponding deflection of the 26° line seaward from the point where the line intersects the parallel passing through the most westerly point of the Gulf of Gabes. The point of intersection of this parallel and the 26° line would mark the termination of the delimitation line's course in the first sector using the first delimitation method and the commencement of the line's course in the second sector employing the second delimitation method. The 26° line delimiting the first sector would give way in the second sector to a delimitation line at a more easterly bearing to reflect the change in direction of the Tunisian coastline.¹²⁰ The parallel of latitude passing through the most westerly point of the Gulf of Gabes is illustrated on Map 3. The boundary between the first and second sectors is marked by a change in the angle of the delimitation line.

B. *The Second Sector*

Apart from the general change in the direction of the Tunisian coastline in the Gulf of Gabes, another circumstance considered highly rele-

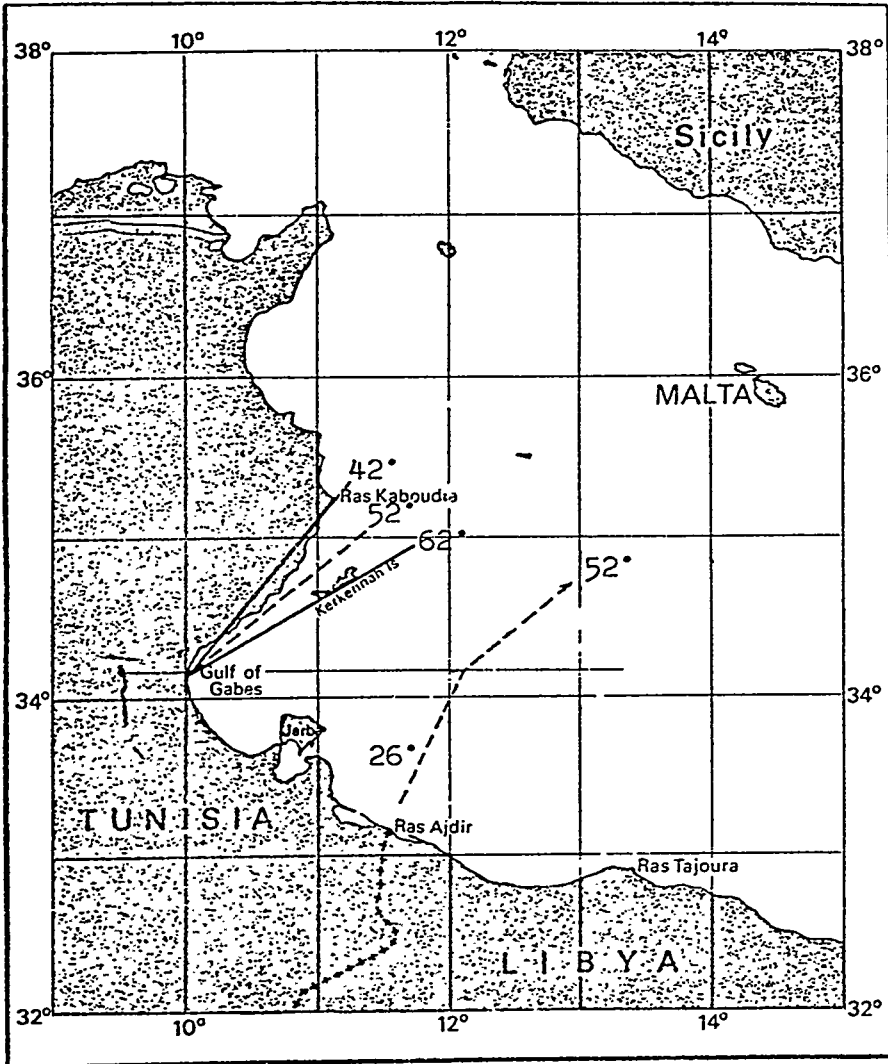
¹¹⁶ 1982 I.C.J. at 85-86, para. 121.

¹¹⁷ See *supra* notes 83-84 and accompanying text.

¹¹⁸ A summary of the practical method for the application of the principles and rules of international law applicable to the present delimitation is set out at 1982 I.C.J. at 93-94, para. 133(c)(1-3).

¹¹⁹ *Id.* at 87, para. 124.

¹²⁰ *Id.*



Map No. 3

For illustrative purposes only, and without prejudice to the role of the experts in determining the delimitation line with exactness

vant by the Court in the second sector (i.e., the area which extends seawards beyond the parallel of latitude of the most westerly point of the Gulf of Gabes) is the existence and position of the Kerkennah Islands previously described. As in the first sector where the delimitation line was constituted by a straight line drawn at an angle of 26° to the meridian,

the Court considered that a straight delimitation line, though at a different angle, throughout the second sector would also produce an equitable result.¹²¹ The problem that faced the Court, however, was to determine the angle at which the line in the second sector should be drawn. The Court found that the general change in direction of the Tunisian coastline could be expressed in terms of a straight line drawn from the most westerly point of the Gulf of Gabes to Ras Kaboudia (see Map 3) whose bearing is approximately 42° to the meridian.¹²² East of this 42° line, however, lie the Kerkennah Islands over which Tunisia exercises territorial sovereignty. The Court determined that a straight line again drawn from the most westerly point of the Gulf of Gabes along the seaward coast of the Kerkennah Islands (thereby giving full effect to them) would run at a bearing of approximately 62° to the meridian. Although the Court regarded the Kerkennah Islands in view of their size (180 square kilometers) and position (eighteen kilometers east of the Tunisian mainland) as a circumstance relevant for the delimitation, it nevertheless considered that "to cause the delimitation line to veer even as far as to 62°, to run parallel to the [Kerkennah] island coastline, would, in the circumstances of the case, amount to giving excessive weight to the Kerkennahs."¹²³

The Court thereupon sought to justify this decision by recalling a number of examples found in state practice of delimitations in which only partial effect has been given to islands situated close to the coast. The effect attributed to the Scilly Islands by the Court of Arbitration in the 1977 *Franco-British Arbitration*¹²⁴ is one such example.¹²⁵ The Scilly Islands consist of 48 islands lying between 21 and 31 nautical miles from the southwestern tip of England. Noting that the effect of the Scillies on the equidistance line was to deflect it considerably more to the southwest than would be the case if the line were delimited from the English mainland, the Court of Arbitration decided to give the Scillies only "half-effect" in determining the equidistance line.¹²⁶ This was accomplished by determining the line midway between an equidistance line giving full effect to the Scillies and an equidistance line drawn without regard to the Scillies.¹²⁷ Thus, a modified form of equidistance was adopted by the Court of Arbitration in order to abate the disproportionality which would result from giving full effect to the Scillies.

¹²¹ *Id.* at 88, para. 127.

¹²² *Id.* at 88, para. 128.

¹²³ *Id.* at 89, para. 128.

¹²⁴ 1977 *Franco-British Arbitration*, 18 I.L.M. 397 (1979).

¹²⁵ See Brown, *The Anglo-French Continental Shelf Case*, 16 SAN DIEGO L. REV. 461, 519-20 (1979); Colson, *U.K.-France Arbitration*, *supra* note 5, at 110; Colson, *Interpretive Decision*, *supra* note 5, at 114.

¹²⁶ 1977 *Franco-British Arbitration*, 18 I.L.M. at 454-55, paras. 243-49.

¹²⁷ *Id.* at 455-56, paras. 248-54.

In the present case, the Court attributed "half-effect" to the Kerkennah Islands not through the application of a modified form of the equidistance method but rather through the use of the "half-angle" technique. Such technique involved the drawing of two straight reference lines, one line giving to the islands in question full effect for the purposes of delimitation and the other completely disregarding the islands.¹²⁸ The reference line actually adopted for the delimitation falls between both of these and bisects the angle which they make with each other.¹²⁹ On the basis of this "half-angle" technique adopted by the Court, the delimitation line passing through the second sector—that is to say, the shelf areas located seaward or north of the parallel of the most westerly point of the Gulf of Gabes—is a line (at a bearing of 52° east of north) drawn from that point bisecting the angle formed by a line drawn from the same point to Ras Kaboudia corresponding to the general direction of the Tunisian coastline (42°) and a line drawn from the most westerly point of the Gulf of Gabes along the seaward coast of the Kerkennah Islands (running at a bearing of 62°); the bearing of the delimitation line in the second sector parallel to such bisector being 52° to the meridian (east of north).¹³⁰ The Court's approach in this respect is illustrated by Map 3. In the result, the delimitation line in the second sector is deflected to the east (from a bearing of 26° in the first sector to a 52° bearing in the second sector) thereby attributing half-effect to the Kerkennahs. Had these islands been attributed full effect, the delimitation line would have assumed a 62° bearing which would have resulted in a substantially larger amount of shelf area on the Tunisian side of the line.¹³¹

Having defined the course of the delimitation line resulting from the application of the delimitation methods, the Court proceeded to its final task of testing the equitableness of this line in relation to the criterion of proportionality. The Court defined seaward boundaries of the area relevant to the delimitation solely for the purpose of employing the proportionality criterion.¹³² For this purpose, the Court considered that the parallel of latitude passing through Ras Kaboudia on the Tunisian coast and the meridian of longitude passing through Ras Tajoura on the Libyan coast represented appropriate seaward boundaries; the entire area of continental shelf within these seaward boundaries being apportioned between Tunisia and Libya for proportionality purposes by the delimitation line selected by the Court. The Court thereupon determined the length of

¹²⁸ 1982 I.C.J. at 89, para. 129.

¹²⁹ *Id.*

¹³⁰ The method employed by the Court in determining the course of the delimitation line in the second sector is set out at *id.* at 88-89, para. 128 and *id.* at 94, para. 133(c)(3).

¹³¹ *Id.* at 89, para. 129.

¹³² See *supra* note 36 and accompanying text.

the Libyan coast from Ras Tajoura to Ras Ajdir to be approximately 185 kilometers and that of Tunisia from Ras Ajdir to Ras Kaboudia to be approximately 420 kilometers. Using ratios, the Court ascertained that the relevant coastline of Libya stands in the proportion of approximately 31:69 to that of Tunisia.¹³³ On the other hand, the Court found that the areas of continental shelf enclosed by the aforementioned seaward boundaries appertaining to each party following the delimitation methods indicated by the Court stand in relation to each other in approximately the proportion: Libya 40 and Tunisia 60.¹³⁴ In the Court's estimation, this result satisfied the test of proportionality thereby confirming the equitableness of the delimitation line it had selected.¹³⁵ Considering the extent of the discrepancy between the two ratios, Tunisia might well hold a different view.

IX. COMMENTARY ON THE JUDGMENT

At least four different aspects of the Judgment raise the following problems: (1) the Court's reliance upon the 26° line of adjoining petroleum concessions in delimiting the first sector; (2) the insufficient weight attributed to certain relevant geographical features in the delimitation area; (3) the insufficient regard paid by the Court to the equidistance method as a possible delimitation method; and, (4) the manner in which it employed the proportionality criterion.

A. *The Utilization of the 26° Line to Delimit the First Sector*

The Judgment's primary justification for the delimitation of the first sector by a straight line at a bearing of 26° east of north is the line of adjoining petroleum concessions employed at various times by each party. Such line coincides with the above-noted 1913 lateral delimitation line between Libyan and Tunisian sponge-banks¹³⁶ which was in turn based on a line drawn on a perpendicular basis in relation to the general direction of the Tuniso-Libyan coastline at the point where the land boundary terminates at Ras Ajdir. Although the correspondence of each of these three lines with each other may have been regarded by the Court as consolidating its method on how to delimit the first sector, the 26° line of adjoining concessions cannot be considered opposable to Tunisia for the purposes of continental shelf delimitation. A concession granted by Tunisia as recently as 1972 was expressed in 1974 to be bounded on the south-east by "the maritime boundary between Tunisia and Libya . . . [specified

¹³³ 1982 I.C.J. at 91, para. 131.

¹³⁴ *Id.*

¹³⁵ *See id.* at 91, para. 131 for the proportionality calculations.

¹³⁶ *See supra* note 81 and accompanying text.

to be part of] the equidistance line . . . pending an agreement between Tunisia and Libya defining the limit of their respective jurisdictions over the continental shelf."¹³⁷ The substantial weight attributed by the Court to the 26° line as a relevant circumstance to be considered in the delimitation of the first sector is all the more incongruous when one considers the unsuccessful attempts made by both parties to negotiate a mutually acceptable continental shelf boundary and their eventual recourse to the Court in this connection. The attempted attribution by the Court of a *consensus ad idem* concerning such boundary (where such, it is submitted, never existed) to two coastal states which have never been able to reach any formal agreement on the lateral delimitation of their respective maritime zones of jurisdiction, can only impugn the basis on which the Court proceeded to delimit the first sector.

B. *The Effect of Islands on the Delimitation*

A second criticism of the Judgment involves the Court's failure to attribute sufficient weight to the Kerkennah Islands, and its apparent disregard of the island of Jerba lying in the immediate vicinity of the Tunisian coast between the Gulf of Gabes and Ras Ajdir. The Court does indeed assert that "the presence of the island of Jerba and of the Kerkennah Islands . . . is a circumstance which clearly calls for consideration . . . [and] the Court cannot accept the exclusion in principle of the island of Jerba and the Kerkennah Islands from consideration."¹³⁸ However, in the same paragraph, the Court announces its intention to totally disregard the island of Jerba¹³⁹ essentially on the ground that in the part of the delimitation area in which Jerba would be relevant (i.e., the first sector), the existence of the 26° line of adjoining concessions must prevail over the effect of Jerba's presence. With regard to the relevancy of the Kerkennahs, however, the Court concludes by affirming that "the existence and position of the Kerkennah Islands and surrounding low-tide elevations . . . are material."¹⁴⁰ Surprisingly, in apparent contradiction of this latter finding, the Court ultimately decided "that it should go so far as to attribute to the [Kerkennah] Islands a 'half-effect.'"¹⁴¹

Dealing first with the island of Jerba, Judge *ad hoc* Evensen pointed out in his dissenting opinion: (1) that "at low-tide [Jerba] is scarcely an island, but is separated from the mainland by a very narrow strait"; (2) that Jerba "has an area of some 690 square kilometers, which corresponds

¹³⁷ 1982 I.C.J. at 35, para. 21.

¹³⁸ *Id.* at 63-64, para. 79.

¹³⁹ *Id.* at 64, para. 79.

¹⁴⁰ *Id.* at 63-64, para. 79.

¹⁴¹ *Id.* at 89, para. 129.

to twice the size of the island of Malta"; (3) that Jerba's "economic importance . . . is significant"; and, (4) that Jerba "has a considerable permanent population."¹⁴² Perhaps of greater concern, however, is the insufficient effect attributed by the Court to the Kerkennahs in the drawing of the delimitation line in the second sector and the consequent loss sustained by Tunisia of a considerable area of continental shelf. It is difficult to support the Court's decision to accord the Kerkennahs only a "half-effect" in the delimitation process if one considers: the substantial size of the Kerkennahs (an area of some 180 square kilometers); their close proximity to the Tunisian mainland (eighteen kilometers therefrom, bearing in mind that Tunisia claims a territorial sea of twelve miles); the fact that they are separated from the mainland by shallow waters; the long-established fishing activities of the significant population of the Kerkennahs; and, the fact that an extensive area of low-tide elevations is located off their seaward coasts.

Apart from these factual considerations, there are legal considerations which support the view that the Kerkennahs should have been granted full effect by the Court. Under both treaty law and customary international law, the continental shelf by legal definition includes seabed and subsoil areas adjacent to the coasts of islands.¹⁴³ This definition was considered by the Court in the *North Sea Continental Shelf Cases* to have been regarded in 1958 as a definition "reflecting, or as crystallizing, received or at least emergent rules of customary international law relative to the continental shelf."¹⁴⁴ Moreover, Article 121(2) of the Draft Convention on the Law of the Sea (Informal Text) carries forward this principle of identity of treatment for delimitation purposes as between island and mainland by providing in part that "the continental shelf of an island [is] determined in accordance with the provisions of this Convention applicable to other land territory."¹⁴⁵ There can be no doubt that Jerba and the Kerkennahs fulfill the requirements of an "island" as that term is defined in the 1958 Convention on the Territorial Sea and the Contiguous Zone (Territorial Sea Convention)¹⁴⁶ and in the Draft Convention.¹⁴⁷ As islands receive the same rights to a continental shelf as would the mainland under Article 1 of the 1958 Geneva Convention on the Continental Shelf,¹⁴⁸ considerations of demography, economics, history and physical geography compel the awarding of a full continental shelf to Jerba and

¹⁴² *Id.* at 300, para. 17.

¹⁴³ 1958 Convention, *supra* note 79.

¹⁴⁴ 1969 I.C.J. at 39, para. 63.

¹⁴⁵ Draft Convention, *supra* note 6, at 1184.

¹⁴⁶ Convention on the Territorial Sea and the Contiguous Zone, Apr. 29, 1958, art. 10(1), 15 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205.

¹⁴⁷ Draft Convention, *supra* note 6, at 1184 (art. 121(1)).

¹⁴⁸ 1958 Convention, *supra* note 79.

the Kerkennahs respectively. Indeed, state practice supports the view that islands similar to Jerba and the Kerkennahs (considering their size, proximity to the mainland, and their being within the territorial sea of their own mainland) should be awarded a full continental shelf.¹⁴⁹ Islands similarly situated to the Kerkennahs and Jerba have been awarded full continental shelves of their own under international law. As Judge Schwebel asserted in his Separate Opinion: "There is no rule of international law which affords islands less than their full effect in the delimitation of the continental shelf"¹⁵⁰

In short, it would have been equitable and not without precedent for the Court to have included Jerba as part of the mainland in delimiting the continental shelf. There is, in the opinion of Sir Humphrey Waldock, a "considerable body of state practice" supporting the principle that islands located in the vicinity of the coast may be treated as part of the mainland on the grounds of geographical association and appurtenance.¹⁵¹ With regard to the Kerkennah Islands and the surrounding low-tide elevations, these types of features were considered relevant by the Court in its 1951 Judgment in the *Anglo-Norwegian Fisheries Case*.¹⁵² There the Court found that the Norwegian system of straight baselines drawn between the numerous islands, rocks and low-tide elevations of the "skjaergaard" running along the coast of Norway was not contrary to international law.¹⁵³ This holding was subsequently codified by article 4(1) of the Territorial Sea Convention which provides in part that, "[I]f there is a fringe of islands along the coast in its immediate vicinity, the method of straight baselines joining appropriate points may be employed in drawing the baseline from which the breadth of the territorial sea is measured."¹⁵⁴

¹⁴⁹ See, e.g., Agreement on the Maritime Boundary in the Gulf of Manaar and the Bay of Bengal and Related Matters, Mar. 23, 1976, India-Sri Lanka, reprinted in BUREAU OF INTELLIGENCE AND RESEARCH, U.S. DEP'T OF STATE, INTERNATIONAL BOUNDARY STUDY SERIES A, LIMITS IN THE SEAS [hereinafter cited as LIMITS IN THE SEAS], No. 77 (Feb. 16, 1978); Agreement Concerning Delimitation of the Continental Shelf, July 25, 1974, Iran-Oman, 972 U.N.T.S. 265; Agreement on the Boundary in Historic Waters and Related Matters, June 26, 1974, India-Sri Lanka, reprinted in 13 I.L.M. 1442 (1974); Treaty Concerning the Delimitation of the Continental Shelf Under the North Sea, Jan. 28, 1971, Netherlands-Federal Republic of Germany, 857 U.N.T.S. 131; Treaty Concerning the Delimitation of the Continental Shelf in the Baltic Sea, Oct. 29, 1968, Poland-German Democratic Republic, 768 U.N.T.S. 253; Agreement on Delimitation of the Continental Shelf, Jan. 8, 1968, Italy-Yugoslavia, reprinted in 7 I.L.M. 547 (1968). See generally D. BOWETT, THE LEGAL REGIME OF ISLANDS IN INTERNATIONAL LAW 176-77 (1979).

¹⁵⁰ 1982 I.C.J. at 99.

¹⁵¹ Waldock, *The Anglo-Norwegian Fisheries Case*, 28 BRIT. Y.B. INT'L L. 114, 142 (1951).

¹⁵² Fisheries Case (U.K. v. Nor.), 1951 I.C.J. 116 (Judgment of Dec. 18, 1951).

¹⁵³ *Id.* at 130.

¹⁵⁴ Convention on the Territorial Sea and the Contiguous Zone, *supra* note 146, art. 4(1).

Not only do the *Anglo-Norwegian Fisheries Case* and article 4(1) of the Territorial Sea Convention support Tunisia's position of advocating the drawing of straight baselines to the Kerkennahs, they also add support to the view that at least the seaward coasts of the Kerkennahs should have been employed as base points for the continental shelf delimitation line. In other words, the Kerkennahs should have been given full effect. In the words of Judge Schwebel: "[T]he Court has not carried the burden of demonstrating why granting full effect to the Kerkennahs would result in giving them 'excessive weight.'"¹⁵⁵ At the relevant point in the second sector, the Kerkennahs should have been relied on in determining the delimitation line and, accordingly, the delimitation line should have run at a bearing of 62° east of north—based on the attribution of full effect to the Kerkennahs—rather than at the "half-angle" of 52° chosen by the Court. The ignoring of the island of Jerba by the Court in delimiting the first sector and giving only a half-effect to the Kerkennahs in delimiting the second sector was an unwarranted refashioning of the geography of the Tunisian coastline, the equity of which is surely questionable.

C. *The Role of Equidistance*

The third area in which the Judgment warrants criticism is the insufficient attention paid by the Court to equidistance as a possible delimitation method. The Court merely formulated some general observations on the equidistance method¹⁵⁶ without providing sufficient reasons why it chose not to employ this method, which has been codified by article 6(2) of the 1958 Geneva Convention on the Continental Shelf.¹⁵⁷ One writer has carefully considered the "travaux préparatoires" of article 6 in order to determine the proper role to be assigned to the equidistance principle as incorporated within article 6(2). Professor E. D. Brown concluded that, "[T]he travaux préparatoires provide strong evidence that the intention of the parties to the [1958] Geneva Convention [on the Continental Shelf] was that the equidistance principle of Article 6 should be regarded as 'the general rule' or 'the major principle' . . . [and that] there is a presumption

¹⁵⁵ 1982 I.C.J. at 99.

¹⁵⁶ *Id.* at 78-79, paras. 109-10, and at 88, para. 126.

¹⁵⁷ 1958 Convention, *supra* note 4. Article 6(2) provides:

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 line 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.

in favour of the rule."¹⁵⁸ In a recent article, Robert W. Smith points out that, although various methods have been used to delimit maritime boundaries as evidenced by state practice, "[T]he equidistant line has been found to be acceptable in many negotiations; in some situations a multi-segmented equidistant line has been simplified; in other cases modifications have been made to the method used to calculate an equidistant line."¹⁵⁹ State practice has generally been consistent with article 6(2).¹⁶⁰ In short, the prevalent use of equidistance as a method of continental shelf delimitation between adjacent states and its apparent convenience in resolving delimitation disputes may have raised its status above that accorded it by the majority of the Court.

The starting point of the majority was the holding in the *North Sea Continental Shelf Cases* that the equidistance method of delimitation is not a mandatory rule of customary law.¹⁶¹ The Court observed that the practice of states subsequent to 1969, as is apparent from treaties delimiting the continental shelf, shows that states have employed methods other than equidistance in order to attain an equitable solution. Furthermore, in the Court's view, the equidistance method does not have "privileged status" in relation to other methods in the sense that the Court did not consider that it was "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."¹⁶² However, though the Court ultimately rejected the equidistance method in the present case,¹⁶³ it did consider its

¹⁵⁸ Brown, *supra* note 126, at 505.

¹⁵⁹ Smith, *supra* note 101, at 10.

¹⁶⁰ See, e.g., Convention on the Delimitation of the Continental Shelf in the Bay of Biscay, Jan. 29, 1974, France-Spain, reprinted in *LIMITS IN THE SEAS*, *supra* note 149, No. 83 (Feb. 12, 1979); Treaty Concerning the Delimitation of the Continental Shelf Under the North Sea, Jan. 28, 1971, Netherlands-Federal Republic of Germany, 857 U.N.T.S. 131; Treaty Concerning the Delimitation of the Continental Shelf Under the North Sea, Jan. 28, 1971, Denmark-Federal Republic of Germany, 857 U.N.T.S. 109; Agreement Relating to the Delimitation of the Continental Shelf Boundaries in the Northern Part of the Straits of Malacca, Dec. 21, 1971, Indonesia-Malaysia-Thailand, reprinted in *LIMITS IN THE SEAS*, *supra* note 149, No. 81 (Dec. 27, 1978); Treaty Concerning the Boundary of the Continental Shelf in the Gulf of Gdansk and the South-Eastern Part of the Baltic Sea, Aug. 28, 1969, Poland-U.S.S.R., 769 U.N.T.S. 75; Treaty Concerning the Delimitation of the Continental Shelf in the Baltic Sea, Oct. 29, 1968, Poland-German Democratic Republic, 768 U.N.T.S. 253; Agreement Relating to the Division of the Continental Shelf in the Varangerfjord, Feb. 15, 1957, Norway-U.S.S.R., reprinted in *LIMITS IN THE SEAS*, *supra* note 149, No. 17.

¹⁶¹ 1969 I.C.J. at 46, para. 83. The Court also stated that, for the purpose of applying equitable principles: "[T]he equidistance method can be used, but other methods exist and may be employed, alone or in combination, according to the areas involved." *Id.* at 47, para. 85.

¹⁶² 1982 I.C.J. at 79, para. 110.

¹⁶³ *Id.* at 62-63, para. 126.

possible relevance to the delimitation in the second sector:

[I]t 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.¹⁶⁴

Notwithstanding this momentary inclination towards equidistance, the Court never really did examine the effect on an equidistance line of the more outstanding geographical features and whether any inequitable results that might be produced by the employment of the equidistance principle could be abated by modifications to the application of such method. The Court's finding that the equidistance method is not applicable loses its persuasiveness since the grounds for excluding equidistance were not adequately canvassed. In this respect, Judge *ad hoc* Evensen maintained the view that, "[T]he equidistance principle would, in the present case—adjusted or tempered by considerations of equity—have given a more equitable and a more verifiable solution than the line given by the Court . . . [which] should at least have endeavoured to give a detailed analysis of an equidistance line adjusted by equity considerations, and why such a line would lead to inequitable results."¹⁶⁵ Although it may well be that the Court was not required (as it has opined) to examine the effects of a delimitation by application of the equidistance method as a first step, it should nevertheless have considered itself required to do so at some point in its Judgment, especially in view of its predecessor's statement in the *North Sea Continental Shelf Cases* to the effect that the concurrent use of various methods is not objectionable provided that it leads to a reasonable result.¹⁶⁶ The Court, therefore, should have examined several methods including equidistance in order to compare their respective effects. In the words of Judge Gros (dissenting), the "lack of a systematic search for the equitable has produced a result the equity of

¹⁶⁴ *Id.* at 88, para. 126.

¹⁶⁵ *Id.* at 319.

¹⁶⁶ 1969 I.C.J. at 50, para. 90.

which remains to be proved."¹⁶⁷

D. Proportionality

The Court included in its enumeration of the relevant circumstances to be taken into account in achieving an equitable delimitation:

[T]he 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 the relevant part of its coast, measured in the general direction of the coastlines, account being taken for this purpose of the effects, actual or prospective, of any other continental shelf delimitation between States in the same region.¹⁶⁸

This language concerning proportionality appeared in the *North Sea Continental Shelf Cases Judgment*¹⁶⁹ which perceived the role of proportionality to be that of establishing "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."¹⁷⁰ In the instant case, Judge *ad hoc* Jiménez de Aréchaga succinctly pointed out in his Separate Opinion the proper role of proportionality as a factor intended to verify the equitableness of the line of delimitation selected:

[The function of proportionality] is to test the equitable character of the method of delimitation used, in the light of the results to which it leads. It constitutes a test to be applied *ex post facto* to the results obtained through the appreciation of the relevant circumstances, and not a relevant circumstance or independent factor in itself.¹⁷¹

In other words, proportionality is never to be used to directly determine the course of the actual delimitation line but rather to provide a basis for considering whether a particular delimitation line already selected is equitable or otherwise. In this regard, the Court of Arbitration in the 1977 *Franco-British Arbitration* formulated the following views on the role of proportionality in a continental shelf delimitation:

[T]he equitable delimitation of the continental shelf is not . . . a question of apportioning—sharing out—the continental shelf amongst the States abutting upon it. Nor is it a question of simply assigning to them areas of the shelf in proportion to the length of their coastlines; for to do this would be to substitute for the delimitation of boundaries a distributive

¹⁶⁷ 1982 I.C.J. at 149, para. 11.

¹⁶⁸ *Id.* at 93, para. 133(B)(5).

¹⁶⁹ 1969 I.C.J. at 52, para. 98 and at 54, para. 101(D)(3).

¹⁷⁰ *Id.* at 52, para. 98.

¹⁷¹ 1982 I.C.J. at 138, para. 117.

apportionment of shares . . . 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.*¹⁷²

Proportionality, then, can be considered a relevant factor in evaluating whether the final result is equitable, but it cannot be regarded as an independent source of rights to areas of continental shelf. Put in another way, the proportionality criterion cannot influence in any way the determination of where the continental shelf boundary should run otherwise than on an *ex post facto* basis. It is submitted that the majority of the Court should have elaborated upon the limitations attached to the use of proportionality.

Other aspects concerning the manner in which the Court utilized the proportionality criterion are more troubling. The 1969 Court referred to "the element of a *reasonable* degree of proportionality"¹⁷³ and it would seem that the Court in the instant case has overconceptualized the proportionality criterion by attempting to arrive at mathematically precise calculations in the form of ratios.¹⁷⁴ The 1977 Court of Arbitration shied away from what it described as "nice calculations" of proportionality¹⁷⁵ and, indeed, in the present case the Court does not provide many details on how the figures contained in the ratios have been determined. In any event, attempts at mathematical refinement of the proportionality concept are bound to create difficulties since in most cases the extent of the continental shelf areas concerned and the length of the relevant coasts will not be susceptible to precise calculation. For example, the Court attempted to establish seaward boundaries in the form of a parallel of latitude and meridian of longitude for the purpose of defining in advance the area of continental shelf within which the delimitation line would be drawn.¹⁷⁶ Such an approach is not very realistic since it ignores the possibility that in many cases, such as the present one, the seaward boundaries of the area relevant to the delimitation (and, hence, the extent of the continental shelf areas concerned) will not be able to be defined with certainty until the rights of third states in this area have been the subject of formal agreement by the states concerned. Although neither party has concluded a continental shelf delimitation agreement with Malta,¹⁷⁷ the Court considered that "the parallel of latitude passing through Ras Kaboudia, and the meridian of longitude passing through Ras Tajoura,

¹⁷² 1977 *Franco-British Arbitration*, 18 I.L.M. at 427, para. 101 (emphasis added).

¹⁷³ 1969 I.C.J. at 52, para. 98 (emphasis added).

¹⁷⁴ 1982 I.C.J. at 91, para. 131.

¹⁷⁵ 1977 *Franco-British Arbitration*, 18 I.L.M. at 412, para. 27.

¹⁷⁶ 1982 I.C.J. at 61-62, para. 75 and at 91, para. 130.

¹⁷⁷ See *supra* note 11 and accompanying text.

which have the advantage of cartographical convenience" constitute appropriate seaward boundaries of the area relevant for the delimitation.¹⁷⁸ Consider the Court's previous statement:

The conclusion that these areas [i.e., the areas of continental shelf not enclosed within the relevant delimitation area by the seaward boundaries formed by the parallel and meridian in question] are not legally relevant to the delimitation between the parties does not however lead to the conclusion by way of corollary that the whole area bounded by the [relevant] coasts of both countries and by such seaward boundaries is reserved in its entirety for division between Libya and Tunisia.¹⁷⁹

In view of this statement, the Court's drawing of such seaward boundaries for the purpose of employing the proportionality criterion was neither practical nor conducive to precise mathematical calculation in view of the possibility, acknowledged by the Court itself, of certain continental shelf rights within the bounded area belonging *ab initio* to a third state such as Malta.

Finally, with regard to proportionality, the Court's statement that it "is not convinced by the Tunisian contention that the areas of internal and territorial waters must be excluded from consideration"¹⁸⁰ in applying the proportionality test cannot pass without comment. Although the Court reaffirmed that in a legal context the continental shelf does not include sea-bed areas below territorial and internal waters,¹⁸¹ it nevertheless based its proportionality calculations on such areas as well as areas of shelf beyond the territorial sea of each party.¹⁸² Such an approach is surely at odds with the definition of the continental shelf for legal purposes. Provided the straight baselines employed by Tunisia are justified by the circumstances, and it is submitted that they are,¹⁸³ there should have been no further obstacles in excluding sea-bed areas below internal and territorial waters from consideration in assessing proportionality. It is probable, however, that difficulties encountered by some members of the Court in accepting the validity of the straight Tunisian baselines drawn to the Kerkennah Islands had considerable bearing on the Court's decision to include such areas within the areas considered relevant for the proportionality test.

¹⁷⁸ 1982 I.C.J. at 91, para. 130.

¹⁷⁹ *Id.* at 62, para. 75.

¹⁸⁰ *Id.* at 76, para. 104.

¹⁸¹ *Id.*

¹⁸² *Id.* at 91, para. 131.

¹⁸³ See *supra* section IX(B) of text.

X. THE IMPORT OF THE JUDGMENT

It is a trite statement that the area found to appertain to each coastal state concerned in the delimitation of a continental shelf does not necessarily have to be equal to be equitable; yet underlying the Judgment seems to be the desire of the Court to reach a solution which places Tunisia and Libya in a position of equality. Such an approach was clearly proscribed by the Court in the *North Sea Continental Shelf Cases* when it remarked, "Equity does not necessarily imply equality. There can never be any question of completely refashioning nature . . ." ¹⁸⁴ The Court, then, must accept the natural inequalities of the coastline and other relevant geographical features as it finds them. The Court of Arbitration in the *Franco-British Arbitration* similarly recognized that "[T]here can never be a question of completely refashioning nature, such as by rendering the situation of a State with an extensive coastline similar to that of a State with a restricted coastline." ¹⁸⁵ In seeking equality when Tunisia and Libya are not on an equal geographical footing by attributing insufficient weight to a number of relevant geographical features, the Court failed to strike an equitable solution for both of them—it being necessary that a delimitation be equitable for both parties.

The Court was requested by the parties to decide the matter of the continental shelf delimitation submitted to it in accordance with international law which requires the application of equitable principles. Equity, however, was never intended to remedy natural inequalities by refashioning the geography of coastlines, and it is in this respect that the Court in the present case has applied equitable principles in a manner which is at odds with the approach of the 1969 Court. Although the Court carefully pointed out that it was bound in reaching its decision to apply equitable principles as part of international law as opposed to adjudicating *ex aequo et bono*, ¹⁸⁶ the distinction between equitable principles *infra legem* and considerations *ex aequo et bono* has unfortunately been blurred by its pronouncements.

In light of the compelling dissenting opinions expressed in the Judgment, it is difficult to predict with certainty the Judgment's impact on future shelf delimitations, such as that pending before a specially constituted chamber of the Court between Canada and the United States concerning the Gulf of Maine dispute. Certainly, one might expect in the short-term at least that the Judgment will discourage states from submitting their shelf disputes to the International Court of Justice for settlement for fear that they will find themselves bound to a "discretionary"

¹⁸⁴ 1969 I.C.J. at 49, para. 91; see also *id.* at 48, para. 88.

¹⁸⁵ 1977 *Franco-British Arbitration*, 18 I.L.M. at 427, para. 101.

¹⁸⁶ 1982 I.C.J. at 60, para. 71.

decision. For those coastal states that do submit to the jurisdiction of the Court, one might reasonably expect them to attempt to distinguish the instant decision on the basis of the arguably narrow grounds upon which it was decided.

