

# FROM THE SHOALS OF RAS KABOUDIA TO THE SHORES OF TRIPOLI: THE TUNISIA/LIBYA CONTINENTAL SHELF BOUNDARY DELIMITATION

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## I. INTRODUCTION

The law of the continental shelf is a relatively recent development in international law. The customary law of the continental shelf developed from the Truman Proclamation of 1945<sup>1</sup> in which the United States claimed the extension of the land mass under the ocean that was the natural prolongation of the United States coasts.<sup>2</sup> By 1958, the concept of exclusive coastal state jurisdiction over its adjacent continental shelf was clearly established, and was reflected in the Convention on the Continental Shelf.<sup>3</sup> Major issues of the law of the continental shelf, including the seaward extent of the shelf<sup>4</sup> and the law applicable to delimiting the shelf between opposite or adjacent coasts, were not resolved by the 1958 Convention. The Convention adopted the position that in the case of irresolvable, overlapping continental shelf claims, the boundary should be an equidistant or median line unless special circumstances justified another line.<sup>5</sup> The delimitation provision was subject to reser-

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<sup>1</sup> Proclamation No. 2667, 3 C.F.R. 67-68 (1943-48 Comp.).

<sup>2</sup> *Id.*

<sup>3</sup> Convention on the Continental Shelf, done April 29, 1958, art. 2, 15 U.S.T. 471, 473, T.I.A.S. No. 5578, 499 U.N.T.S. 311, 312-14.

<sup>4</sup> *Id.* art. 1, 15 U.S.T. at 473, T.I.A.S. No. 5578, 499 U.N.T.S. at 312. The Convention on the Continental Shelf provided that the continental shelf would extend to a depth of 200 meters or beyond that to the limits of exploitability.

<sup>5</sup> *Id.* art. 6, 15 U.S.T. at 474, T.I.A.S. No. 5578, 499 U.N.T.S. at 316.

vations by the parties<sup>6</sup> and did not reflect customary state practice at that time.<sup>7</sup>

The International Court of Justice [ICJ] first addressed the issue of delimitation of the continental shelf between adjacent States in the *North Sea Continental Shelf Cases*<sup>8</sup> of 1969 [North Sea Cases]. The ICJ found that customary international law did not require equidistant boundaries, but that continental shelf delimitations between adjacent States must be determined by taking into account all relevant circumstances,<sup>9</sup> and must be according to equitable principles so that the natural prolongation of each state is preserved.<sup>10</sup>

In 1977, the arbitration establishing the continental shelf boundary between France and the United Kingdom<sup>11</sup> [Anglo-French Arbitration] provided an opportunity for judicial analysis of customary law and the boundary delimitation provisions of the Convention on the Continental Shelf<sup>12</sup> in geographic circumstances radically different from the *North Sea Cases*.<sup>13</sup> The Court of Arbitration's conclusion that the equidistance/special circumstances rule was merely another way of expressing that a boundary must

<sup>6</sup> *Id.* art. 12, 15 U.S.T. at 475, T.I.A.S. No. 5578, 499 U.N.T.S. at 318. *North Sea Continental Shelf Cases* (W. Ger. v. Den.; W. Ger. v. Neth.), 1969 I.C.J. 3, 38-39, at para. 63 (Judgment of Feb. 20).

<sup>7</sup> See *North Sea Continental Shelf Cases* (W. Ger. v. Den.; W. Ger. v. Neth.), 1969 I.C.J. 3, 38-39, 41, at paras. 63, 69 (Judgment of Feb. 20).

<sup>8</sup> The *North Sea Cases* involved the delimitation of the continental shelf between The Netherlands and the Federal Republic of Germany and Denmark and the Federal Republic of Germany. Application of the equidistance method in delimiting the two boundaries would have cut off the German continental shelf very near the coast. *North Sea Continental Shelf Cases* (W. Ger. v. Den.; W. Ger. v. Neth.), 1969 I.C.J. 3 (Judgment of Feb. 20).

<sup>9</sup> In the *North Sea Cases*, the relevant factors identified by the ICJ included the configuration of the coastline, the physical and geological structure of the shelf, the natural resources of the shelf, and a reasonable degree of proportionality between the length of coastline and area of continental shelf. See *id.* at 53-54, para. 101(D).

<sup>10</sup> *Id.* at 53, para. 101(C)(1).

<sup>11</sup> Arbitration on the Delimitation of the Continental Shelf (U.K. v. Fr.), reprinted in 18 I.L.M. 397 (1979) (Decision of June 30, 1977). See generally Colson, *The United Kingdom-France Continental Shelf Arbitration*, 72 Am. J. Int'l L. 95 (1978).

<sup>12</sup> Convention on the Continental Shelf, *supra* note 3, art. 6, 15 U.S.T. at 474, T.I.A.S. No. 5578, 499 U.N.T.S. at 316.

<sup>13</sup> The *North Sea Cases* involved lateral boundary delimitations of three States on the same concave area of coastline on the North Sea. See *North Sea Continental Shelf Cases* (W. Ger. v. Den.; W. Ger. v. Neth.), 1969 I.C.J. 3, 13, at para. 3 (Judgment of Feb. 20). The Anglo-French Arbitration involved two opposite States on the English Channel, islands and an area seaward of the two States. See Arbitration on the Delimitation of the Continental Shelf (U.K. v. Fr.), reprinted in 18 I.L.M. 397, 408-09 at paras. 1-8 (1979) (Decision of June 30, 1977).

be delimited by equitable principles,<sup>14</sup> harmonized the Convention and customary law.

Neither the establishment of the rather nebulous criteria of equitable principles, nor state practice, nor international negotiations have provided sufficient guidance to quell the continuing debate over the principles of law and methodologies applicable to the delimitation of the continental shelf between adjacent or opposite States.<sup>15</sup> Over two hundred ocean boundaries worldwide either have not been negotiated, are being negotiated, or are now actively disputed.<sup>16</sup> Each clarification of the meaning of equitable principles or identification of principles relevant to the delimitation process is of particular importance to nations in negotiating, litigating or arbitrating these hundreds of boundaries.

The 1982 Tunisia-Libya Delimitation<sup>17</sup> has now become the third major judicial opinion dealing with the principles applicable to continental shelf delimitation. The clarification by the ICJ of the relationship of natural prolongation and equitable principles is a major contribution to the law of continental shelf delimitation. The purpose of this article is to discuss this recent decision of the ICJ and analyze the decision in light of the *North Sea Cases*, the Anglo-French Arbitration and developing international law.

#### A. *The History of the Dispute*

Tunisia granted the first petroleum concessions on the continental shelf in the early 1960's. In 1968 Libya began granting concessions which abutted the grid system created by the Tunisian grants.<sup>18</sup> Both parties' continental shelf claims were far more extensive than the areas which were involved in the concessions: Tunisia originally adopted an equidistance line as the boundary of its concessions and claimed to a line known as the ZV (Zenith Vertical) 45° line; Libya claimed sovereign rights to a line running di-

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<sup>14</sup> Arbitration on the Delimitation of the Continental Shelf (U.K. v. Fr.), reprinted in 18 I.L.M. 397, 421 at para. 70 (1979) (Decision of June 30, 1977).

<sup>15</sup> See generally Hodgson & Smith, *Boundaries of the Economic Zone*, in *LAW OF THE SEA: CONFERENCE OUTCOMES AND PROBLEMS OF IMPLEMENTATION* 183 (E. Miles & J. Gamble eds. 1980); Adede, *Toward the Formulation of the Rule of Delimitation of Sea Boundaries Between States with Adjacent or Opposite Coastlines*, 19 VA. J. INT'L L. 207 (1979).

<sup>16</sup> See generally Hodgson, *International Ocean Boundary Disputes*, in *THE OCEANS AND U.S. FOREIGN POLICY* 37 (T. Clingan, R. Darman, R. Daschbach, R. Hodgson, S. Kime, J. Moore, M. Morris & J. Murphy eds. 1978).

<sup>17</sup> Continental Shelf (Tunisia/Libyan Arab Jamahiriya), 1982 I.C.J. 18 (Judgment of Feb. 24).

<sup>18</sup> *Id.* at 35, para. 21.

rectly north from Ras Adjir, the point where the land frontier meets the coastline.<sup>19</sup> (See Figure 1).<sup>20</sup> However, none of the concessions actually overlapped until 1974 in areas approximately 50 miles from shore.<sup>21</sup>

Apparently, negotiations between the two countries began in 1968, shortly after the grant of the Libyan concessions.<sup>22</sup> The failure of the negotiations led to formal protests by each government in 1976. Diplomatic discussions resulted in the signing of the Special Agreement of 10 June 1977<sup>23</sup> [hereinafter Special Agreement] which referred the matter to the ICJ for resolution.<sup>24</sup>

### B. *Terms of the Special Agreement*

Article 1 of the Special Agreement requested the ICJ to deter-

<sup>19</sup> *Id.* at 83, para. 117.

<sup>20</sup> The geography of Tunisia and Libya involves two adjoining countries on the northern coastline of the continent of Africa abutting the Mediterranean Sea. Libya lies to the east and has a relatively regular coastline running in a generally east-southeast direction. Traveling northwest along the Tunisian coast from the land frontier, one encounters the island of Jerba and the concavity of the Gulf of Gabes. In this area the coastline changes direction and runs in a northeast direction to Ras Kaboudia, then generally northward to Cape Bon, at which point the coastline again changes direction radically and proceeds in a generally west-northwest direction. Lying between the island of Jerba and Ras Kaboudia, approximately 11 miles east of the Tunisian coast are the Kerkennah Islands. The Kerkennah Islands are an archipelagic group of islands with extensive shoals and low tide elevations on both the landward and seaward sides of the islands. Continental Shelf (Tunisia/Libyan Arab Jamahiriya), 1982 I.C.J. 18, 34 at para. 19 (Judgment of Feb. 24).

The land area of most of eastern Tunisia and northern Libya is part of an area known as the Pelagian Block. The Pelagian Block also extends into the seabed of the area of the delimitation. The continental shelf descends from west to east at a gentle slope. Virtually the entire area is less than 200 meters deep and most of the area is less than 100 meters deep. A major depression called the Tripolitanian Furrow extends parallel and quite near to the Libyan coast east of Ras Tajoura (Tripoli). *Id.* at 41, para. 32.

The ICJ described the general area of the delimitation as bounded on the west by the Tunisian coast, but "unconfined on the east by any visible feature or agreed delimitation line." *Id.* at 35, para. 20. To the north, neither party has concluded a delimitation agreement with Malta, but Tunisia and Italy have established a continental shelf boundary based primarily on a median line with special modifications for islands. *Id.* Malta requested permission to intervene in the case, but the request was denied. *Id.* at 24, para. 8. See Continental Shelf (Tunisia/Libyan Arab Jamahiriya) Application by Malta for Permission to Intervene, 1981 I.C.J. 3 (Judgment of Apr. 14).

<sup>21</sup> Continental Shelf (Tunisia/Libyan Arab Jamahiriya), 1982 I.C.J. 18, 35, 83, at paras. 21, 117 (Judgment of Feb. 24).

<sup>22</sup> See *id.* at 306 (dissenting opinion of Judge *ad hoc* Evensen at para. 20).

<sup>23</sup> The text of the Special Agreement in both the English and French translations is included in the beginning of the ICJ's decision. See *id.* at 21-24, paras. 2, 4. The Special Agreement is also reprinted in 18 I.L.M. 49 (1979).

<sup>24</sup> Continental Shelf (Tunisia/Libyan Arab Jamahiriya), 1982 I.C.J. 18, 35 at para. 21 (Judgment of Feb. 24).

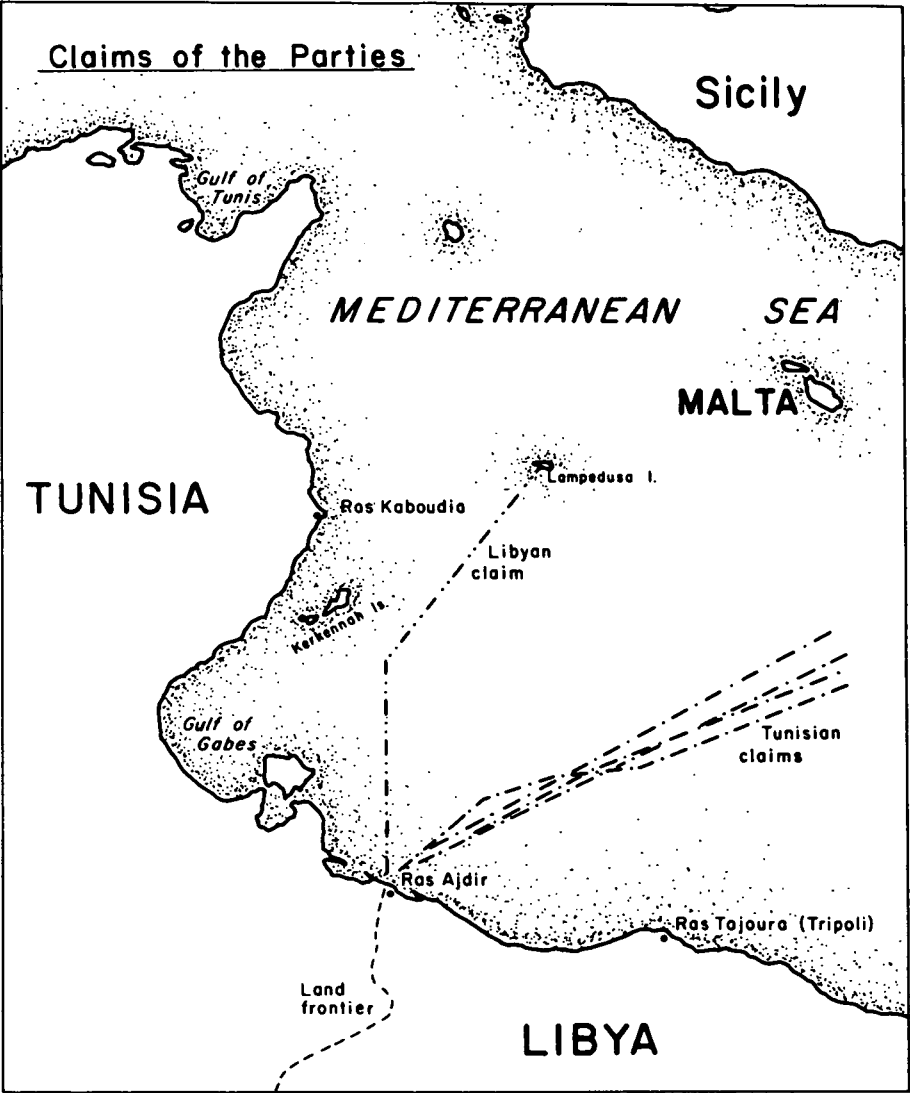


Figure 1

mine the principles and rules of international law to be applied in delimiting the continental shelf appurtenant to Tunisia and Libya. The agreement asked the Court to consider equitable principles, the relevant circumstances of the area, and recent accepted trends of the Third United Nations Conference on the Law of the Sea [hereinafter UNCLOS III].<sup>25</sup> The 1958 Convention on the Continental Shelf was not directly applicable to the court's decision because neither Libya nor Tunisia were parties to the Convention.<sup>26</sup>

The parties' request that the ICJ consider equitable principles and relevant circumstances is a proposal clearly within the jurisprudence of the Court.<sup>27</sup> In regard to new trends of international law, the work of UNCLOS III has progressed much further in the law-making process since the *Fisheries Jurisdiction* cases<sup>28</sup> of 1974 in which the ICJ stated that the proposals of UNCLOS III were merely "aspirations" rather than expressions of existing law and that the Court could not anticipate the law.<sup>29</sup> The parties' request failed to identify what trends the Court should recognize or to specify particular trends of UNCLOS III as *lex specialis* in the case.<sup>30</sup> The Court responded that the trends of UNCLOS III would be taken into account, in any event, to the extent that a provision of the draft convention<sup>31</sup> is "binding upon all members of the international community because it embodies or crystallizes a pre-existing or emergent rule of customary law."<sup>32</sup>

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<sup>25</sup> Special Agreement, *supra* note 23, art. 1, reprinted in *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, 1982 I.C.J. 18, 21, 23 at paras. 2, 4 (Judgment of Feb. 24).

<sup>26</sup> *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, 1982 I.C.J. 18, 43 at para. 36 (Judgment of Feb. 24). The 1958 Convention on the Continental Shelf is cited and briefly explained *supra* note 3 and accompanying text.

<sup>27</sup> See *North Sea Continental Shelf Cases* (W. Ger. v. Den.; W. Ger. v. Neth.), 1969 I.C.J. 3, 53 at para. 101(C)(1) (Judgment of Feb. 20). "[D]elimitation is to be effected . . . in accordance with equitable principles, and taking account of all the relevant circumstances . . . ."

<sup>28</sup> *Fisheries Jurisdiction Cases* (U.K. v. Ice.), 1974 I.C.J. 3 and (W. Ger. v. Ice.), 1974 I.C.J. 175 (Judgments of July 25, 1974).

<sup>29</sup> *Fisheries Jurisdiction Cases* (U.K. v. Ice.), 1974 I.C.J. 3, 23 at para. 53 and (W. Ger. v. Ice.), 1974 I.C.J. 175, 192 at para. 45 (Judgments of July 25, 1974).

<sup>30</sup> *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, 1982 I.C.J. 18, 38 at para. 24 (Judgment of Feb. 24).

<sup>31</sup> Draft Convention on the Law of the Sea (Informal Text), A/CONF. 62/WP.10/Rev.3/Add. 1 (1980) [hereinafter cited as Draft LOS Treaty]. The Draft LOS Treaty was the negotiating document at the time of Tunisia/Libya Delimitation. The current version of the treaty was adopted by UNCLOS III on 30 April 1982. See Convention on the Law of the Sea, Drafting Committee, Working Paper 1, 4 June 1982 [hereinafter cited as LOS Treaty].

<sup>32</sup> *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, 1982 I.C.J. 18, 38 at para. 24 (Judgment of Feb. 24). See also *North Sea Continental Shelf Cases* (W. Ger. v. Den.; W.

A second request of the Special Agreement asked the Court to clarify the method of applying the law in this situation so that the experts of the two countries could delimit the continental shelf areas without difficulty.<sup>33</sup> The ICJ encountered a situation that differed from and lay somewhere between the *North Sea Cases*, where the parties reserved the right to choose a method of applying the principles of international law,<sup>34</sup> and the Anglo-French Arbitration in which the court determined the course of the boundary.<sup>35</sup>

Tunisia's French translation of the section requiring the ICJ to clarify methodology differed from Libya's English translation<sup>36</sup> leading to a disagreement that centered primarily on the degree of precision with which the Court should describe the method.<sup>37</sup> The Court found the differences in translation and arguments of little consequence and inferred that a relatively high degree of precision was required from the fact that the Court had been requested to make a *judgment* rather than an advisory opinion<sup>38</sup> and that the Special Agreement contemplated a final delimitation by the parties within three months of the judgment — a period which would not allow for additional protracted interpretations and negotiations.<sup>39</sup>

## II. SUBMISSIONS OF THE PARTIES

Both Tunisia and Libya based their claims and theories of delimitation on the principle that a nation is entitled to that area of the continental shelf that is the natural prolongation of its land mass.<sup>40</sup> Tunisia characterized the continental shelf as having an east-west direction and supported the contention with arguments

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Ger. v. Neth.), 1969 I.C.J. 3, 39 at para. 63 (Judgment of Feb. 20).

<sup>33</sup> Special Agreement, *supra* note 23, art. 1, reprinted in *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, 1982 I.C.J. 18, 21, 23 at paras. 2, 4 (Judgment of Feb. 24). See generally *id.* at 38-40, paras. 25-30.

<sup>34</sup> *North Sea Continental Shelf Cases* (W. Ger. v. Den.; W. Ger. v. Neth.), 1969 I.C.J. 3, 13 at para. 2 (Judgment of Feb. 20).

<sup>35</sup> *Arbitration on the Delimitation of the Continental Shelf (U.K. v. Fr.)*, reprinted in 18 I.L.M. 397, 408 at para. 1 (1979) (Decision of June 30, 1977).

<sup>36</sup> The original Special Agreement, *supra* note 23, was done in Arabic. The official languages of the ICJ are English and French. Each party filed a different translation. See *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, 1982 I.C.J. 18, 21, 23, 37 at paras. 2, 4, 22 (Judgment of Feb. 24).

<sup>37</sup> *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, 1982 I.C.J. 18, 39 at para. 26 (Judgment of Feb. 24).

<sup>38</sup> *Id.* at 40, para. 29.

<sup>39</sup> See *id.* at 40, 78, paras. 30, 108.

<sup>40</sup> *Id.* at 26, 29, para. 15.

based upon the geologic composition of the continental shelf as compared to the land mass and the fact that bathymetric curves reflect the general configuration of the coast.<sup>41</sup> Libya, on the other hand, represented the continental shelf as having a northward direction from the continental land mass of North Africa<sup>42</sup> and cited the geologic history as supporting its claim.<sup>43</sup>

Tunisia also claimed that a delimitation could not encroach upon areas where it has well established historic rights.<sup>44</sup> Libya countered that any fishing rights which Tunisia claims as historic rights would be irrelevant to continental shelf delimitation.<sup>45</sup>

Both Libya and Tunisia recognized the change of direction (or concavity) of the coastline as a circumstance relevant to the delimitation.<sup>46</sup> Tunisia also cited the irregularity of the Tunisian coastline, islands, the geomorphological peculiarities of the region, economic factors, and the effect on other States and delimitations in the region as relevant circumstances that the Court must consider.<sup>47</sup> In oral proceedings, Libya identified the north-south direction of the land frontier, the homogeneous character of the shelf area, domestic legislation of both parties, and the existence of petroleum fields or wells in the area as additional relevant factors.<sup>48</sup>

Both parties rejected an equidistance line as an inequitable method of delimitation.<sup>49</sup> As the practical method of delimitation, Libya submitted a due north line, adjusted to run parallel to the Tunisian coast where the coast changed its general direction.<sup>50</sup> Tunisia submitted a "sheaf of lines" representing proposals that included a parallel to a line bisecting the angle created by the Gulf of Gabes, the crestline of certain oceanic ridges, and a line determined according to the angle of aperture of the coastline in proportion to the lengths of the relevant coastlines.<sup>51</sup> (See Figure 1).

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<sup>41</sup> *Id.*; see also *id.* at 41, 52, paras. 32, 58.

<sup>42</sup> *Id.* at 29, para. 15; see also *id.* at 52, para. 57.

<sup>43</sup> *Id.* at 29, para. 15. Geologic history refers to the history of the formation of the continental shelf. Libya contended that the northward movement of the tectonic plates that resulted in the separation of the European and African continents also created a northward-extending continental shelf.

<sup>44</sup> *Id.* at 26, para. 15.

<sup>45</sup> *Id.* at 31, para. 15.

<sup>46</sup> *Id.* at 27, 29, para. 15.

<sup>47</sup> *Id.* at 26, para. 15.

<sup>48</sup> *Id.* at 63, para. 77.

<sup>49</sup> *Id.* at 32, 79, paras. 16, 110.

<sup>50</sup> *Id.* at 31, para. 15.

<sup>51</sup> *Id.* at 27, 32, paras. 15, 16.



## III. DECISION OF THE COURT

A. *Natural Prolongation*

The 1969 pronouncements of the ICJ in the *North Sea Cases* concerning the "fundamental concept of the continental shelf as being the natural prolongation of the land domain"<sup>52</sup> and requiring that the delimitation be effected

by agreement in accordance with equitable principles, and taking account of all the relevant circumstances, in such a way as to leave as much as possible to each Party all those parts of the continental shelf that constitute a natural prolongation of its land territory into and under the sea, without encroachment on the natural prolongation of the land territory of the other<sup>53</sup>

were the starting points for both parties' arguments concerning the principles and rules of law to be applied in the case.<sup>54</sup> The concept of natural prolongation was not only the basis of each party's claim to the seabed but was also asserted as the major criterion for delimitation.<sup>55</sup>

Before examining the question of whether distinct natural prolongations of the two land territories could be identified, the Court first analyzed the legal concept of natural prolongation. This involved distinguishing the legal concept of continental shelf from geographical or geological prolongation, clarifying the relationship of natural prolongation and equitable principles, and assessing the trends of UNCLOS III.

In the relatively short time since the Truman Proclamation of 1945,<sup>56</sup> the concept of the continental shelf as an institution of international law has developed quite independently of the fact of its physical or scientific existence.<sup>57</sup> The 1958 Convention on the Continental Shelf reflects this independent evolution by defining the boundary of the shelf by an exploitability concept,<sup>58</sup> and the UNCLOS III Draft LOS Treaty creates a continental shelf regime to

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<sup>52</sup> *North Sea Continental Shelf Cases* (W. Ger. v. Den.; W. Ger. v. Neth.), 1969 I.C.J. 3, 31 at para. 40 (Judgment of Feb. 20).

<sup>53</sup> *Id.* at 53, para. 101(C)(1).

<sup>54</sup> *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, 1982 I.C.J. 18, 43 at para. 37 (Judgment of Feb. 24).

<sup>55</sup> *Id.* at 46, para. 44.

<sup>56</sup> See *supra* notes 1-2 and accompanying text.

<sup>57</sup> See *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, 1982 I.C.J. 18, 45 at para. 41 (Judgment of Feb. 24).

<sup>58</sup> See *supra* note 4 and accompanying text.

two hundred miles where the continental margin does not extend that far.<sup>59</sup>

The Court distinguished the Tunisia/Libya delimitation from the *North Sea Cases*, in which natural prolongation played such a prominent role, on the factual situation and the fact that the ICJ in 1969 was examining the concept of natural prolongation in the context of contemporary customary law and state practice.<sup>60</sup> While the Court agreed with the 1969 decision that natural prolongation has "a certain role in the delimitation of shelf areas, in cases in which the geographical situation made it appropriate . . .," the Court felt that this idea of natural prolongation ". . . would not necessarily be sufficient, or even appropriate, in itself to determine the precise extent of the rights of one State in relation to those of a neighbouring State."<sup>61</sup>

The question of the relationship of natural prolongation to equitable principles had two facets. The first aspect related to whether a determination of the natural prolongation would necessarily produce an equitable delimitation. Both Tunisia and Libya, although disagreeing on the method of defining natural prolongation, argued that since such a delimitation should preserve for each party "all those parts of the continental shelf that constitute a natural prolongation of its land territory,"<sup>62</sup> the limits of natural prolongation represent an equitable boundary.<sup>63</sup> The Court rejected the notion that once the natural prolongation is determined, the Court only has to follow the "dictates of nature."<sup>64</sup> Citing the language of the *North Sea Cases* relied upon by the parties, the Court noted that the language of the operative clause only requires that the natural prolongation of each party be preserved "'as much as possible'."<sup>65</sup>

The second aspect of the relationship of natural prolongation and equitable principles relates to Tunisia's position that application of equitable principles is part of the process of identification of a State's natural prolongation. The Court clearly explained that

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<sup>59</sup> Draft LOS Treaty, *supra* note 31, art. 76, para. 1, at 38.

<sup>60</sup> Continental Shelf (Tunisia/Libyan Arab Jamahiriya), 1982 I.C.J. 18, 46 at para. 43 (Judgment of Feb. 24).

<sup>61</sup> *Id.*

<sup>62</sup> North Sea Continental Shelf Cases (W. Ger. v. Den.; W. Ger. v. Neth.), 1969 I.C.J. 3, 53 at para. 101(C)(1) (Judgment of Feb. 20).

<sup>63</sup> Continental Shelf (Tunisia/Libyan Arab Jamahiriya), 1982 I.C.J. 18, 46 at para. 44 (Judgment of Feb. 24).

<sup>64</sup> *Id.* at 47, para. 44.

<sup>65</sup> *Id.* at 46, para. 44.

while in appropriate geographical circumstances, natural prolongation may have an important role in an equitable delimitation, the reverse does not follow.<sup>66</sup> "The satisfaction of equitable principles is . . . of cardinal importance" and "the two considerations . . . are not to be placed on a plane of equality."<sup>67</sup>

The Court found that the developments of UNCLOS III have had no effect on the concept of natural prolongation in relation to delimitation of the continental shelf between States.<sup>68</sup> Although Article 76 of the draft treaty continues to recognize natural prolongation as a basis of a coastal State's legal title, that is not necessarily a criterion relevant in a delimitation between States,<sup>69</sup> and Article 83 has been revised to exclude all guidance to the effort to achieve an equitable delimitation.<sup>70</sup>

Having relegated natural prolongation to its proper perspective, the Court then considered the role of geology, geomorphology and bathymetry<sup>71</sup> in identifying the natural prolongation. Libya's arguments were based upon the geologic history of the area which indicated that the movement of continental plates had created a generally north-south shelf off the African land mass.<sup>72</sup> Libya contended that the subsequent uplifting of the area that is now Tunisia and the tilting of the Pelagian Block did not disturb the essential relationship of the Libyan coast to the shelf.<sup>73</sup> Tunisia emphasized the geologic continuity of the structure of the shelf with the eastern land territory of Tunisia.<sup>74</sup> By interpreting natural prolongation as a geological concept, each State had adopted a different, though legitimate, aspect of geology as a science.<sup>75</sup> The Court reasoned that just as it is the present day coastline that is relevant in a delimitation, it is the present seabed and not the span of evolution that is relevant to the delimitation process.<sup>76</sup> In this case, however,

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<sup>66</sup> *Id.* at 47, para. 44.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 49, para. 50. The Court was to consider the UNCLOS III Drafts according to the parties' Special Agreement. See note 25 and accompanying text.

<sup>69</sup> *Id.* at 48, para. 48.

<sup>70</sup> *Id.* at 49, para. 49; LOS Treaty, *supra* note 31, art. 83, at 41-42.

<sup>71</sup> Geomorphology and bathymetry are sciences related to the physical relief of submarine areas and the corresponding depths of waters.

<sup>72</sup> Continental Shelf (Tunisia/Libyan Arab Jamahiriya), 1982 I.C.J. 18, 52 at para. 57 (Judgment of Feb. 24).

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 52, para. 58.

<sup>75</sup> *Id.* at 53, para. 60.

<sup>76</sup> *Id.* at 54, para. 61.

the Court could not legally define the natural prolongation "by reference solely or mainly to geological considerations."<sup>77</sup>

Geomorphology and bathymetry relate to the current structure of the seabed, and many of Tunisia's strongest arguments were based on geomorphological features of the seabed. Although the Court did not discount the importance of these features as potentially relevant circumstances in the delimitation, the ICJ did not find that any feature disrupted the essential unity of the shelf so as "to constitute an indisputable indication of the limits of two separate continental shelves."<sup>78</sup>

In short, the Court concluded that the areas which constitute the natural prolongation of the two States substantially coincide and, therefore, the determination of the areas appurtenant to each State must be made by reference to criteria of international law other than those related to physical features.<sup>79</sup>

## B. *Equitable Principles*

Having found equitable principles to be the controlling rule of international law in the delimitation, the Court explained the nature of the concept. Equitable principles, unlike the concept of equity in most legal systems, are directly applicable principles of positive international law, rather than mechanisms to mitigate the harshness of a rigid rule of law.<sup>80</sup> Application of equitable principles involves balancing all the relevant considerations in a case to produce an equitable result.<sup>81</sup> Although there are no rules for establishing the weight of the elements in the balancing process<sup>82</sup> and no limit to the considerations which may be taken into account,<sup>83</sup> the Court explained that the process is not "an exercise of discretion or conciliation; nor is it an operation of distributive justice."<sup>84</sup>

The test of whether a concept represents an equitable principle is a function of the result of applying the principle. That is, a prin-

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<sup>77</sup> *Id.* at 53, para. 61.

<sup>78</sup> *Id.* at 57, 58, paras. 66, 68.

<sup>79</sup> *Id.* at 58, para. 67.

<sup>80</sup> *Id.* at 60, para. 71.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> See *North Sea Continental Shelf Cases* (W. Ger. v. Den.; W. Ger. v. Neth.), 1969 I.C.J. 3, 50 at para. 93 (Judgment of Feb. 20).

<sup>84</sup> *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, 1982 I.C.J. 18, 60 at para. 71 (Judgment of Feb. 24).

ciple must be assessed as to its ability to produce an equitable result; a principle may acquire the quality of equitableness solely by reference to its result.<sup>85</sup> The Court stressed that it is "the result which is predominant; the principles are subordinate to the goal."<sup>86</sup> If application of international law leads to several possible interpretations or equitable delimitation methods, the Court may choose the one which produces the most just result.<sup>87</sup>

### C. *Relevant Circumstances*

The determination of what is equitable in a given case is dependent on the particular circumstances of the area.<sup>88</sup> Therefore, the Court was required to determine the relevant circumstances and assess their relative weights.<sup>89</sup>

In order to evaluate the circumstances of the area, the Court found that the first step was to determine the area relevant to the delimitation with particularity.<sup>90</sup> Since adjacency to the coastline is the basis for legal claims to submarine areas, the coastline was the starting point for determining which areas were appurtenant to each State.<sup>91</sup> By excluding each State's coastline which, because of geographical situation, cannot be extended so as to overlap, the Court narrowed the relevant area to the coastline from Ras Kaboudia in Tunisia to Ras Tajoura (Tripoli) in Libya.<sup>92</sup> The characteristics of areas beyond these points were not considered in the determination of relevant circumstances.<sup>93</sup>

The Court then identified the change of direction of the coast<sup>94</sup> and the existence of islands and low tide elevations off the Tunisian coast<sup>95</sup> as the relevant physical characteristics which must be taken into account. In reexamining the geomorphology of the area to determine whether some aspect of the shelf which does not amount to a limit of natural prolongation might, however, be taken into account as a relevant circumstance of the area, the Court identified the Tripolitanian Furrow as the "principal feature which

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<sup>85</sup> *Id.* at 59, para. 70.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 60, para. 71.

<sup>88</sup> *Id.* at 60, para. 72.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 61, para. 74.

<sup>92</sup> *Id.* at 61, 62, paras. 74, 75.

<sup>93</sup> *Id.* at 62, para. 75.

<sup>94</sup> *Id.* at 63, para. 78.

<sup>95</sup> *Id.* at 63, para. 79.

could, . . . be taken into account . . . ."<sup>96</sup> In addition to the fact that the Furrow lies largely beyond the relevant coastline, the Court noted that it would be inappropriate to consider in an equitable delimitation a feature positioned so near and parallel to the coastline unless the feature demarcated natural prolongation.<sup>97</sup>

Physical characteristics were not the only relevant circumstances of the area considered by the ICJ. Since there was no agreed upon delimitation for territorial sea, contiguous zone, continental shelf or exclusive economic zone, the Court found that the undisputed land frontier<sup>98</sup> and attempts to establish unilateral boundaries may have relevance.<sup>99</sup> The Court found that the line on the official map accompanying Libya's petroleum legislation was purely internal legislation, not intended as a delimitation and not opposable to Tunisia.<sup>100</sup> Tunisian fisheries surveillance and regulation legislation was found to be of a similar nature and not opposable to Libya.<sup>101</sup>

Of importance, however, was a 1913 *modus vivendi* line established by Italy, then sovereign of Tripolitania (Libya). Italy refused to recognize a 45° line as the delimitation of a Tunisian fishery zone and declared a line perpendicular to the coast with an 8 mile buffer zone as the Tripolitanian sea boundary.<sup>102</sup> The lack of protest by Tunisia or the French authorities responsible for Tunisia's foreign relations was not sufficient evidence to conclude that the line represented a recognized boundary. However, the Court found that the tacit respect for the line and the lack of formal protest for such a long period could be historical justification for the choice of continental shelf delimitation to the extent that Tunisia could not claim historic rights opposable to Libya to the east of the *modus vivendi* line.<sup>103</sup>

The final "line" which the Court found to be a "circumstance of great relevance for the delimitation"<sup>104</sup> was the *de facto* boundary created by the adjoining petroleum concessions of the two States. The Court noted that the line approximately corresponds to the perpendicular to the coast, the *modus vivendi* line, and was

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<sup>96</sup> *Id.* at 64, para. 80.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 65-66, paras. 82-86.

<sup>99</sup> *Id.* at 66, para. 86.

<sup>100</sup> *Id.* at 69, para. 92.

<sup>101</sup> *Id.* at 68, 69, paras. 90, 92.

<sup>102</sup> *Id.* at 70, paras. 93, 94.

<sup>103</sup> *Id.* at 70, para. 95.

<sup>104</sup> *Id.* at 71, para. 96.

respected for a number of years.<sup>105</sup>

Tunisia's historic rights and baselines and the test of proportionality were recognized as relevant factors and were discussed concurrently because of their relationship in the delimitation process.<sup>106</sup> Tunisia contended that the delimitation must not encroach upon areas in which it had established historic rights, and that in applying the test of proportionality, internal waters within Tunisia's baselines and areas within the territorial sea should not be included in the determination of the ratio of continental shelf to coastline.<sup>107</sup>

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<sup>105</sup> *Id.* at 71, 84, paras. 96, 119.

<sup>106</sup> *Id.* at 71, para. 97. Tunisia's claim to extensive territorial and internal waters is based upon several sections of the Convention on the Territorial Sea and Contiguous Zone, done April 29, 1958, 15 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205. Article 12(1) provides that a territorial sea claim between opposite or adjacent states normally may not extend past an equidistance line, this rule does "not apply, however, where it is necessary by reason of historic title . . . to delimit the territorial seas . . . in a way which is at variance with this provision." Articles 4 and 5 of the Convention deal with drawing straight baselines and in relevant sections provide:

#### Article 4

1. In localities where the coast line is deeply indented and cut into, or if 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.

2. The drawing of such baselines must not depart to any appreciable extent from the general direction of the coast, and the sea areas lying within the lines must be sufficiently closely linked to the land domain to be subject to the regime of internal waters.

3. Baselines shall not be drawn to and from low-tide elevations, unless light-houses or similar installations which are permanently above sea level have been built on them.

4. Where the method of straight baselines is applicable under the provisions of paragraph 1, account may be taken, in determining particular baselines, of economic interests peculiar to the region concerned, the reality and the importance of which are clearly evidenced by a long usage.

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#### Article 5

1. Waters on the landward side of the baseline of the territorial sea form part of the internal waters of the State.

<sup>107</sup> Continental Shelf (Tunisia/Libyan Arab Jamahiriya), 1982 I.C.J. 18, 75 at para. 102 (Judgment of Feb. 24). The test of proportionality is derived from the *North Sea Cases* which found that:

A final factor to be taken account of is the element of a reasonable degree of proportionality which a delimitation effected according to equitable principles ought to bring about between the extent of the continental shelf appertaining to the States concerned and the lengths of their respective coastlines, — these being measured according to their general direction in order to establish the necessary balance between States with straight, and those with markedly concave or convex coasts, or to reduce very irregular coastlines to their truer proportions.

Tunisia claimed extensive areas seaward to the 50 meter isobath and east to the ZV 45° line based on fixed gear fisheries for free-swimming species and fisheries for sedentary species (*i.e.*, sponges).<sup>108</sup> Although the rationale for Tunisia's establishment of straight baselines was partially based on historic rights, the area Tunisia proposed to exclude from the proportionality test was that area within the baselines, not the larger area in which historic rights were claimed. Consequently, the Court found that the question of the validity of Tunisia's historic rights was not relevant to the proportionality determination.<sup>109</sup>

The Court did not reach the question of whether Tunisia's baselines were opposable to Libya in defining which areas of the seabed were to be included in the proportionality test. Although internal waters and territorial seas are not legally part of the continental shelf, the Court explained that the "only absolute requirement of equity" is to compare like with like.<sup>110</sup> In a situation such as this where the coastlines are markedly different and when straight baselines are employed, the results would be quite different if the strictly defined continental shelf area were used rather than the entire area of the seabed.<sup>111</sup> In addition, the Court noted that the proportionality calculation is based on a shelf to coastline ratio, not on a shelf to baseline ratio.<sup>112</sup> Therefore, the Court found that all areas below the low waterline on the relevant coasts should be compared to determine the equitable character of the delimitation.<sup>113</sup>

Having found it unnecessary to rule on the validity of historic rights in relation to Tunisia's claimed baselines, the Court turned to the relationship of historic rights and continental shelf delimitation. Historic rights or historic waters represent a legal regime distinct from the continental shelf regime in customary international law; however, the two regimes could coincide.<sup>114</sup> The existence of historic rights is neither part of the concept of natural prolonga-

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North Sea Continental Shelf Cases (W. Ger. v. Den.; W. Ger. v. Neth.), 1969 I.C.J. 3, 52 at para. 98 (Judgment of Feb. 20).

<sup>108</sup> Continental Shelf (Tunisia/Libyan Arab Jamahiriya), 1982 I.C.J. 18, 67 at para. 88 (Judgment of Feb. 24).

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 76, para. 104.

<sup>111</sup> *Id.* at 75, para. 103.

<sup>112</sup> *Id.* at 76, para. 104.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 74, para. 100.



tion nor relevant to the method of continental shelf delimitation.<sup>115</sup> The determination of the scope and opposability to Libya of Tunisia's historic rights would have been necessary only if an independently established delimitation encroached on the claimed rights.<sup>116</sup> The Court had previously rejected Tunisia's claims east of the perpendicular *modus vivendi* line.<sup>117</sup> The method of delimitation chosen by the Court did not encroach on other claimed areas.<sup>118</sup>

Both Tunisia and Libya argued that economic factors were circumstances relevant to the delimitation. Tunisia contended that its relative poverty and its economic dependence on fishery resources in historic waters must be considered; Libya argued that the existence of oil or gas in wells was an indication of natural prolongation.<sup>119</sup> The Court found that economic factors are extraneous and unpredictable variables that cannot be considered in the delimitation process.<sup>120</sup> The presence of oil wells, rather than the presence of oil in the wells, in the area to be delimited was, however, a factor that might be considered in the balancing process.<sup>121</sup>

#### D. *The Method of Delimitation*

The final task of the ICJ was to clarify the method of applying the principles and rules of international law that had been identified. The Court rejected the proposition that an equidistance line must be the starting point in a delimitation and may be rejected only if the results are inequitable.<sup>122</sup> The Court took the position that customary law had not changed since the ICJ held in the *North Sea Cases* that the equidistance method was not a mandatory rule of law. Subsequent state practice, treaties and the UNCLOS III negotiations indicate only that "equidistance may be applied if it leads to an equitable solution; if not, other methods should be employed."<sup>123</sup> The fact that both Libya and Tunisia argued that an equidistance line would be inequitable was also a fac-

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<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 76-77, para. 105.

<sup>117</sup> *Id.* at 70-71, para. 94.

<sup>118</sup> *Id.* at 76-77, para. 105.

<sup>119</sup> *Id.* at 77, para. 106.

<sup>120</sup> *Id.* at 77-78, para. 107.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 79, para. 110.

<sup>123</sup> *Id.* at 79, para. 109.

tor for consideration, though it was not a controlling factor.<sup>124</sup>

The Court noted that the area was not of such "geographical homogeneity" that a single method could be applied throughout the extent of the delimitation.<sup>125</sup> As one possible means of avoiding an inequitable result the Court chose to deal with the delimitation in two sectors and thus minimize delimitation problems resulting from the distortion and magnification of effects as the boundary extends far from the shore.<sup>126</sup>

In the first sector, the Court found that the leasing practices of the parties was the most relevant circumstance of the area.<sup>127</sup> Independent actions of Libya and Tunisia had created a *de facto* line approximately 26° east of north which divided the oil concessions of the two countries.<sup>128</sup> The Court emphasized that it was not finding that a tacit agreement existed between the parties, but that it "must take into account whatever indicia are available of the line or lines which the Parties themselves may have considered equitable or acted upon as such — if only as an interim solution affecting part only of the area to be delimited."<sup>129</sup>

The fact that the 26° line corresponds to the perpendicular to the coast and reflects the general direction of the land boundary was also found to be relevant.<sup>130</sup> (See Figure 2). Further support was found in the precedent of the perpendicular *modus vivendi* line for fisheries jurisdiction that had been established by Italy and respected for many years.<sup>131</sup> In addition, the 26° line did not encroach on Tunisia's claimed historic rights and obviated the necessity for the Court to rule on the opposability of Tunisia's historic rights to Libya.<sup>132</sup> The Court held that "the 26° line therefore reflects all appropriate factors . . . ."<sup>133</sup>

In the second sector, the Court found that other circumstances became important as the delimitation moved seaward. In justifying

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<sup>124</sup> *Id.* at 79, para. 110.

<sup>125</sup> *Id.* at 82, para. 114.

<sup>126</sup> *Id.* at 82, para. 115.

<sup>127</sup> *Id.* at 83, para. 117.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 84, para. 118.

<sup>130</sup> *Id.* at 84-85, para. 119. These were two methods of delimitations created by the International Law Commission in its report to the United Nations General Assembly on lateral boundary delimitation in the territorial sea. 1956 2 Y.B. INT'L L. COMM'N 272; U.N. Doc. A/CN.4/SER.A (1956).

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at 86, para. 121.

<sup>133</sup> *Id.*

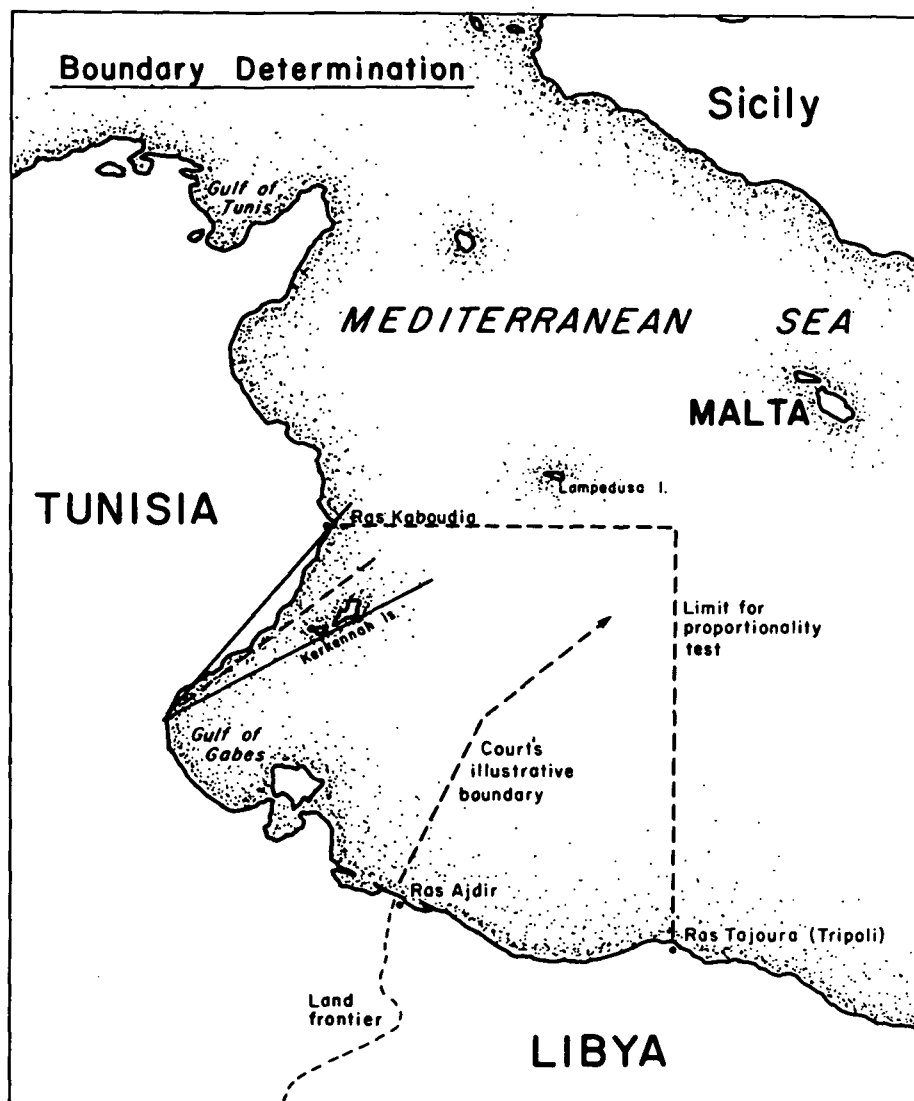


Figure 2

a change in the method of delimitation for the second sector, the Court pointed out that the existence of the *de facto* line created by each party's oil concessions near the shore could not be assumed to indicate that the parties would accept an extension of that line as equitable.<sup>134</sup> Additionally, a line perpendicular to the coast generally becomes less suitable as a delimitation line the further it extends from the coast.<sup>135</sup>

The Court held that the major geographic feature that must be considered to effect an equitable delimitation was the radical change in direction of the Tunisian coastline.<sup>136</sup> The parties, however, disagreed on the location where the coastline changed direction, and the Court was of the opinion that the point could not be "objectively determined as a matter of fact."<sup>137</sup> Notwithstanding this dilemma, a mere determination that the delimitation line should change direction at the same location that the coastline changes direction would have left considerable room for disagreement and would have been inadequate to indicate the practical method that would allow the experts to draw the delimitation line without any difficulties.<sup>138</sup>

The Court considered the most westerly point on the Gulf of Gabes to be the appropriate reference for determining the location at which the delimitation line should reflect the change in direction of the coastline.<sup>139</sup> The intersection of a line drawn eastward from the relevant point on the Gulf of Gabes and the 26° line, therefore, marked the end of the first segment of the delimitation line.<sup>140</sup>

In determining the method of delimiting the continental shelf in the second sector, the Court had to consider such relevant circumstances as the Kerkennah Islands, the surrounding low tide elevations, and the change in direction of the coastline.<sup>141</sup> The equidistance method was again rejected in the second sector, apparently because of the effect of the islands off the Tunisian coast.<sup>142</sup> The Court found that a second straight line segment would produce a

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<sup>134</sup> *Id.* at 87, para. 125.

<sup>135</sup> *Id.* at 87-88, para. 125.

<sup>136</sup> *See id.* at 63, 86, paras. 78, 122.

<sup>137</sup> *Id.* at 86-87, para. 123.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 87, para. 124.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 88, para. 127.

<sup>142</sup> *Id.* at 88, para. 126.

"reasonable and equitable result."<sup>143</sup>

The Court represented the general direction of the coast as a line of an approximate 42° bearing drawn from the most westerly point of the Gulf of Gabes to Ras Kaboudia.<sup>144</sup> (See Figure 2). This depiction of the coastline, however, did not give effect to the Kerkennah Islands or the low tide elevations which were determined to be relevant circumstances. Even though it was difficult to define a line from the Gulf of Gabes which took into account the low tide elevations, the Court described a line along the seaward side of the islands as having an approximately 62° bearing. (See Figure 2). In spite of the fact that the 62° line disregarded large areas of low tide elevations to the east of the Kerkennah Islands, the Court considered that a delimitation running parallel to the seaward side of the islands would give excessive weight to the Kerkennahs.<sup>145</sup>

Following the example of other delimitations which have given only partial effect to islands,<sup>146</sup> the Court determined that taking into account the position and the low tide elevations of the Kerkennah Islands, the islands should be given "half effect."<sup>147</sup> By bisecting the angle formed by the 42° and 62° lines, the Court effectively gave halfweight to the islands in the delimitation by drawing the line in the second sector at an angle of 52° from the meridian.<sup>148</sup> (See Figure 2).

The outer limit of the continental shelf delimitation was not determined by the ICJ or indicated in the Special Agreement.<sup>149</sup> In order to apply the criterion of proportionality, the Court had to define an area as relevant to the delimitation. By extending a line east from Ras Kaboudia and north from Ras Tajoura<sup>150</sup> (see Figure 2), the Court circumscribed an area that was divided by the delimitation line in a ratio of approximately 40:60 in comparing the Libyan seabed area to the Tunisian. The Court concluded that this compared favorably with an approximately 31:79 ratio of the rele-

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<sup>143</sup> *Id.* at 88, para. 127.

<sup>144</sup> *Id.* at 88, para. 128.

<sup>145</sup> *Id.* at 88-89, para. 128.

<sup>146</sup> *Id.* at 89, para. 129. See *Arbitration on the Delimitation of the Continental Shelf (U.K. v. Fr.)*, reprinted in 18 I.L.M. 397, 455 at para. 251 (1979) (Decision of June 30, 1977).

<sup>147</sup> *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, 1982 I.C.J. 18, 89 at para. 129 (Judgment of Feb. 24).

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* at 91, para. 130.

<sup>150</sup> *Id.*

vant coastlines measured by their general direction.<sup>151</sup>

#### IV. ANALYSIS

For those who hoped that the Tunisia-Libya delimitation would furnish an opportunity for the ICJ to formulate a general legal framework for the application of the concept of equitable principles, the opinion provided little guidance. The Court emphasized that every continental shelf delimitation must be "considered and judged on its own merits, having regard to its peculiar circumstances" and that in this case no attempt had been made "to over-conceptualize the application of principles and rules relating to the continental shelf."<sup>152</sup> The opinion did, however, serve to clarify certain areas of law, perhaps the most important being the relationship between natural prolongation and equitable principles.

There are essentially three aspects of the law of the continental shelf in which natural prolongation may be an element:

- 1) in forming the basis for a legal claim to the shelf;
- 2) in defining the seaward limit of the continental shelf; and
- 3) in delimiting the continental shelf between adjacent or opposite States.

These are not isolated concepts, however, and the role of natural prolongation is not the same in each context.

From the time of the Truman Proclamation of 1945<sup>153</sup> through the UNCLOS III negotiations,<sup>154</sup> natural prolongation or appurtenance has been the accepted justification for extending sovereignty of the land territory to the seabed. In the Tunisia-Libya delimitation the ICJ confirmed that natural prolongation is the basis for legal title, but did not conclude that it also necessarily provides criteria for effecting an equitable delimitation of the continental shelf between States.<sup>155</sup>

The ICJ explained that natural prolongation is a physical fact, not a legal concept that includes consideration of historic rights or equitable principles in identifying its limits.<sup>156</sup> The legal concept of the continental shelf, on the other hand, although linked to the

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<sup>151</sup> *Id.* at 91, para. 131.

<sup>152</sup> *Id.* at 92, para. 132.

<sup>153</sup> See *supra* note 1.

<sup>154</sup> See Draft LOS Treaty, *supra* note 31, art. 76, at 31-32. See also LOS Treaty, *supra* note 31, art. 76, at 38-39.

<sup>155</sup> See Continental Shelf (Tunisia/Libyan Arab Jamahiriya), 1982 I.C.J. 18, 48 at para. 48 (Judgment of Feb. 24).

<sup>156</sup> See *id.* at 47, 73, paras. 44, 100.

physical feature, has developed a meaning independent of that which would be ascribed to it by geographers, geologists or oceanographers. This was demonstrated early in the development of the law of the continental shelf by Article 1 of the Convention on the Continental Shelf which defines the area as extending to the two hundred meter isobath or to the limits of exploitability.<sup>157</sup> The Draft LOS Treaty describes natural prolongation as extending through the continental margin, but the legally recognized continental shelf extends two hundred miles if the margin does not extend that far.<sup>158</sup>

This does not mean that the definition or means of identifying natural prolongation have been clear or remained constant while the legal concept of the continental shelf has evolved. In the *North Sea Cases*, the ICJ identified the continental shelf divided from the coast of Norway by the Norwegian Trough as an example of an area that was clearly not the natural prolongation of Norway.<sup>159</sup> Neither state practice nor the Anglo-French Arbitration, however, have tended to recognize such geological faults as disrupting the "essential unity of the continental shelf."<sup>160</sup>

In the *North Sea Cases*, the ICJ considered the geology of the shelf to be a major factor in determining the natural prolongation of the land territory.<sup>161</sup> "Geology" was explained by the Court in the Tunisia- Libya delimitation to mean the present structure rather than the geologic history of the shelf.<sup>162</sup> Despite voluminous geological and geomorphological evidence,<sup>163</sup> the Court could not determine any "indisputable indication" of the limit of the natural prolongation of Tunisia or Libya.<sup>164</sup> Considering state practice, the

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<sup>157</sup> See *supra* note 4.

<sup>158</sup> See Draft LOS Treaty, *supra* note 31, art. 76, at 31-32. See also LOS Treaty, *supra* note 31, art. 76, at 38-39.

<sup>159</sup> See *North Sea Continental Shelf Cases* (W. Ger. v. Den.; W. Ger. v. Neth.), 1969 I.C.J. 3, 32 at para. 45 (Judgment of Feb. 20).

<sup>160</sup> See *Arbitration on the Delimitation of the Continental Shelf* (U.K. v. Fr.), reprinted in 18 I.L.M. 397, 428 at para. 107 (1979) (Decision of June 30, 1977). Even the Norwegian Trough itself was ignored in the equidistance delimitation of the continental shelf between England and Norway. See *North Sea Continental Shelf Cases* (W. Ger. v. Den.; W. Ger. v. Neth.), 1969 I.C.J. 3, 32 at para. 45 (Judgment of Feb. 20).

<sup>161</sup> See *North Sea Continental Shelf Cases* (W. Ger. v. Den.; W. Ger. v. Neth.), 1969 I.C.J. 3, 51 at para. 95 (Judgment of Feb. 20).

<sup>162</sup> *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, 1982 I.C.J. 18, 54 at para. 61 (Judgment of Feb. 24).

<sup>163</sup> Geomorphology was not mentioned as a factor in the *North Sea Cases*, but is obviously important in assessing the physical structure of the present seabed.

<sup>164</sup> *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, 1982 I.C.J. 18, 57 at para. 66

limitations of the ICJ or any other tribunal in considering complex scientific evidence, the trend toward a distance criteria for continental shelf extension and sovereignty,<sup>165</sup> and the unlikelihood that any situation will arise involving an "indisputable" natural prolongation, it appears that natural prolongation, while remaining the fundamental basis for claiming title to the shelf, will be of little relevance as a criterion for delimitation.

In most cases, the area of contested continental shelf will be characterized as the natural prolongation of both parties. In such cases, other criteria of international law, *i.e.*, equitable principles, including the consideration of relevant circumstances of the area, are controlling.<sup>166</sup> The fact of natural prolongation does not constitute legal title, but represents merely an element in the balancing of factors to produce an equitable outcome.<sup>167</sup>

If the natural prolongation *can* be identified, the satisfaction of equitable principles remains "of cardinal importance."<sup>168</sup> In appropriate geographical circumstances, identification of natural prolongation may play an integral role in a delimitation, but it is not a sufficient basis for determining the rights of a state vis-à-vis a neighboring state, nor does it stand on a level of importance with equitable principles.<sup>169</sup> Therefore, a delimitation following the limits of natural prolongation is not necessarily equitable.<sup>170</sup> The Court in the Tunisia-Libya delimitation did not, however, seem to relegate an identified limit of natural prolongation to the position of just another relevant circumstance. Apparently, if the line demarcating the natural prolongation produces an equitable result,

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(Judgment of Feb. 24).

<sup>165</sup> See *supra* note 158 and accompanying text. At art. 76, para. 5, the Draft LOS Treaty also limits the maximum extension of the continental shelf to 350 nautical miles.

<sup>166</sup> See *Arbitration on the Delimitation of the Continental Shelf (U.K. v. Fr.)*, reprinted in 18 I.L.M. 397, 443 at para. 194 (1979) (Decision of June 30, 1977); *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, 1982 I.C.J. 18, 58, 60 at paras. 67, 72 (Judgment of Feb. 24).

<sup>167</sup> *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, 1982 I.C.J. 18, 58 at para. 68 (Judgment of Feb. 24).

<sup>168</sup> *Id.* at 47, para. 44.

<sup>169</sup> *Id.* at 46, paras. 43, 44.

<sup>170</sup> *Id.* at 46, para. 44. The ICJ's argument was based primarily on the fact that a single easily defined line dividing the identifiable natural prolongations of two States is unlikely to be found. However, the Court's statements went far beyond this principle. It seems fairly clear at this point that States may claim areas that are not their (or any other State's) natural prolongation to a distance of 200 miles from their shore. In addition, one can infer from the Tunisia/Libya Delimitation that equitable principles can vest title in State A to areas clearly identifiable as the physical prolongation of State B.



that boundary would have a somewhat privileged status in relation to other possible delimitations,<sup>171</sup> because it would be consistent with the notion of a State's "inherent and original right"<sup>172</sup> to the natural prolongation of its land territory and it would "leave as much as possible to each Party all those parts of the continental shelf that constitute a natural prolongation . . . , without encroachment on the natural prolongation . . . of the other."<sup>173</sup>

The equidistance method clearly has no comparable "privileged status," not even as a logical starting point in the delimitation process.<sup>174</sup> The Court's treatment of equidistance went beyond rejection, which implies some consideration and subsequent repudiation, and might better be described as disregard. The failure to recognize any necessity to at least go through the exercise of trying the equidistance method to determine if the results were extraordinary or inequitable was the subject of strong dissents by Judges Gros,<sup>175</sup> Oda,<sup>176</sup> and Evensen.<sup>177</sup> The disagreement reflects the two schools of thought as to the relationship of equidistance and equitable principles that negotiations in UNCLOS III have been unable to resolve for over a decade.<sup>178</sup> The Court of Arbitration's finding in the Anglo-French delimitation that the equidistance/special circumstances language of Article 6 of the Convention on the Continental Shelf is merely an expression of the requirement to delimit the boundary by equitable principles simply begs the question.<sup>179</sup> At least, in the case of delimitation of adjacent states

<sup>171</sup> See generally *id.* at 46, 58, 64, 92, paras. 44, 68, 80, 133.

<sup>172</sup> North Sea Continental Shelf Cases (W. Ger. v. Den.; W. Ger. v. Neth.), 1969 I.C.J. 3, 32 at para. 46 (Judgment of Feb. 20).

<sup>173</sup> *Id.* at 53, para. 101(C)(1).

<sup>174</sup> Continental Shelf (Tunisia/Libyan Arab Jamahiriya), 1982 I.C.J. 18, 79 at para. 110 (Judgment of Feb. 24).

<sup>175</sup> *Id.* at 148-49 (dissenting opinion of Judge Gros at paras. 11-12).

<sup>176</sup> *Id.* at 260-61 (dissenting opinion of Judge Oda at paras. 165-66).

<sup>177</sup> *Id.* at 293-96 (dissenting opinion of Judge Evensen at para. 14).

<sup>178</sup> See generally Adede, *supra* note 15, at 211-22. The futility of attempting to resolve the debate is reflected in the present text of the LOS Treaty which takes a noncommittal position:

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

LOS Treaty, *supra* note 31, art. 83, para. 1, at 41.

<sup>179</sup> Article 6 of the Convention on the Continental Shelf provides:

Where the same continental shelf is adjacent to the territories of two or more States whose coasts are opposite each other, the boundary of the continental shelf appertaining to such States shall be determined by agreement between them. In

applying customary international law, the ICJ has taken the unequivocal position that the equidistance method has no priority in relation to other possible delimitation methods.<sup>180</sup> As a positive rule of law, this position still leaves much to be desired, of course, because all that is positively established is that there is no clear starting point for a delimitation.

In the *North Sea Cases*, the ICJ included a "reasonable degree of proportionality" between the area of the continental shelf and the length of the coastline as a factor in negotiating continental shelf boundaries in that case.<sup>181</sup> The applicability of the factor would clearly be limited if natural prolongation ruled the extent of the continental shelf<sup>182</sup> and judges were not to refashion nature.<sup>183</sup> The Court of Arbitration in the Anglo-French delimitation related the proportionality criterion not to a comparison of coastline to shelf, but to the effect of geographical features on the boundary. That is, in a delimitation by the equidistance method, proportionality as a factor is more often a question of whether the effects of a particular geographic feature produce disproportionate or inequitable results.<sup>184</sup>

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

Convention on the Continental Shelf, *supra* note 3, art. 6, para. 1, 15 U.S.T. at 474, T.I.A.S. No. 5578, 499 U.N.T.S. at 316. The Court of Arbitration in the Anglo-French delimitation interpreted this to mean that:

the role of the "special circumstances" condition in Article 6 is to ensure an equitable delimitation; and the combined "equidistance-special circumstances rule", in effect, gives particular expression to a general norm that, failing agreement, the boundary between States abutting the same continental shelf is to be determined on equitable principles.

Arbitration on the Delimitation of the Continental Shelf (U.K. v. Fr.), *reprinted in* 18 I.L.M. 397, 421 at para. 70 (1979) (Decision of June 30, 1977).

<sup>180</sup> Continental Shelf (Tunisia/Libyan Arab Jamahiriya), 1982 I.C.J. 18, 79 at para. 110 (Judgment of Feb. 24).

<sup>181</sup> North Sea Continental Shelf Cases (W. Ger. v. Den.; W. Ger. v. Neth.), 1969 I.C.J. 3, 52, 54 at paras. 98, 101(D)(3) (Judgment of Feb. 20).

<sup>182</sup> For example, if the test of proportionality of coastline to shelf area were applied to two adjacent States with straight, relatively equal coasts, but with significantly different natural prolongations, that is, physical extension of a species of platform under the sea, the result would not be relevant to an equitable delimitation.

<sup>183</sup> See North Sea Continental Shelf Cases (W. Ger. v. Den.; W. Ger. v. Neth.), 1969 I.C.J. 3, 50 at para. 91 (Judgment of Feb. 20). See also Arbitration on the Delimitation of the Continental Shelf (U.K. v. Fr.), *reprinted in* 18 I.L.M. 397, 427 at para. 101 (1979) (Decision of June 30, 1977).

<sup>184</sup> See Arbitration on the Delimitation of the Continental Shelf (U.K. v. Fr.), *reprinted in* 18 I.L.M. 397, 427 at paras. 99-101 (1979) (Decision of June 30, 1977).

Since the Tunisia-Libya Delimitation did not involve an equidistance boundary or opposite States, it cannot be stated that the ICJ rejected the theory of the Court of Arbitration. The ICJ did, however, seem to give the proportionality factor a great deal more weight in the delimitation process than the Court of Arbitration.<sup>185</sup> Due to different geographic circumstances and delimitation methods,<sup>186</sup> as well as the trend to delimit the extent of the continental shelf by distance rather than natural prolongation,<sup>187</sup> the ICJ's additional emphasis on proportionality and its method of circumscribing the area relevant to the delimitation may not be inconsistent with the Court of Arbitration's reasoning.

The ICJ rejected the proposal that economic considerations, such as the relative wealth or degree of development of the countries or economic dependence on resources from the area to be delimited, should be factors to be considered in the delimitation.<sup>188</sup> Although critical of much of the Court's reasoning, Judge Oda in his voluminous dissent agreed on this point.<sup>189</sup> His clear, succinct analysis stated: "Such questions involve global resource policies, or basic problems of world politics which not only could not have been solved by the judicial organ of the world community but stray well beyond equity as a norm of law into the realm of social organization."<sup>190</sup>

The line segment delimited by the ICJ in the first sector has

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<sup>185</sup> See *id.* at paras. 98, 99. The Court of Arbitration stated:

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

See also *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, 1982 I.C.J. 18, 314 (dissenting opinion of Judge *ad hoc* Evensen at para. 23), 152 (dissenting opinion of Judge Gros at para. 17) (Judgment of Feb. 24).

<sup>186</sup> In the *North Sea Cases* the ICJ noted that "the relative weight to be accorded to different considerations naturally varies with the circumstances of the case." *North Sea Continental Shelf Cases (W. Ger. v. Den.; W. Ger. v. Neth.)*, 1969 I.C.J. 3, 50 at para. 93 (Judgment of Feb. 20).

<sup>187</sup> See *supra* note 165.

<sup>188</sup> See *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, 1982 I.C.J. 18, 77 at paras. 106-107 (Judgment of Feb. 24).

<sup>189</sup> *Id.* at 255-56 (dissenting opinion of Judge Oda at para. 157).

<sup>190</sup> *Id.* at 256 (dissenting opinion of Judge Oda at para. 157).

both good and bad elements. The choice seems generally consistent with the Statute of the Court<sup>191</sup> which favors, as a source of law, what nations do over what they claim to accept as law.<sup>192</sup> The main problem with choosing the boundary between the concessions as the delimitation line is that in the future, States will be discouraged from seeking peaceful compromise or *modus vivendi* pending resolution of a dispute because they may be held to those terms.

In both the first and second sectors, however, the major criticism must be directed to the failure to explain why other methods were rejected or were less equitable.<sup>193</sup> For example, the equidistance method was not investigated in the nearshore segment where distortion due to distance from the coast is less of a problem. In addition, the Kerkennah Islands in the second sector were given half-effect,<sup>194</sup> rather than one-third, three-fourths or even full effect. The Court did not sufficiently distinguish whether the relevant factors in determining the weight given to the islands were the land area, the demography, the distance from the shore, the economic significance, the disproportionate effect the islands have on the direction of the boundary, or only their position and low tide areas.

Left unresolved in the Tunisia-Libya case was the effect of fishing zones or historic rights on continental shelf delimitation. The ICJ did not have to reach that question to effect a delimitation, but as dicta noted, the rights over sedentary fisheries claimed by Tunisia might be "more nearly related to the concept of the exclusive economic zone."<sup>195</sup> This reference is not clear for several reasons. Although the concept of the exclusive economic zone (EEZ) contains an aspect of recognition of traditional fishing rights for entry into a fishery, there is no indication that this is a criterion

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<sup>191</sup> Statute of the International Court of Justice, 1970 U.N.Y.B. 1013, at art. 38.

<sup>192</sup> A possible analogy may be drawn to the fact that in the Statute of the Court international custom, as evidence of a general practice accepted as law, is a superior source of law to the general principles of law recognized by nations. *Id.* Of course, in this case there was no general international practice involved, and in spite of the Court's protestations that no tacit agreement was found, the situation seems more closely related to acquiescence. See Continental Shelf (Tunisia/Libyan Arab Jamahiriya), 1982 I.C.J. 18, 84 at para. 118 (Judgment of Feb. 24).

<sup>193</sup> See generally Continental Shelf (Tunisia/Libyan Arab Jamahiriya), 1982 I.C.J. 18, 156 (dissenting opinion of Judge Gros at para. 24), 319 (dissenting opinion of Judge *ad hoc* Evensen) (Judgment of Feb. 24).

<sup>194</sup> Another consideration is whether the Court's line did indeed give the Kerkennah Islands and the low tide elevations half-effect, since the calculation used a line that did not take the low tide elevations into account.

<sup>195</sup> Continental Shelf (Tunisia/Libyan Arab Jamahiriya), 1982 I.C.J. 18, 73-74 at para. 100 (Judgment of Feb. 24).

for delimitation of an EEZ between States.<sup>196</sup> Also, in spite of the fact that historic rights and the continental shelf represent distinct legal regimes,<sup>197</sup> the resources involved in the claim of historic rights are sedentary species, resources of the continental shelf.<sup>198</sup> If exploitation of petroleum and the existence of oil wells are relevant circumstances,<sup>199</sup> it should follow that the historic exploitation of sedentary fisheries should also be related to continental shelf delimitation.

## V. CONCLUSION

The decision of the ICJ is, of course, only binding upon the parties to the case, and the Court emphasized that the delimitation rather than the "overconceptualiz[ing]" of principles and rules relating to the continental shelf was the goal.<sup>200</sup> In spite of these caveats, there is no doubt that the legal theory of the delimitation will be of importance to scholars and future jurists. Although each continental shelf delimitation presents a unique situation, each application of international law, in particular geographic circumstances, hopefully clarifies aspects of the law and the delimitation process.

The current trend in extensions of jurisdiction is toward 200 mile fishery or exclusive economic zones. It is not clear that a continental shelf boundary between States can differ from the EEZ boundary since the EEZ regime includes the seabed, subsoil, and water column.<sup>201</sup> The two areas coincide to a distance of 200 miles, and the legal regime of the continental shelf is applicable through the entire extent of the EEZ.<sup>202</sup> From the text of the LOS Treaty, it is not clear whether they must be treated as two distinct regimes.<sup>203</sup> Even if the regimes must be considered as separate, the

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<sup>196</sup> See Draft LOS Treaty, *supra* note 31, art. 62, para. 3, at 24, and art. 74, at 30.

<sup>197</sup> See Continental Shelf (Tunisia/Libyan Arab Jamahiriya), 1982 I.C.J. 18, 73-74 at para. 100 (Judgment of Feb. 24).

<sup>198</sup> See Convention on the Continental Shelf, *supra* note 3, art. 2, para. 4, 15 U.S.T. at 473, T.I.A.S. No. 5578, 499 U.N.T.S. at 314.

<sup>199</sup> See Continental Shelf (Tunisia/Libyan Arab Jamahiriya), 1982 I.C.J. 18, 77-78 at para. 107 (Judgment of Feb. 24).

<sup>200</sup> *Id.* at 92, para. 132.

<sup>201</sup> See Draft LOS Treaty, *supra* note 31, art. 56(1)(a), at 21.

<sup>202</sup> *Id.* at 21, art. 56, para. 3.

<sup>203</sup> *Id.* Article 56, para. 3, of the Draft LOS Treaty may be interpreted as incorporating the continental shelf regime into the EEZ regime, or as merely providing for parallel rights in the coinciding area.

perspective that the ICJ gave the role of natural prolongation<sup>204</sup> seems to lend to the compatability of the two regimes.

It remains to be seen what analogies can be drawn from continental shelf delimitations for application in more complex maritime delimitations. Because the goal of equitable delimitation is the same and the regimes are overlapping, it is likely that the legal theory of continental shelf cases will be equally important in more complex delimitations.

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<sup>204</sup> See *supra* text accompanying notes 161-67.