

**THE PEACEFUL SETTLEMENT
OF MARITIME BOUNDARY DISPUTES
BY THE INTERNATIONAL COURT OF JUSTICE
AND OTHER COURTS AND TRIBUNALS**

By Professor Barbara Kwiatkowska*

Guest Lectures at the Senghor University, Alexandria
and the Egyptian Society of International Law, Cairo

9-10 November 1999

INTRODUCTORY REMARKS

In his historic Statement delivered at the ongoing 54th United Nations General Assembly, His Excellency Judge Stephen M. Schwebel, President of the International Court of Justice, while commending the extended recourse to the Court as being immensely encouraging, remarked:

This extended recourse is the more noteworthy when the diversity of States submitting cases to the Court is considered. Parties to the Statute of the Permanent Court of International Justice were restricted by the prevalence of colonial rule and the policies of the United States of America and the Union of Soviet Socialist Republics; perforce, the PCIJ was Euro-centred.

The International Court of Justice today is universal in its clientele; States submitting cases to the Court are drawn not only from Europe and the Americas, but Africa, Asia, the Middle East, and Australasia. Indeed, today States of Africa are in the lead in their resort to the Court. The Court itself is universal in its composition, comprised as it is of Members from the United

*Deputy Director of the Netherlands Institute for the Law of the Sea (NILOS), Faculty of Law, Utrecht University, The Netherlands.

States of America, Sri Lanka, Japan, Algeria, France, Madagascar, Hungary, China, Germany, Sierra Leone, Russian Federation, United Kingdom, Venezuela, Netherlands and Brazil. (...)

Not only is the Court far busier than ever before. Not only is the diversity of States using the Court far greater. The range of issues raised before the Court increasingly includes questions related to major international crises. In the 12 months under review, cases concerning hostilities in Kosovo and the Congo were brought to the Court, joining on the docket such sensitive cases as those concerning the *Lockerbie* atrocity and claims of genocide on the territory of the former Yugoslavia. The Court's General List also includes four cases of boundary delimitation, a more traditional area in which the Court has been notably successful.¹

It follows that in parallel to the progressing United Nations New Agenda for the Development of Africa in the 1990s,² African States have been in a forefront of the development perceived by President Schwebel as acquiring by States of a "law habit", which has been continuously contributing to the busiest docket in the Court's history³ and to the successful fulfillment by the

¹Statement of H.E. Judge Stephen M. Schwebel, President of the International Court of Justice, to the 54th Session of the General Assembly, in Connection with the Annual Report of the ICJ, *ICJ Communiqué* No.99/46, 26 October 1999 [<http://www.icj-cij.org>]. See also the preceding Statement of H.E. President Schwebel to the 53rd Session of the General Assembly, UN Doc. A/53/PV.44, 1, 4 (27 October 1998), and *ICJ Communiqué* No.98/33, 27 October 1998 [<http://www.icj-cij.org>]. Cf. P.H.F. Bekker, The 1998 Judicial Activity of the International Court of Justice, 93 *American Journal of International Law* (AJIL) 534, 536 (1999).

²See *Implementation of the United Nations New Agenda for the Development of Africa in the 1990s, Including Measures and Recommendations Agreed Upon at Its Mid-Term Review - Progress Report by the Secretary-General*, UN Doc. A/53/390 (1998).

³See Statement of H.E. President Schwebel (53rd UNGA), *supra* note 1, remarking that: "There is reason to surmise that this increase in recourse to the Court is likely to endure, at any rate if a state of relative détente in international relations endures", and his latest Statement (54th UNGA), *supra* note 1, observing that: "Concern that the proliferation of international tribunals might produce substantial conflict among

Court of its functions as "the world's most senior international court, the principal judicial organ of the United Nations, the Court with the richest history, the broadest material jurisdiction and the most refined jurisdictional jurisprudence". These functions, as addressed in President Schwebel's Statement, include the Court's acting as a factor and actor in the maintenance of international peace and security, as the most authoritative interpreter of the legal obligations of States in disputes between them, and as the supreme interpreter of the United Nations Charter and of its associated instruments.⁴

As within performance of these paramount functions, the Court has made unquestioned and significant contributions to the development of the law of the sea as part of the global system of peace and security and as part of general international law,⁵ it was with the greatest delight that I accepted invitation of His Excellency Judge Ahmed S. El-Kosheri, President of the

them, and evisceration of the docket of the ICJ, have not materialized, at any rate as yet. (...) The more international adjudication there is, the more there is likely to be; the 'judicial habit' may stimulate healthy imitation". Cf. Statement of H.E. Judge Stephen M. Schwebel, President of the International Court of Justice, to the 52nd Session of the General Assembly, in Connection with the Annual Report of the ICJ, UN Doc. A/52/PV.36, 1-5 (27 October 1997), *reprinted in* 92 AJIL 612-617 (1998). For Statements of President Schwebel, his Bibliography and the list of over 20 currently pending cases, see the Court's website [<http://www.icj-cij.org>], referred to *infra* note 30.

⁴See Statement of H.E. President Schwebel (53rd UNGA), *supra* note 1, at 1-3. Cf. Stephen M. Schwebel, ICJ President, The Impact of the International Court of Justice, in *Boutros Boutros-Ghali Amicorum Discipulorumque Liber - Paix, Développement, Démocratie* 663-674 (1998); *infra* notes 92, 106-109.

⁵See Stephen M. Schwebel, Fifty Years of the World Court: A Critical Appraisal, in *Are International Institutions Doing Their Job?, Proceedings of the 90th ASIL Annual Meeting, Washington D.C., 27-30 March 1996* 339, 345 (1997); Plenary Address by H.E. Judge Stephen M. Schwebel, President of the International Court of Justice, on The Contribution of the ICJ to the Development of International Law, in *International Law and The Hague's 750th Anniversary, Kurhaus Proceedings, 2-4 July 1998* 405-416 (1999); and Schwebel, The Impact of the International Court of Justice, *supra* note 4, at 669-670; Barbara Kwiatkowska, The Contribution of the International Court of Justice to the Development of the Law of the Sea, Guest Lecture, University of Stockholm, 3 March 1998 - Updated as of 26 October 1999, available at the NILOS website [<http://www.rgl.ruu.nl/english/isep/nilos-1a.asp>].

Senghor University in Alexandria and eminent Member of the Egyptian Society of International Law in Cairo, to deliver these Guest Lectures on The Peaceful Settlement of Maritime Boundary Disputes.

I felt particularly honoured by that invitation, because as was shown in an admirable essay by Her Excellency Judge Rosalyn Higgins, the name of Judge El-Kosheri features prominently on the list of African contributions to the regular composition and the institution of Judges *ad hoc* at the International Court of Justice, as well as to the development of international law by elaborating or refining ideas in individual (Separate and Dissenting) Opinions of the Judges. The Egyptian Members of the Court included Judge A.H. Badawi Pacha (1946-1965), who was Vice-President from 1955 to 1958, and Judge El-Erian (1979-1981), while Judgeship *ad hoc* of Professor El-Kosheri in the pair of the pending *Lockerbie (Libya v. UK and Libya v. USA)* cases,⁶ was preceded by serving by another Egyptian outstanding lawyer, Professor Georges Abi-Saab, as Judge *ad hoc* in the *Burkina Faso/Mali Frontier Dispute* and the *Libya/Chad Territorial Dispute* cases.⁷ The latter two cases

⁶See *Libya v. UK and Libya v. USA (Provisional Measures) Orders*, ICJ Reports 1992, 3, 114. and Dissenting Opinions of Judge *ad hoc* El-Kosheri, *id.* 94, 199; and *Libya v. UK and Libya v. USA (Preliminary Objections) Judgments*, ICJ Reports 1998, 9, 115, reprinted in 37 ILM 587 (1998). On the Lockerbie negotiations and the trial before a Scottish court sitting in the Netherlands held after delivery of the pair of the 1998 *Lockerbie (Preliminary Objections) Judgments*, parallel to the pending phase of merits, ICJ Reports 1998, 237, 240; *ICJ Communiqué* No.98/11, 1 April 1998, and No.99/36, 1 July 1999 [<http://www.icj-cij>], see 38 ILM 926 (1999); and *Lockerbie Trial Briefing* [<http://www.law.gla.ac.uk/lockerbie/main.htm>]. See also reference to the *Lockerbie* cases in Statement of H.E. President Schwebel (54th UNGA) quoted in the main text accompanying *supra* note 1.

For Biography of Judge *ad hoc* El-Kosheri, see *ICJ Yearbook 1996-1997* 59-60 (No.51). Cf. Elihu Lauterpacht, *The Role of Judges Ad Hoc*, in Connie Peck and Roy S. Lee eds., *Increasing the Effectiveness of the International Court of Justice* 371-378 (1997); and Stephen M. Schwebel, *National Judges and Judges Ad Hoc*, in *Mélanges en l'Honneur de Nicolas Valticos - Droit et Justice* 319-329 (1999).

⁷See Rosalyn Higgins, *The International Court of Justice and Africa*, in Emile Yakpo and Tahar Boumedra eds., *Liber Amicorum Judge Mohammed Bedjaoui* 343-369 (1999).

illustrate that, as President Schwebel put it: "Stability and certainty of boundaries, and the need for clear principles, fairly applied, have been matters of particular importance to African States emerging from the colonial era".⁸ The adequacy of this view is further illustrated by the *Cameroon v. Nigeria Land and Maritime Boundary* and the *Botswana/Namibia Kasikili/Sedudu Island* cases pending before the ICJ, as well as by the *Eritrea/Yemen* case pending before the Arbitral Tribunal composed of President Stephen M. Schwebel, Judge Rosalyn Higgins, Judge *ad hoc* Ahmed S. El-Kosheri and Mr. Keith Highet, presided over by the former ICJ President, Sir Robert Jennings.⁹

While Egypt is one of by now 62 adherents to the Optional Clause under Article 36(2) of the Court's Statute,¹⁰ is a party to number of multilateral

⁸Schwebel, *The Impact of the International Court of Justice*, *supra* note 4, at 668-669. See also Statement of H.E. President Schwebel (54th UNGA), *supra* note 1, remarking: "The boundary dispute on which the Court will announce a judgment in some weeks concerns the river boundary between Botswana and Namibia and a small island in the river. But the example set by Botswana and Namibia - of litigating rather than fighting over a bit of land - is one that other States, including other African States, could usefully emulate".

⁹On the 1998 *Eritrea/Yemen Territorial Sovereignty and Scope of the Dispute Award* (Phase I), 114 ILR (1999), see Barbara Kwiatkowska, *Award of the Arbitral Tribunal in the First Stage of the Eritrea/Yemen Proceedings*, 14 *International Journal of Marine and Coastal Law* 125-136 (1999); P. Hamilton *et al.* eds, *The Permanent Court of Arbitration: International Arbitration and Dispute Resolution 3*, 26-27 [J.G. Merrills], 196-197 [Summary] (1999); N.S.M. Antunes, *The Eritrea/Yemen Arbitration: First Stage - The Law of Title to Territory Reaverred*, 48 *International and Comparative Law Quarterly* 362-386 (1999).

The *Eritrea/Yemen (Maritime Delimitation)* Oral Hearings and Tribunal's deliberations (Phase II) were held in the Peace Palace, The Hague, on 5-17 July and 10-14 November 1999.

Cf. *infra* notes 24, 32-34, 48 and 74-78.

¹⁰For the list of 60 States that had made Optional Clause declarations as of August 1998, see Report of the International Court of Justice, 1 August 1997-31 July 1998, UN Doc. A/53/4, at 4 (United Nations 1998) [<http://www.icj-cij.org>]. Two more declarations have been deposited, one by Guinea prior to its instituting a new case against Congo, see *ICJ Communiqué No.98/46*, 30 December 1998, and one by Yugoslavia prior to its instituting new cases against (separately) ten NATO members, of which two cases against the United States and Spain were removed

treaties containing compromissory clauses under Article 36(1) of the Statute,¹¹ and may, if it wishes, bring any case to the Court by means of a *compromis* (Special Agreement) concluded with another State under Article 36(1), it has so far been involved in but one discontinued *Protection of French Nationals and Protected Persons in Egypt (France v. Egypt)* contentious case and one *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt* advisory case.¹² Important statements (written and oral) were made by Egypt in the milestone *Legality of the Use by a State of Nuclear Weapons in Armed Conflict (WHO Request)* and the *Legality of the Threat or Use of Nuclear Weapons (UNGA Request)* advisory proceedings.¹³

The choice by Egypt, in its Declaration of 26 August 1983 made upon ratification of the 1982 United Nations Law of the Sea Convention, of arbitral tribunal under the Convention's Article 287,¹⁴ does not prevent it from consenting in the future to submitting any its dispute to the International Court of Justice.¹⁵ The law of the sea related practice of Egypt, in particular its Royal

from the ICJ General List, see *ICJ Communiqués Nos 99/23-33*, 2 June 1999, No.99/39, 2 July 1999, and 38 ILM 950 (1999). For the list of current 62 adherents to the Optional Clause, see Report of the International Court of Justice, 1 August 1998-31 July 1999, UN Doc. A/54/4, at 4 (United Nations 1999) [<http://www.icj-cij.org>]. Cf. Statement of H.E. President Schwebel (54th UNGA), *supra* note 1.

For the text of Egypt's Optional Clause Declaration of 22 July 1957, see *ICJ Yearbook 1996-1997* 94 (No.51). Cf. Higgins, *supra* note 7, at 352.

¹¹See Higgins, *supra* note 7, at 354-355.

¹²See ICJ Reports 1950, 59, and 1980, 73, respectively. Cf. Shabtai Rosenne, *The World Court: What It Is and How It Works* 164 and 217-218 (1995).

¹³ICJ Reports 1996, 66, 69, para.9 [*WHO Request*]; and 226, 229, para.5, and 230, para.9 [*UNGA Request*]. In both these cases, oral statements were made for Egypt by Professor Georges Abi-Saab.

¹⁴*The Law of the Sea - Declarations and Statements 24-26* (UN 1997). For the List of Choice of Procedure by States Parties under Article 287 of the Convention, see *UN Law of the Sea Bulletin* 54-56 (1998 No.36). For the status of the 1982 Convention and the 1994 Part XI Agreement as of 30 November 1998, see *id.* 1 (1999 No.39).

¹⁵Note that in its Declaration of 25 August 1986 made upon ratification of the Law of the Sea Convention, Guinea-Bissau did not accept as regards Article 287 the jurisdiction of the ICJ. By that time, Guinea-Bissau concluded an Arbitration Agreement with Senegal (of 12 March 1985) which led to the 1989 *Guinea-*

Decree on the Territorial Waters of 18 January 1951 as protested by the United Kingdom and the United States,¹⁶ and its (at that time pioneering in the Mediterranean region) Declaration on the Exclusive Economic Zone made upon the Convention's ratification as protested by the United States,¹⁷ were pleaded in the famous *Anglo/Norwegian Fisheries* and the *Libya/Malta Continental Shelf* cases respectively. The regime of Suez Canal connecting the Red Sea with the Mediterranean, along with the regime of Panama Canal, were addressed in the inaugural 1923 *SS Wimbledon* Judgment, the only decision of

Bissau/Senegal Maritime Delimitation Award [83 ILR 1; 94 *Revue Générale de Droit International Public* (RGDIP) 204 (1990)]. Since Guinea-Bissau found that Award unsatisfactory, it made on 7 August an Optional Clause Declaration under Article 36(2) of the ICJ Statute [*ICJ Yearbook 1996-1997* 96 (No.51)] and filed on 23 August 1989 in the Court's Registry an Application instituting the *Guinea-Bissau v. Senegal Arbitral Award of 31 July 1989* proceedings. The two Court's decisions in that case [ICJ Reports 1990, 64, and 1991, 53] were followed by yet another Application of Guinea-Bissau of 12 March 1991 relying on Article 36(2) which instituted the ultimately discontinued *Guinea-Bissau v. Senegal Maritime Delimitation* case [ICJ Reports 1995, 423].

Note further that although Cameroon ratified the Law of the Sea Convention on 19 November 1985 and Nigeria on 14 August 1986, Cameroon made on 3 March 1994 an Optional Clause Declaration [*ICJ Yearbook 1996-1997* 89 (No.51)] and by an Application of 29 March 1994 instituted the pending *Land and Maritime Boundary* proceedings against Nigeria in reliance on Article 36(2) of the ICJ Statute [ICJ Reports 1996, 13, 1998, 275, 420, and 1999, 24]. Consequently, in the *Cameroon v. Nigeria (Preliminary Objections)* Judgment, the Court rejected Nigeria's argument based on Articles 74/83 of the Convention, because it has been seised in this case on the basis of Article 36(2) of the Statute, and not on the basis of Article 36(1) and Part XV of the Convention [ICJ Reports 1998, 321-322].

¹⁶*Anglo/Norwegian Fisheries* Pleadings, Vol.III, 630, 634, 641, 650 [Rejoinder of Norway]. For the text of Egyptian Decree, see *id.* 676-677; and for that of the UK Note to Egypt of 28 May 1951, see Vol.IV, 578-580. On the historic Bay of El-Arab claim under that Decree, as rolled back upon promulgation by Egypt of its straight baselines in 1990, see also *Straight Baseline Claims: Albania and Egypt, Limits in the Seas* No.116 (US Department of State, 6 May 1994); J. Ashley Roach and Robert W. Smith, *United States Responses to Excessive Maritime Claims* 54-55 and 85-89 (1996).

¹⁷*Libya/Malta Continental Shelf* Pleadings, Vol.IV, 84-85 [Counsel Quéneudec, 11 December 1984], 371 [Counsel Weil, 12 March 1985]. For the text of Egyptian Declaration, see *supra* note 14; and for that of the US Diplomatic Note to Egypt of 26 February 1985, see Roach and Smith, *supra* note 16, at 189.

the World Court concerning the interoceanic canals (in the Kiel Canal's context), and were pleaded in a number of subsequent cases.¹⁸ The regime of the 3-mile-wide Strait of Tiran connecting the 98-mile-long Gulf of Aqaba with the Red Sea resulted in extension under the 1958 UN Territorial Sea Convention of the definition of straits from those used for international navigation between two parts of the high seas, as determined in the *Corfu Channel (Merits)* Judgment,¹⁹ to also the so-called "dead-end" straits between one part of the high seas and the territorial sea of a foreign State (Article 16(4)). While the latter straits continue under the 1982 Law of the Sea Convention to be governed by the right of non-suspendable innocent passage (Article 45), the Strait of Tiran and the Gulf of Aqaba have been meanwhile, as a result of the Egypt/Israel Treaty of Peace of 26 March 1979, subject to "unimpeded and non-suspendable freedom of navigation and overflight" (Article V(2)).²⁰

¹⁸*SS Wimbledon* Judgment, PCIJ Series A, No.1 (1923), 15, 25-28, Dissenting Opinion of Judges Anzilotti and Huber, 39, 40, Dissenting Opinion of Judge Schücking, 43-44, 46; *Corfu Channel (Merits)* Dissenting Opinion of Judge Azevedo, ICJ Reports 1949, 105. Cf. *SS Wimbledon* Pleadings, PCIJ Series C, No.3-Additional Volume, 47-48 [Counter-Memorial of Germany], 69-71, 84-85, 88, 99, 101-102, 108 [Reply of Four Powers], 146-147, 155 [Rejoinder of Germany]; *SS Lotus* Pleadings, PCIJ Series C, No.13-II, 162-163 [Agent Basdevant, 9 August 1927]; *Eastern Greenland* Pleadings, PCIJ Series C, No.67, 3592 [Counsel Rygh, 3 February 1933]; *Anglo/Norwegian Fisheries* Pleadings, Vol.II, 427 [UK Reply], Vol.III, 290 [Rejoinder of Norway]. See also Sir Robert Jennings and Sir Arthur Watts, *Oppenheim's International Law* 592-595 and 914 n.6 (1992).

¹⁹ICJ Reports 1949, 4, 27, 28-29, Individual Opinion of Judge Alvarez, 46, and Dissenting Opinion of Judge Azevedo, 105-107. Cf. *Anglo/Norwegian Fisheries* Judgment, ICJ Reports 1951, 116, 120, 122, 132.

²⁰18 ILM 365 (1979). Israel/Jordan Treaty of Peace of 26 October 1994 [Article 14(3), 34 ILM 43, 51 (1995)], contains provision virtually identical to Article V(2) of Egypt/Israel Treaty. See also Egyptian Declaration of 26 August 1983, *supra* note 14; Shabtai Rosenne, *An International Law Miscellany*, Chapter 27: Israel and the First United Nations Conference on the Law of the Sea (1958): The Strait of Tiran, 723-778 (1993); Roach and Smith, *supra* note 16, at 360-364.

For Egypt's claim of prior notification with respect to the passage of foreign warships through its territorial sea, see the 1983 Declaration, *supra* note 14, as

Egypt's prominence in arbitral settlement of international disputes was moreover marked by the 1988 *Egypt/Israel Taba Beachfront Boundary Award* which determined boundary (the locations of the 14 boundary pillars) down from the Sinai hills into the Gulf of Aqaba.²¹ The equidistant boundary between Israel and Jordan in the Gulf was established under their Maritime Boundary Agreement of 18 January 1996.²² A tri-junction of the Egyptian/Israeli/Jordanian maritime boundaries may, in the view of one commentator, very well be located in the northern sector of the Gulf of Aqaba, if and when maritime boundary between Egypt and Israel is established.²³ The pending *Eritrea/Yemen* arbitration also is of Egypt's interest due to involving islands located in the southern Red Sea, along the shipping lanes leading to the strategically critical Strait of Bab el-Mandeb and the southern approaches to the Suez Canal.²⁴

protested on by the United States on 26 February 1985, Roach and Smith, *supra* note 16, at 258.

²¹80 ILR 226; 27 ILM 1421 (1988); 28 ILM 611 (1989). Cf. *Guinea-Bissau v. Senegal Arbitral Award of 31 July 1989* Dissenting Opinion of Judges Aguilar and Ranjeva, ICJ Reports 1991, 124-125; Rosenne, *An International Law Miscellany*, *supra* note 20, at 252, 630, 695 and 725; Prosper Weil, Some Observations on the Arbitral Award in the *Taba* Case, 23 *Israel Law Review* 1-25 (1989); Derek W. Bowett (Counsel of Egypt), The *Taba* Award of 29 September 1988, *id.* 429-442; Elihu Lauterpacht (Counsel of Israel), The *Taba* Case: Some Recollections and Reflections, *id.* 443-468; W. Michael Reisman, The Supervisory Jurisdiction of the International Court of Justice: International Arbitration and International Adjudication, 258 RCADI 296 n.564, 311-316 (1997).

²²*UN Law of the Sea Bulletin* 97 (1997 No.32).

²³Israel-Jordan Report No.8-12 [J.I. Charney], in Jonathan I. Charney and Lewis M. Alexander, *International Maritime Boundaries*, Vol.III 2457-2461, at 2458 (1998). Cf. *infra* note 27.

²⁴See *supra* note 9. For Egyptian Prime Ministerial Decree No.1511 on the Establishment of Two Protected Natural Areas in Nabq and Abou-Galoum in the Governorate of Southern Sinai of 20 August 1992, see UN Doc.IMO NAV 39/3/13 (1993); and for Traffic Separation Scheme in the Gulf of Suez, see Doc.IMO NAV 41/23, at 8, 33 and Annex 2 (1995), as amended, Doc.IMO MSC 67/22, at 27 (1996).

**THE ICJ DOCTRINE OF
EQUITABLE MARITIME BOUNDARY DELIMITATION**

While addressing the audience in a country with such diverse and longstanding experience in both the traditional and the new law of the sea as has Egypt, it seems particularly gratifying to focus our attention on The Peaceful Settlement of Maritime Boundary Disputes. The predominant number of such disputes have continued to be settled by negotiations, in pursuance of Article 33 of the United Nations Charter as referred to in Article 279 of the Law of the Sea Convention, leading to agreements between States concerned. However, it is the doctrine of application of equitable principles to maritime delimitation, as originated in the modern exposition of equity by Judge Manley O. Hudson²⁵ and as developed in the magnificent jurisprudence of the Court, which has been reigning successfully in the peaceful settlement of such disputes ever since the *Anglo/Norwegian Fisheries* Judgment took the first step towards creating that doctrine²⁶ and the *North Sea Continental Shelf (FRG/Denmark; FRG/Netherlands)* Judgment laid the foundation for its application.²⁷ This doctrine has thereafter been restated and further crystallized

²⁵*Diversion of Water from the Meuse* Dissenting Opinion of Judge Hudson, PCIJ Series A/B, No.70 (1937), 25, 76-77, stating that "under Article 38 of the Statute, if not independently of that article, the Court has some freedom to consider principles of equity as part of the international law which it must apply". Cf. Manley O. Hudson, *The Permanent Court of International Justice 1920-1942 - A Treatise* 618 (1943); *Nicaragua v. USA (Provisional Measures)* and *(Merits)* Dissenting Opinions of Judge Schwebel, ICJ Reports 1984, 198-199, and 1986, 392-393.

²⁶ICJ Reports 1951, 116, 133, asserting that "certain basic considerations inherent in the nature of the territorial sea, bring to light certain criteria which, though not entirely precise, can provide courts with an adequate basis for their decisions, which can be adapted to the diverse facts in question".

²⁷ICJ Reports 1969, 4. Note that according to Charney, *supra* note 23, the Israeli shoreline in its relation to those of Jordan and Egypt is located much like the shoreline of the FRG in its relation to those of the Netherlands and Denmark, in the case of which the *North Sea* Judgment called for a maritime boundary that is more generous to the State in the middle (Israel in this situation) than equidistance. He finds therefore notable that Israel accepted equidistance in its delimitation with Jordan.

in all the next decisions involving maritime boundary delimitation, including in the *Greece v. Turkey Aegean Sea*, *Tunisia/Libya*, *Canada/United States Gulf of Maine*, *Libya/Malta*, *El Salvador/Honduras Gulf of Fonseca*, *Guinea-Bissau v. Senegal Arbitral Award*, and *Denmark v. Norway (Jan Mayen)* cases,²⁸ through which the Court and its Chambers contributed importantly and consistently to the development of the modern law of the sea as part of the global system of peace and security.²⁹ All these Judgments were subsequently implemented through bilateral treaty practice of the respective parties to the

²⁸*Greece v. Turkey Aegean Sea Continental Shelf (Interim Measures)* Order, ICJ Reports 1976, 3, *Aegean Sea (Jurisdiction)* Judgment, ICJ Reports 1978, 3; *Tunisia/Libya Continental Shelf (Application by Malta for Permission to Intervene)* Judgment, ICJ Reports 1981, 3, *Tunisia/Libya (Merits)* Judgment, ICJ Reports 1982, 18, and *Tunisia v. Libya (Application for Revision and Interpretation)* Judgment, ICJ Reports 1985, 192; *Canada/United States Delimitation of the Maritime Boundary in the Gulf of Maine Area (Constitution of Chamber)* Order, ICJ Reports 1982, 3, *Gulf of Maine* Judgment (Chamber), ICJ Reports 1984, 246; *Libya/Malta Continental Shelf (Application by Italy for Permission to Intervene)* Judgment, ICJ Reports 1984, 3, *Libya/Malta (Merits)* Judgment, ICJ Reports 1985, 13; *El Salvador/Honduras Land, Island and Maritime Frontier Dispute (Application for Permission to Intervene)* Order, ICJ Reports 1990, 3, *El Salvador/Honduras (Application by Nicaragua for Permission to Intervene)* Judgment, ICJ Reports 1990, 92; *El Salvador/Honduras; Nicaragua Intervening* Judgment (Chamber), ICJ Reports 1992, 351; *Guinea-Bissau v. Senegal Arbitral Award of 31 July 1989 (Provisional Measures)* Order, ICJ Reports 1990, 64, *Guinea-Bissau v. Senegal Arbitral Award* Judgment, ICJ Reports 1991, 53, *Guinea-Bissau v. Senegal Maritime Delimitation (Discontinuance)* Order, ICJ Reports 1995, 423 (*supra* note 15); *Denmark v. Norway Maritime Delimitation in the Area Between Greenland and Jan Mayen* Judgment, ICJ Reports 1993, 38; *Portugal v. Australia East Timor* Judgment, ICJ Reports 1995, 90.

In the 1978 *Aegean Sea (Jurisdiction)* Judgment, the Court found that it had no jurisdiction to entertain Greece's Application. But the Court's reliance [ICJ Reports 1978, 29-37] on the "territorial status" clause in Greece's reservation to the 1928 General Act provided, by analogy, a significant contribution to the interpretation that a "territorial status/disputes" reservation in the Optional Clause Declarations covers the continental shelf. The 1995 *East Timor* Judgment involved the 1989 Indonesia/Australia Treaty on the Zone of Cooperation in an Area Between the Indonesian Province of East Timor and Northern Australia. In a follow-up to the 1991 *Guinea-Bissau v. Senegal Arbitral Award* Judgment and the bilateral delimitation/joint development agreement reached by the parties, the *Guinea-Bissau v. Senegal Maritime Delimitation* case was discontinued.

²⁹See *supra* note 5.

disputes concerned. Two cases concerning maritime delimitation in combination with territorial and land boundary questions which are presently pending in the phase of merits before the Court are the *Qatar v. Bahrain* and *Cameroon v. Nigeria* cases.³⁰

At the same time the consistency of the Court's doctrine of equitable principles *infra legem* reached a significant stage in the 1993 *Denmark v. Norway (Jan Mayen)* Judgment which marked notable progress in the accomodation of the operation of equity with by then crystallized principles and rules of the new law of the sea. This progress, apart from the jurisprudence of the Court itself, is also being reinforced by third-party settlements of other courts and tribunals, including those in the *Anglo/French, Beagle Channel, Iceland/Norway (Jan Mayen), Dubai/Sharjah, Guinea/Guinea-Bissau, Taba, Guinea-Bissau/Senegal*, and *Canada/France* cases.³¹ One presently pending

³⁰*Qatar v. Bahrain Maritime Delimitation and Territorial Questions (Jurisdiction and Admissibility)* Judgment, ICJ Reports 1994, 112; *Qatar v. Bahrain (Jurisdiction and Admissibility)* Judgment, ICJ Reports 1995, 6; *Qatar v. Bahrain Order*, ICJ Reports 1998, 243; *Qatar v. Bahrain Order* (deciding that the Replies will not rely on 82 Qatar's documents challenged by Bahrain), ICJ Reports 1999, 3.

Cameroon v. Nigeria Land and Maritime Boundary (Provisional Measures) Order, ICJ Reports 1996, 13; *Cameroon v. Nigeria (Preliminary Objections)* Judgment, ICJ Reports 1998, 275 (*supra* note 15); *Cameroon v. Nigeria Order*, ICJ Reports 1999, 24; *Nigeria v. Cameroon (Request for Interpretation of the Judgment of 11 June 1998)* Judgment, ICJ Reports 1999 (in press), *ICJ Communiqué* No.99/14 and 14bis, 25 March 1999; *Cameroon v. Nigeria (Counter-Claims) Order*, ICJ Reports 1999 (in press), *ICJ Communiqué* No.99/37, 2 July 1999; Equatorial Guinea's Application requesting permission to intervene in the *Cameroon v. Nigeria* proceedings, *ICJ Communiqué* No.99/35, 30 June 1999, and *Cameroon v. Nigeria; Equatorial Guinea Intervening Order*, granting Equatorial Guinea permission to intervene, *ICJ Communiqué* No.99/44, 22 October 1999. Note that shortly prior to its Application of 30 June, Act No.1 of Equatorial Guinea of 6 March 1999 designated the median (equidistant) line as its maritime boundary. See also *infra* note 82.

Commencing with the first Judgment delivered under the Presidency of Judge Stephen M. Schwebel in the *Hungary/Slovakia Gabcikovo-Nagymaros Project* case, ICJ Reports 1997, 7 (*infra* notes 69, 99, 102-105), all the Court's decisions, the *ICJ Communiqués* and other relevant documents (*supra* note 3) are accessible on the website of the Court [<http://www.icj-cij.org>].

³¹See the 1977 and 1978 *Anglo/French Delimitation of the Continental Shelf* Decisions of the Court of Arbitration, 18 UNRIAA 3, 271, and 18 ILM 397, 463

arbitration is the *Eritrea/Yemen* case (Phase II) referred to earlier.³² A valuable means of this uniquely reinforcing relationship between decisions of the ICJ and those of other courts and tribunals has proved a longstanding tradition of Members of the World Court acting as Arbitrators in inter-State and other arbitrations.³³ The enhancement of the quality and consistency of international jurisprudence as a result of that tradition has been recently reaffirmed by development in the unanimous 1998 *Eritrea/Yemen (Territorial Sovereignty and Scope of the Dispute)* Award (Phase I) of rules of international law governing the acquisition of territorial sovereignty in accordance with the jurisprudence of the Court.³⁴

(1979); 1977 *Argentina/Chile Beagle Channel* Award of the Court of Arbitration and related instruments, 21 UNRIAA 55-264 (1997); 1981 *Iceland/Norway Continental Shelf Area Between Iceland and Jan Mayen* Recommendations of the Conciliation Commission, 20 ILM 797 (1981); 1981 *Dubai/Sharjah Maritime and Land Boundaries* Award of the Court of Arbitration, 91 ILR 543 (1993); 1985 *Guinea/Guinea-Bissau Delimitation of the Maritime Boundary* Award of the Arbitration Tribunal, 25 ILM 251 (1986), and 77 ILR 636 (1988); 1988 *Egypt/Israel Taba Area* Award of the Arbitration Tribunal, 80 ILR 226, 27 ILM 1421 (1988), 28 ILM 611 (1989) (*supra* note 21); 1989 *Guinea-Bissau/Senegal Maritime Frontier* Award of the Arbitral Tribunal, 83 ILR 1, and 94 RGDIP 204 (1990) (*supra* note 15); 1992 *Canada/France (St. Pierre et Miquelon) Delimitation of Maritime Areas* Award of the Court of Arbitration, 21 UNRIAA 267 (1997), and 31 ILM 1165 (1992).

³²See *supra* note 9.

³³The latest confirmation of this tradition is appointment of H.E. President Stephen M. Schwebel as Arbitrator of the *Southern Bluefin Tuna* Tribunal established under Annex VII of the UN Law of the Sea Convention. See Shabtai Rosenne, *The Law and Practice of International Court, 1920-1996* 413-414 n.95 (1997). Note that the composition of the *Beagle Channel* Court of Arbitration of five members, who all were ICJ Judges, provided a stimulus for amending Article 17(2) and (4) of the Rules of the Court with respect to composition of *ad hoc* Chambers. Cf. Georges Abi-Saab, *De l'évolution de la Cour Internationale: Reflections sur quelques tendances récentes*, 96 RGDIP 274, 287 (1992); S.M. Schwebel, *Justice in International Law - Selected Writings of Judge Stephen M. Schwebel*, Chapter 6: Chambers of the International Court of Justice Formed for Particular Case, 93, 101-102 (1994).

³⁴See *supra* note 9. Note that the 1998 Award, paras 108-113, also gives an important exposition of the applicability of equity or equitable principles to the issues of territorial sovereignty. It rejects the proposition that "the international law governing land territory and the international law governing maritime boundaries are not only different but also discrete, and bear no juridical relevance to each other",

While searching for substantial components of the doctrine of application of equitable principles to maritime boundary delimitation, we should keep in mind importance of individual Opinions attached by the Members of the Court and its Chambers to the respective Judgments. The overestimating of such (especially Dissenting) Opinions seems to underestimate the basic rule of collegiality by which the the Court functions.³⁵ However, in some instances Opinions of Judges may be very useful in a proper appreciation of the essential points underlying the reasoning of the majority and/or in elaborating or refining various concepts. In addition, in all cases settled by the Court, even in those which for various reasons did not reach the phase of merits, the written and oral pleadings - given the finest quality of counsel - constitute a valuable source of evolving or established norms of international law.

In the cases which did not proceed to the merits, the value of both Judges' Opinions and pleadings should be viewed with particular caution. For instance, the fact that the 1998 *Spain v. Canada Fisheries (Jurisdiction)* Judgment did not pass upon the legality of the disputed acts undertaken by Canada in connection with the *Estai* incident in the NAFO Regulatory Area of the high seas,³⁶ cannot be construed as implying the majority's view on the legality of those acts. This also illustrates the indispensability of acquaintance with the complex procedural law of the International Court for the purpose of a proper appreciation of its decisions. In the law of maritime delimitation, this

but stresses that in the present Phase I, there can be no question of even "prefiguring" (as Yemen put it), much less drawing, any maritime boundary line. Cf. main text accompanying *infra* notes 74-78.

³⁵Cf. Rosenne, *The Law and Practice*, *supra* note 33, at 1579-1585.

³⁶ICJ Reports 1998 (in press), and Separate Opinion of President Schwebel, summarized in *ICJ Communiqué* No.98/41 and 41bis, 4 December 1998 [<http://www.icj-cij.org>]. Cf. Barbara Kwiatkowska, *Spain v. Canada Fisheries (Jurisdiction)* Judgment, 93 AJIL 502-7 (1999).

can be exemplified by the effect of a third-State intervention (by Italy) on the boundary line determined in the *Libya/Malta (Merits)* Judgment, which was criticized by President Schwebel as follows: "The obscure measure of adjustment of the median line between Libya and Malta appears to have had the benefit of inspiration, if divine, then from Roman gods, for the line selected just happened essentially to coincide with the limit of the claims of a third State, Italy, whose claims the Court paradoxically earlier had declined to pass upon".³⁷

In the light of the jurisprudence of the Court and arbitral decisions, the doctrine of equitable principles is the fundamental norm of customary international law that provides for effecting maritime delimitation by agreement, in accordance with equitable principles, taking account of all relevant circumstances, so as to arrive to an equitable result. Equity operates in this case strictly within the law, as referred to in Article 38(1) of the ICJ Statute, and there is consequently no question of any decision *ex aequo et bono*, as envisaged by Article 38(2). Moreover, equity has in this case no function of mitigating or modifying the rigidity of legal rule(s), but aims at seeking an equitable result *ab initio*. This is clearly reflected by the requirement of respect for all circumstances that may be relevant in a particular case for the purpose of achieving an equitable result, and by the fact that the use of no single delimitation method, including the Queen method of equidistance, is in all circumstances obligatory. These requirements of customary law governing the Court's doctrine are codified in Articles 74/83 of the 1982 Law of the Sea Convention which provide for effecting the delimitation of the continental shelf and the 200-mile EEZs by agreement, in

³⁷*Denmark v. Norway (Jan Mayen)* Separate Opinion of Judge Schwebel, ICJ Reports 1993, 118, 125; reiterating criticism expressed in the *Libya/Malta (Intervention)* and *Libya/Malta (Merits)* Dissenting Opinions of Judge Schwebel, ICJ Reports 1984, 131-147, and 1985, 172-187.

accordance with international law, as referred to in Article 38 of the ICJ Statute, and in order to achieve an equitable solution.

As far as the conceptual framework of applying by the Court of equity *infra legem* to maritime boundary delimitation is concerned, the adequate exposition of such framework is contained in a Separate Opinion appended by Vice-President Christopher G. Weeramantry to the *Denmark v. Norway (Jan Mayen)* Judgment. This is because while reflecting throughout 68 pages of his excellent analysis on the jurisprudential content and practical application of the doctrine of equity in the field of maritime delimitation, Judge Weeramantry does not lose sight of what he calls "the broader equitable landscape lying beyond", which is indeed indispensable for a proper appreciation of all far-reaching legal questions raised by an equitable jurisprudence.³⁸

An advantage of the conceptual framework drawn by Judge Weeramantry also lies in its perfect timing. Until the *Denmark v. Norway* Judgment, the uncertainties of equity - which the Vice-President rightly finds as being intrinsic to its operation and as amounting to one of its strengths³⁹ - were compounded by the fact that the law of the sea has been undergoing a process of spectacular change.⁴⁰ Consequently, as he observes, it was no cause for surprise that "flexible principles superimposed upon so fluid a subject should have failed to produce a greater predictability of legal result".⁴¹ The *Denmark v. Norway* Judgment crowned the equitable jurisprudence at the time when the principles and rules of the modern oceans regime reached the stage of significant crystallization. The most valuable doctrinal surveys also have already been written by that time. Such surveys, which are all taken into

³⁸*Denmark v. Norway (Jan Mayen)* Separate Opinion of Judge Weeramantry, ICJ Reports 1993, 211-279.

³⁹*Id.* 254, para.156, and 255, para.159.

⁴⁰*Id.* 256-257, para.161.

⁴¹*Id.* 257, para.162.

account in Judge Weeramantry's Opinion, include in particular an outstanding essay by Ambassador Shabtai Rosenne on "The Position of the International Court of Justice on the Foundations of the Principle of Equity in International Law"⁴² and several works written by Sir Robert Jennings and other Members of the Court.⁴³

Sir Robert, who was involved in the famous *Anglo/French* arbitration and all delimitation decisions of the Court in the years 1982/1995 except the *Gulf of Maine* Chamber, borrowed from Judge André Gros the analogy of the early days of the English Court of Chancery when the result of suit was said by the cynics to depend upon the size of the Chancellor's foot.⁴⁴ In his attempt to move away from this concept towards a more predictable system of equitable procedures, Sir Robert has hoped in 1989 for "the wheel coming full circle". Since the legal entitlement to the EEZ and the continental shelf up to 200 miles became based on the principle of distance to the exclusion of natural prolongation, the circle could be closed by the necessary resort by the Court in the first stage of its decision-making process (of drawing a provisional

⁴²Rosenne, *An International Law Miscellany*, supra note 20, Chapter 7: The Position of the International Court of Justice on the Foundations of the Principle of Equity in International Law, 201-230 (1993); as relied upon in *Denmark v. Norway (Jan Mayen)* Separate Opinion of Judge Weeramantry.

⁴³Sir Robert Jennings, Equity and Equitable Principles, 42 *Annuaire Suisse de Droit International* 27-38 (1986), and The Principles Governing Marine Boundaries, in *Staat und Völkerrechtsordnung, Festschrift für Karl Doehring* 398-408 (1989); Mohamuned Bedjaoui, L'"énigme" des "principes équitables" dans le droit des délimitation maritimes, *XLII Revista Espanola de Derecho Internacional* 367-387 (1990); as relied upon in *Denmark v. Norway (Jan Mayen)* Separate Opinion of Judge Weeramantry. Cf. Barbara Kwiatkowska, Equitable Maritime Delimitation, as Exemplified in the Work of the International Court of Justice During the Presidency of Sir Robert Yewdall Jennings and Beyond, 28 *Ocean Development and International Law* 91, 92 (1997).

⁴⁴Jennings, Equity, supra note 43, at 31, quoting the *Gulf of Maine* Dissenting Opinion of Judge Gros, ICJ Reports 1984, 386, para.41. Cf. views of Judge Jennings quoted in *Denmark v. Norway (Jan Mayen)* Separate Opinion of Judge Weeramantry, ICJ Reports 1993, 226-227, para.54.

boundary) to equidistance as normally implied by the principle of distance.⁴⁵ The chance seemed increased when then President Jennings was joined by another outstanding advocate of the concept of equity as modifying the rigidity of a legal rule, Judge Shigeru Oda, as his Vice-President.⁴⁶ But the almost unanimous *Denmark v. Norway (Jan Mayen)* Judgment made it clear that the wheel did not come full circle. The Judgment did, however, confirm the *Gulf of Maine* and the *Libya/Malta (Merits)* finding as to the use of equidistance in the first stage of provisional delimitation between opposite states.⁴⁷ Whether the wheel will yet come or not full circle in the *Eritrea/Yemen (Maritime Delimitation)* case (Phase II) pending before the Tribunal Presided over by Sir Robert or in the *Qatar v. Bahrain* and the *Cameroon v. Nigeria* cases pending before the ICJ remains to be seen,⁴⁸ but such prospect does not seem likely.

The current President, Judge Stephen M. Schwebel, who has been involved in all maritime delimitation decisions of the Court since 1981, seized adequately the essence of the doctrine of equitable principles when he remarked in his *Gulf of Maine* Separate Opinion that "on a question such as this, the law is more plastic than formed, and elements of judgment, of appreciation of competing legal and equitable considerations, are *dominant*".⁴⁹ In a similar

⁴⁵Jennings, *The Principles*, *supra* note 43, at 408.

⁴⁶See Barbara Kwiatkowska, Judge Shigeru Oda's Opinions in Law-of-the-Sea Cases: Equitable Maritime Boundary Delimitation, 36 *German Yearbook of International Law* 225, 288-294 (1993).

⁴⁷*Denmark v. Norway (Jan Mayen)* Judgment, ICJ Reports 1993, 59-62, paras 49-53.

⁴⁸See *supra* notes 9 and 30.

⁴⁹*Gulf of Maine* Separate Opinion of Judge Schwebel, ICJ Reports 1984, 353, 357 (emphasis added). Cf. *id.* 357-358, as reaffirmed in the *Libya/Malta (Merits)* Dissenting Opinion of Judge Schwebel, ICJ Reports 1985, 187. See also the *Tunisia/Libya (Merits)* and *Tunisia v. Libya (Application for Revision and Interpretation of the Judgment)* Separate Opinions of Judge Schwebel, ICJ Reports 1982, 99, and 1985, 246; and references to his *Denmark v. Norway (Jan Mayen)* and *Gulf of Maine* Separate Opinions quoted in the main text accompanying *infra* notes 63-64, 97 and 100.

vein, he observed on another occasion that by applying equity to maritime delimitation, the Court may be said to have introduced "a fairness-discourse into the positivist international legal structure", and that: "Whether the salience of equitable considerations in maritime delimitation is sound in law is a matter of controversy. But what is beyond controversy is the influential role played the Court".⁵⁰

President Schwebel was no less critical of the boundary arrived at in the *Denmark v. Norway (Jan Mayen)* Judgment than of that determined in the *Libya/Malta (Merits)* Judgment,⁵¹ observing that: "In the current case, the measure of adjustment seems to have followed, if not from the inspiration of Norse gods, then from considerations of symmetry, once the decision was made to furnish 'equitable access' to the southern sector in which capelin may be fished".⁵² He added that: "In Selden's seventeenth-century days, equity was described as the Chancellor's conscience, variable indeed; it was as if the standard of measurement called a foot were to be the length of the Chancellor's foot, 'an uncertain measure'. (Polllock ed., *Table Talk of John Selden*, 1927, p.43.) Nowadays, equity is to be impressionistically measured by the length of opposite coastlines".⁵³

Nevertheless, Judge Schwebel concurred in the *Denmark v. Norway* Judgment believing that on the whole: "Based on large and loose approaches such as its gross impression of the effects of differing lengths of coasts, its desire to afford equitable access to fishing resources, and the attraction of the symmetrical conjoinder of indicated lines of delimitation, the Court comes up with a line which, given the criteria employed, may be as reasonable as

⁵⁰Plenary Address by H.E. President Schwebel, *supra* note 5, at 409-411.

⁵¹*Libya/Malta (Merits)* Dissenting Opinion of Judge Schwebel, *supra* note 37.

⁵²*Denmark v. Norway (Jan Mayen)* Separate Opinion of Judge Schwebel, ICJ Reports 1993, 125-126.

⁵³*Id.* 126.

another".⁵⁴ In the ending sentence of his Separate Opinion, he remarked that: "Where this leaves the law of maritime delimitation, to the extent that such a law subsists, is perplexing".⁵⁵

It appears that as far as equity lends itself to conceptualization, the confirmation by the *Denmark v. Norway* Judgment of a two-stage decision-making process of the Court and that Judgment's findings regarding the issues of substance could be regarded as having fulfilled, to an important extent, Sir Robert's anticipation as to the degree of predictability and judicial consistency required from equity operating *infra legem*.⁵⁶ This results from the Court's pronouncements on the uniformity of the effects of treaty and customary law governing equitable maritime boundary delimitation, as well as from those on the single boundary line, proportionality, resource factors and other substantive issues.⁵⁷

The 1977 *Anglo/French* Decision, which was the first to address the *North Sea*-introduced distinction between conventional and customary rules, was significant in its finding that the equidistance/special circumstances rule of the 1958 UN Continental Shelf Convention (Article 6) should be regarded as giving expression to the customary norm of equitable principles enunciated in the *North Sea* Judgment.⁵⁸ It is, therefore, equally significant that the *Denmark v. Norway* Judgment now determined that the equidistance/special

⁵⁴*Id.* 128-129.

⁵⁵*Id.* 129. See also Declaration and Separate Opinion of Vice-President Oda, *id.* 83 and 89-117, Declaration of Judge Aguilar Mawdsley, *id.* 86, Separate Opinion of Judge Shahabuddeen, *id.* 139-210, esp. 175-197, and Dissenting Opinion of Judge *ad hoc* Fischer, *id.* 304-314.

⁵⁶See Jennings, Equity, *supra* note 43, at 38, quoted by Eduardo Jiménez de Aréchaga, Counsel of Denmark, ICJ *Denmark v. Norway* Verbatim Record of Pleadings, CR 93/2, at 60.

⁵⁷Cf. Kwiatkowska, *supra* note 43, at 101-107.

⁵⁸1977 *Anglo/French Delimitation of the Continental Shelf* Decision, para.70 (*supra* note 31), as quoted in the *Denmark v. Norway (Jan Mayen)* Judgment, ICJ Reports 1993, 58, para.46.

circumstances rule of the 1958 Convention (Article 6) - which the Court had the very first occasion to apply in the *Denmark v. Norway* case⁵⁹ - "produces much the same result" as an equitable principles/relevant circumstances rule of customary law, and that likewise the requirements of the 1982 Law of the Sea Convention (Articles 74/83) correspond to those of customary law.⁶⁰ This uniformity will significantly facilitate the equitable delimitation settlements between parties and nonparties to the respective treaties.

JOINT EXPLOITATION OF FISHERY AND/OR MINERAL RESOURCES

At the second stage of its decision-making process in the *Denmark v. Norway (Jan Mayen)* case, the Court, under Presidency of Sir Robert Jennings, adjusted its provisional boundary line so as to attribute a larger area of maritime space to Denmark than would the equidistant (median) line, and for the purpose of defining the final line, it divided the area of overlapping claims into Zones 1, 2 and 3.⁶¹ Ultimately, the factor of the marked disparity in coastal lengths of Greenland and Jan Mayen was decisive in determining the course of the boundary in Zones 2 and 3 of the area of overlapping claims which were not subject to an equal division, whereas the fisheries factor influenced the division of Zone 1 into two parts of equal area so as to ensure an equitable access to the migratory stock of capelin in this zone for the vulnerable fishing communities concerned.

With respect to the division of Zone 1, the *Denmark v. Norway* Judgment entails therefore a precedential reliance on exception of "catastrophic

⁵⁹*Denmark v. Norway (Jan Mayen)* Judgment, ICJ Reports 1993, 58, para.45.

⁶⁰*Denmark v. Norway (Jan Mayen)* Judgment, ICJ Reports 1993, 58-59, paras 46-48, and Separate Opinion of Judge Weeramantry, *id.* 234-235, paras 75-77, and 259-261, paras 172-179. By analogy, the same applies to Article 15 of the 1982 Law of the Sea Convention.

⁶¹*Denmark v. Norway (Jan Mayen)* Judgment, ICJ Reports 1993, 77, para.87, and 79-81, paras 91-94, including sketch map No.2, at 80.

repercussions" established by the *Gulf of Maine Judgment* with a view of taking account of economic factors in drawing an equitable boundary line.⁶²

President Schwebel, who was the Member of the *Gulf of Maine Chamber*, considers this *Denmark v. Norway* finding questionable⁶³ and cautions that:

the Court by this holding of distributive justice has departed from the accepted law of the matter, as fashioned pre-eminently by it. It is not suggested that this departure from principle and precedent is legally fatal. If what is lawful in maritime delimitation by the Court is what is equitable, and if what is equitable is as variable as the weather of The Hague, then this innovation may be seen as, and it may be, as defensible and desirable as another. It may be more defensible and desirable than that concerning the length of coastlines.⁶⁴

I assume not many of us would challenge that "what is equitable is as variable as the weather of The Hague", but perhaps some of us may wonder whether by its reliance on the fisheries factor and by its departure "from the accepted law of the matter, as fashioned pre-eminently" by the Court, the

⁶²*Id.* 71-72, paras 75-76, quoting the *Gulf of Maine Judgment*, ICJ Reports 1984, 342, para.237. For reaffirmation of the *Gulf of Maine* findings, see the *Libya/Malta (Merits)* Judgment, ICJ Reports 1985, 41, para.50; as well as the 1985 *Guinea/Guinea Bissau*, paras 121-123, and 1992 *Canada/France*, paras 83-84, Awards (*supra* note 31).

⁶³*Denmark v. Norway (Jan Mayen)* Separate Opinion of Judge Schwebel, ICJ Reports 1993, 118-120.

⁶⁴*Id.* 120. See also Judge Schwebel's views quoted *supra* notes 52-55. Cf. criticism of Jonathan I. Charney, *Denmark v. Norway Maritime Delimitation in the Area Between Greenland and Jan Mayen Judgment*, 88 AJIL 105, 109 (1994); Emmanuel Decaux, *L'affaire de la Délimitation Maritime dans la Région Située entre le Groenland et Jan Mayen (Danemark c. Norvège)* Arrêt de la C.I.J. du 14 juin 1993, 39 *Annuaire Français de Droit International* 495, 507-508, 512-513 (1993), concluding (at 513) that: "A défaut de chercher à justifier 'l'injustifiable', en incorporant l'équité dans le droit, ne serait-il pas plus sage d'admettre que le juge se prononce *ex aequo et bono*. Cette dérive vers la 'justice distributive' est elle-même soulignée avec humour par le juge Schwebel: 'Si le droit, en matière de délimitation maritime par la Cour, est ce qui est équitable, et si ce qui est équitable est aussi variable que le temps à La Haye, alors cette innovation peut être jugée, et elle peut être, aussi défendable et souhaitable qu'une autre'".

Denmark v. Norway Judgment did not mark a positive trend? While endorsing the Court's finding, Vice-President Weeramantry states in his Separate Opinion that: "Access to fishery resources is a matter to which the Court has rightly devoted particular attention and I am in agreement with this approach and with its resultant effect upon the overall delimitation".⁶⁵

It is true that the Court and other tribunals, basing themselves on the premise that equity does not operate in maritime boundary delimitation as *justitia distributiva*, have tended to exclude the relevance of economic (and likewise environmental) factors to such delimitation with a view to ensuring the application of equity *infra legem* and in a manner as objective as possible. But as I have hoped elsewhere, this restrictive position could be subject to evolution towards more liberal approach, under which economic considerations were to be included into circumstances relevant to maritime delimitation.⁶⁶ The reason of my hope, as now increased by the *Denmark v. Norway* Judgment, is the fact that the Court has never restricted relevant circumstances to those which are pertinent to legal entitlement to the delimited areas, but held instead that equity requires the taking into account of all those considerations that are pertinent to "the institutions" of the continental shelf and 200-mile zones as they have developed within the law, and to the application of equitable principles to their delimitation.⁶⁷

Moreover, as Judge Weeramantry noted, however restricted was the

⁶⁵*Denmark v. Norway (Jan Mayen)* Separate Opinion of Judge Weeramantry, ICJ Reports 1993, 268, para.212. Cf. *id.* 245-247, paras 110-121, and 277, para.241.

⁶⁶See Barbara Kwiatkowska, Economic and Environmental Considerations in Maritime Boundary Delimitations, in *International Maritime Boundaries*, *supra* note 23, Vol.I, 75, 103-113 (1993). Cf. Derek W. Bowett, The Economic Factors in Maritime Delimitation Cases, in *International Law at the Time of Its Codification - Essays in Honour of Roberto Ago*, 45-58 (1987).

⁶⁷Cf. *Libya/Malta (Merits)* Judgment, ICJ Reports 1985, 40, para.48; as cited in *Denmark v. Norway (Jan Mayen)* Separate Opinion of Judge Weeramantry, ICJ Reports 1993, 261, para.181.

Gulf of Maine exception of "catastrophic repercussions", it amounted to a recognition that fisheries factors "can play a part in the overall result".⁶⁸ Although the Chamber did not find this exception applicable in the *Gulf of Maine* case, it drew a single boundary line which in fact provided an apportionment of the fisheries resources roughly in line with the established dependence of each party. The *Gulf of Maine* Judgment found the relevance of the 1909 *Norway v. Sweden Grisbadarna Maritime Frontier Award*,⁶⁹ which was relied upon by the United States, "debatable, since the problems of rights over maritime areas differed in many respects from those of the present day", and since the conduct of the United States was not "sufficiently clear, sustained and consistent to constitute acquiescence".⁷⁰ But in the outermost sector of the

⁶⁸*Denmark v. Norway (Jan Mayen)* Separate Opinion of Judge Weeramantry, ICJ Reports 1993, 269-270, para.219. Cf. Prosper Weil, *The Law of Maritime Delimitation - Reflections* 261 (1989), noting that: "One cannot help asking oneself, however, whether, although it defends itself against the charge, the Chamber did not in fact treat socio-economic factors as a consideration which could not be ignored". On the precedential reliance by the *Anglo/Norwegian Fisheries* Judgment on the economic factors, see *supra* note 26.

⁶⁹XI UNRIAA 147; 4 AJIL 186, 226 (1910); *Gulf of Maine* Pleadings, Vol.II, 148-169. Cf. *The Permanent Court of Arbitration*, *supra* note 9, at 511.

The *Grisbadarna* case marked the first site visit (*descente sur les lieux*) for the past 90 years, of which the third one took place in the *Gabcikovo-Nagymaros Project* case. See Statement of H.E. President Schwebel (52nd UNGA), *supra* note 3, at 2; Shabtai Rosenne, *Visit to the Site by the International Court*, in *Liber Amicorum Judge Mohammed Bedjaoui*, *supra* note 7, at 461-473.

⁷⁰ICJ Reports 1984, 309, para.146. Cf. the *Gulf of Maine* Pleadings, Vol.II, 64-70, 76, 93, 96-97, 99, 101, 109-109 [US Memorial], Vol.III, 16-18, 142, 190 n.25, 202, 219-220, 236-237, 244 [Counter-Memorial of Canada], Vol.IV, 69, 76-77, 83 [US Counter-Memorial], Vol.V, 32, 49 n.48, 50 n.51 [Reply of Canada], 447, 477-478, 481 [US Reply], Vol.VI 46 [Agent Legault, 3 April 1984], 63-64, 69 [Deputy Agent Hankey, 3 April 1984], 88, 91-92 [Counsel Binnie, 4 April], 137 [Counsel Bowett, 5 April], 263, 264, 275, 279-280 [Counsel Stevenson, 12 April], 338-339 [Counsel Lancaster, 16 April], 352 [Special Counsel Rashkow], 380 [Counsel Feldman], Vol.VII, 87-88, 91 [Counsel Binnie, 4 May], 101-102 [Counsel Bowett, 5 May], 114 [Counsel Fortier], 174 [Feldman, 9 May], 218 [Deputy Agent Colson, 10 May], 271 [Agent Robinson, 11 May 1984], 332, Vol.VIII, 30, (Figure 20), 74 (Figure 46).

The 1909 *Grisbadarna* Award was also relied upon, in the *Eastern Greenland* Pleadings, PCIJ Series C, No.63, 817, 818 [Reply of Denmark], 1314-

US/Canadian boundary the Chamber adopted the method of the perpendicular, of which precedential application by the *Grisbadarna* Arbitral Tribunal (in order to avoid the boundary crossing any lobster banks) marked a notable instance of impact of fisheries factor on the maritime delimitation.⁷¹

In the post-adjudicative phase, the Canadian/US boundary determined by the 1984 *Gulf of Maine* Judgment has created significant transboundary stock management concerns, and has continued to impact and shape the course of fisheries relations, management and conditions in the Gulf of Maine region.⁷² A single boundary (in the form of two coinciding lines), which was determined by the 1993 *Denmark v. Norway (Jan Mayen)* Judgment in precedential reliance on the *Gulf of Maine* exception of "catastrophic repercussions" referred to above, was fully implemented by means of the 1995 Denmark/Norway Oslo Agreement and its 1997 Additional Protocol. This

1315 [Rejoinder of Norway], No.67, 3553 [Counsel Gidel, 2 February 1933]; *Anglo/Norwegian Fisheries Pleadings*, Vol.I, 570-571 [Counter-Memorial of Norway], Vol.II, 655 [UK Reply]; *Minquiers and Ecrehos Pleadings*, Vol.II 177-178 [Counsel Harrison, 24 September 1953], 206, 266, 274 [Agent Gros, 28 and 30 September 1953]; *North Sea* Separate Opinions of Judges Jessup and Ammann, ICJ Reports 1969, 79, 113, Dissenting Opinion of Judge Koretsky, *id.* 160; *Libya/Chad Territorial Dispute* Separate Opinion of Judge Ajibola, ICJ Reports 1994, 81.

⁷¹See Gilbert Gidel, *Le Droit International Public de La Mer*, Tome III, 769-771 (1934), noting (at 770) that, "il ne faut donc pas attribuer au Tribunal de déclaration formelle en faveur de la perpendiculaire (comme paraît le faire le *Research*, p.275 [1929 Harvard Research Project - B.K.]; mais le raisonnement par lequel il étaye sa sentence basée sur le droit du XVIIe siècle laisse percer une évidente sympathie pour la solution, dont il précise certaines modalités pratiques d'application". See also A.L.W. Munkman, *Adjudication and Adjustment - International Judicial Decisions and the Settlement of Territorial and Boundary Disputes*, 44 *British Yearbook of International Law* 60 (1972/1973); Bowett, *supra* note 66, at 48-49; David H. Anderson, *Grisbadarna Revisited*, in *The Baltic Sea: New Developments in National Policies and International Cooperation* 155-166 (1996).

⁷²For the 1990 Canada/USA Agreement on Fisheries Enforcement, see 30 *ILM* 419 (1991). See also Glen J. Herbert, *Fisheries Relations in the Gulf of Maine: Implications of An Arbitrated Maritime Boundary*, 19 *Marine Policy* 301-316 (1995); Aldo Chircop, David VanderZwaag and Peter Mushkat, *The Gulf of Maine Agreement and Action Plan*, *id.* 317-323.

Agreement also contains a standard mineral resource deposit clause and confirms the desire of both parties "to continue cooperation on reciprocal fisheries and on the flexible exploitation of the living marine resources in the area".⁷³

It is noteworthy that in its 1998 *Eritrea/Yemen (Territorial Sovereignty and Scope of the Dispute)* Award, the Arbitral Tribunal unanimously decided that the sovereignty found to lie with Yemen (over the Zuqar-Hanish group, the island of Jabal-al-Tayr, and the Zubayr group) entails "the perpetuation of the traditional fishing regime in the region, including free access and enjoyment for the fishermen of both Eritrea and Yemen".⁷⁴ This finding, which may perhaps play further role in the pending *Eritrea/Yemen (Maritime Delimitation)* Phase II, is preceded by the Tribunal's noting of its awareness that "Western ideas of territorial sovereignty are strange to peoples brought up in the Islamic tradition and familiar with notions of territory very different from those recognized in contemporary international law".⁷⁵ While commending the Tribunal's

⁷³UN *Law of the Sea Bulletin* 59 (1996 No.31) and *id.* 37 (1999 No.39). Cf. Kwiatkowska, *supra* note 43, at 107. Note that similarly, under the 1999 Denmark (Faroes)/UK Delimitation Agreement, implemented by the United Kingdom in its Fishery Limits Order and the Continental Shelf (Designation of Areas) Order, there are different fishery and continental shelf lines and a special regime for fisheries jurisdiction in a special area of overlapping jurisdiction. This Agreement is regarded by both parties as providing an equitable solution to the complex geographical relationship between the Faroes and Britain. Based on email received by this author from H.E. Judge David H. Anderson (UK) on 28 August 1999. On joint schemes involving both mineral and fishery resources, see *infra* note 89.

⁷⁴*Dispositif* - para. 527(vi) of the 1998 Award, *supra* note 9, and *id.* para.526. On the underlying role of fishing interests in the *UK/France Minquiers and Ecrehos* case, ICJ Reports 1953, 47, see Kwiatkowska, *supra* note 9, at 136 n.45; Rosenne, *The World Court*, *supra* note 12, at 179-180.

⁷⁵Para.525 of the 1998 Award, *supra* note 9. Cf. *supra* note 34. The *Eritrea/Yemen* approach may perhaps be followed upon in the pending *Indonesia/Malaysia Sovereignty over Pulau Ligitan and Pulau Sipadan* case, ICJ *Communiqués* Nos 98/35 and 98/37, 2 and 11 November 1998, No.99/40, 16 September 1999 [<http://www.icj-cij.org>], and with respect to the islands of Abu Musa and the Greater and Lesser Tunbs disputed between the United Arab Emirates and Iran, of which Abu Musa Island is already subject to Iran/Sharjah revenue sharing arrangement.

conclusions, Arbitrator Ahmed S. El-Kosheri observes that: "The traditional fishing regime of free access and enjoyment for the fishermen of both countries as decided by the Tribunal is in harmony with the Islamic concept of free entitlement to benefit from the wealth that God gave to the humanity as whole, in order to meet the nutrition needs for livelihood among poor and industrious people".⁷⁶ This conforms with the views of the Tribunal's two other eminent Members, President Schwebel and Sir Robert Jennings, that the international legal order generally is no longer "Euro-centred"⁷⁷ and that it involves the inescapable evolution of the law toward universality in terms of not uniformity but rather "richness of variety and diversity".⁷⁸

The International Court of Justice has moreover already partly

See Sharjah-Umm al Qaywayn Report No.7-10 [R.F. Pietrowski], in *International Maritime Boundaries*, *supra* note 23, Vol.II, 1549-1555 (1993). On the continuing appeals of the UAE and the Gulf of Cooperation Council to bring that dispute to the ICJ, see Kwiatkowska, *supra* note 5, at 24 n.92.

⁷⁶Ahmed S. El-Kosheri, *The Interrelation Between Worldwide Arbitral Culture and the Islamic Traditions* (para.9), A Paper presented at the Centenary Conference of the Members of the Permanent Court of Arbitration, 1899-1999, Great Hall of Justice - Peace Palace, The Hague, 17 May 1999. Cf. Mohammed Bedjaoui, *General Introduction* (para.47), in Mohammed Bedjaoui ed., *International Law: Achievements and Prospects* 1, 16 (UNESCO 1991). Cf. also generally, Georges Abi-Saab, *La Commission du Droit International, La codification et le processus de formation de droit international*, in *Making Better International Law: The International Law Commission at 50* 181-200 (United Nations 1998).

⁷⁷Statement of H.E. President Schwebel (54th UNGA) quoted in the main text accompanying *supra* note 1. Cf. Schwebel, *The Impact of the International Court of Justice*, *supra* note 4, at 666; Schwebel, *Justice in International Law*, *supra* note 33, Chapter 30: *The United Nations and the Challenge of a Changing International Law*, 514-520, noting (at 518) that: "As the States of the world join together in the continuing United Nations process of codification and progressive development of international law, newer as well as older States should be afforded a sense of participation in the refinement and growth of international law which should conduce to its relatively universal acceptance and application". See also references to Judge Schwebel's Question and Libya's Reply during the *Tunisia/Libya* proceedings, *infra* note 88.

⁷⁸Sir Robert Jennings, *Universal International Law in a Multicultural World*, in Martin Bos and Ian Brownlie eds., *Liber Amicorum for the Rt. Hon. Lord Wilberforce* 39, 50 (1987). Cf. *infra* notes 102-105.

acknowledged that also mineral seabed resources may be factors relevant to maritime boundary delimitation.⁷⁹ By contrast to fisheries, a relatively small number of the 14 joint development (all of them bilateral) schemes for offshore minerals is due to the high-risk decision involved for States undertaking such schemes, in particular the necessity of large investments in a situation of uncertain profits. Generally, except in a few cases such as the Persian Gulf or areas offshore from Venezuela, the occurrence of hydrocarbons (oil and gas) should be characterized in terms of potential rather than as known resources. Consequently, it is political will which has played a dominant role in undertaking by States joint development of these resources and the pertaining institutional measures, be it as part of the final settlement of a disputed boundary or as an interim arrangement pending the maritime delimitation. The up-to-date state practice provides interesting evidence in support of the assertion of the 1985 *Libya/Malta (Merits)* Judgment that:

The natural resources of the continental shelf under delimitation "so far as known or readily ascertainable" might well constitute relevant circumstances which it would be reasonable to take into account in a delimitation, as the Court stated in the *North Sea Continental Shelf* cases (ICJ Reports 1969, 54, para.101(D)(2)). Those resources are the essential objective envisaged by States when they put forward claims to seabed areas containing them.⁸⁰

A notable exception to this approach was the 1981 *Iceland/Norway*

⁷⁹Cf. Kwiatkowska, *supra* note 66, at 108.

⁸⁰ICJ Reports 1985, 41, para.50. See also the *Libya/Malta (Merits)* Separate Opinion of Judge *ad hoc* Valticos, *id.* 112; and the *North Sea* Separate Opinions of Judges Bustamante y Rivero and Jessup, ICJ Reports 1969, 60, 81-83. Note that the 1974 Japan/South Korea Joint Development Agreement (*infra* note 89) was the first bilateral scheme to follow upon the *North Sea* Judgment.

On origin of the joint development schemes in practice of the United States in the 1930s, see Masahiro Miyoshi, *The Joint Development of Offshore Oil and Gas in Relation to Maritime Boundary Delimitation*, 2 *IBRU Maritime Briefing* 1 (1999 No.5).

(*Jan Mayen*) case, in which the Conciliation Commission recommended a joint development regime (instead of determining a boundary line) in spite of the fact that the hydrocarbon resources clearly were not "known" nor "readily ascertainable" in the areas concerned.⁸¹ In the 1982 *Tunisia/Libya (Merits)* Judgment, the Court stated:

As to the presence of oil-wells in an area to be delimited, it may, depending on the facts, be an element to be taken into account in the process of weighing all relevant factors to achieve an equitable result.⁸²

The Court suggested a first sector of the boundary line between Tunisia and Libya on the basis of a line which, while a perpendicular to the general direction of the coast, in fact also divided petroleum concession areas of the two States.⁸³ The *Tunisia/Libya* Judgment considered the presence of oil-wells and not of oil in the wells to be a circumstance of a great relevance for the delimitation. This Judgment reflects the position expressed by the Court both in the *North Sea* and *Libya/Malta (Merits)* Judgments, as well as the relevant state practice, including that related to some cases brought before the Court.

⁸¹20 ILM 797 (1981), *supra* note 31. The recommended joint development was based on the total dependence of Iceland on import of hydrocarbons and a very low hydrocarbon potential in the shelf surrounding Iceland. An unstated consideration could be the fact that, in contrast to Iceland, Norway was a significant exporter of oil and gas.

⁸²ICJ Reports 1982, 77, para.107. Note that in support of its Application of 30 June 1999 requesting permission to intervene in the *Cameroon v. Nigeria (Merits)* proceedings, *supra* note 30, Equatorial Guinea observed that "the general maritime area where the interests of Equatorial Guinea, Nigeria and Cameroon come together is an area of active oil and gas exploration and exploitation"; it therefore maintained that "any judgment extending the boundary between Cameroon and Nigeria across the median line with Equatorial Guinea would be relied upon by concessionaires who would likely ignore Equatorial Guinea's protests and proceed to explore and exploit resources to the legal economic detriment" of that country.

⁸³ICJ Reports 1982, 71, para.96, 83-84, para.117, and 93, para.133 C(2). Note that in the *Tunisia v. Libya (Revision and Interpretation)* Judgment, ICJ Reports 1985, 192 (*supra* note 28), the Court found the Application of Tunisia for revision of the 1982 Judgment on the basis of a different course of the Libyan concession No.137 to be inadmissible since this new fact was not a sufficiently decisive factor.

The continental shelf boundary line determined by the 1982 *Tunisia/Libya (Merits)* Judgment and the 1985 *Tunisia v. Libya (Revision and Interpretation)* Judgment was implemented by the two parties through their 1988 Benghazi Agreement.⁸⁴ On the same day, Tunisia and Libya also concluded two other Agreements - one concerning their joint exploitation zone in the Gulf of Gabes (El Bouri Field), with this zone being divided in two parts by the boundary line, and another Agreement concerning the financing of joint projects by a percentage of oil revenues.⁸⁵ Thus, the parties, motivated primarily throughout the long course of their dispute by their concerns with petroleum exploitation, opted ultimately for the solution of joint development, as originally envisaged in their 1972 Communiqué⁸⁶ and as suggested by Judge *ad hoc* Jens Evensen (designated by Tunisia) in his 1982 *Tunisia/Libya (Merits)* Dissenting Opinion, in reliance on the *North Sea* Judgment and Separate Opinion of Judge Philip C. Jessup.⁸⁷ While suggesting the Tunisian/Libyan joint development zone, Judge Evensen presumably also based himself on his then recent experience of participating as a Conciliator in the 1981 *Iceland/Norway (Jan Mayen)* case, which was expressly relied upon by Libya in its written Replies to Questions posed by Judge Shigeru Oda and Judge Stephen M. Schwebel during the *Tunisia/Libya* proceedings.⁸⁸

⁸⁴Libya-Tunisia Report No.8-9 [T. Scovazzi], in *International Maritime Boundaries*, *supra* note 23, Vol.II, 1663-1680 (1993).

⁸⁵*Id.*; G. Francalanci and T. Scovazzi eds., *Lines in the Sea* No.111: Libya-Tunisia, 240-241 (1994); Miyoshi, *supra* note 80, at 35-36.

⁸⁶For the 1972 Tunisia/Libya Communiqué on the joint exploitation of the respective continental shelves and fishing zones as "a single economic entity" in the area of the Pelagian Block in the central Mediterranean, see *Tunisia/Libya Pleadings*, Vol.I, 233-237, 469-470 [Memorial of Libya].

⁸⁷*Tunisia/Libya (Merits)* Dissenting Opinion of Judge *ad hoc* Evensen, ICJ Reports 1982, 320-223; and *supra* note 80.

⁸⁸See *supra* note 81. For Question IV of Judge Oda and Question II of Judge Schwebel of 9 October 1981, see the *Tunisia/Libya Pleadings*, Vol.V, 246, and for Written Replies by Libya of 21 October 1981, see *id.* 503-504.

Another example of a joint development scheme adopted as a part of the final settlement of a disputed boundary was provided for by the 1993 Guinea-Bissau/Senegal Dakar Agreement on Management and Cooperation and its 1995 Bissau Protocol on the Establishment and Functioning of the International Agency, which applies in respect of not only hydrocarbons (shared in the proportion of 85% to Senegal and 15% to Guinea-Bissau) but also fishery resources (shared equally between the parties).⁸⁹ This agreement was closely intertwined with the preceding *Guinea-Bissau v. Senegal Arbitral Award of 31 July 1989* case and with subsequently discontinued *Guinea-Bissau v. Senegal Maritime Delimitation* case.⁹⁰ The process of diplomatic negotiations accompanying these cases furnished an important instance of acting by the Court, in the general context of *An Agenda for Peace*, as "a partner in preventive diplomacy",⁹¹ which in the words of President Schwebel is a source of the continuing gratification to the Court.⁹²

See also references the joint protected zone under the 1978 Australia/Papua New Guinea Torres Strait Treaty [18 ILM 291-331 (1979)], *id.* Vol.II, 212, 268 [Counter-Memorial of Libya], Vol.V, 504 [Libya's Reply to Question II of Judge Schwebel]; and *Tunisia/Libya (Merits)* Dissenting Opinion of Judge Oda, ICJ Reports 1982, 234.

⁸⁹UN *Law of the Sea Bulletin* 40, 42 (1996 No.31). Other instances of joint development involving both mineral and fishery resources are the 1974 Japan/South Korea Agreement and the 1993 Colombia/Jamaica Treaty. See Miyoshi, *supra* note 80, at 12-14, 22-26 and 37-41. See also references to the 1978 Torres Strait Treaty, *supra* note 88.

In a follow-up to the 1985 *Guinea/Guinea-Bissau Award*, *supra* note 31, the parties issued the 1986 Kamsar Joint Communiqué stating that they would cooperate in the development of offshore resources for the mutual benefit of their peoples [25 ILM 251 (1986)], but it is uncertain whether they have engaged into any joint development scheme.

⁹⁰See *supra* notes 15 and 28; ICJ *Communiqué* No.95/36, 14 November 1995. Cf. Schwebel, *Justice in International Law*, *supra* note 33, Chapter 13: The Majority Vote of an International Tribunal, 213-222; Kwiatkowska, *supra* note 43, at 94-96.

⁹¹As in *Iran v. USA Aerial Incident of 3 July 1988* case, the normal course of the *Guinea-Bissau v. Senegal* proceedings was suspended to allow for negotiations between the parties which ultimately led to the removal of these cases from the Court's General List. The *Finland v. Denmark Passage Through the Great Belt* and

Unlike Tunisia/Libya and Guinea-Bissau/Senegal joint development schemes, the 1989 Indonesia/Australia Treaty on the Zone of Cooperation in an Area Between the Indonesian Province of East Timor and Northern Australia (Timor Gap Treaty) provided for a joint development zone by means of an interim arrangement agreed pending the continental shelf delimitation, as referred to in Articles 74/83 of the Law of the Sea Convention.⁹³ In the *East Timor* case, Portugal claimed in its 1991 Application that Australia, by negotiating with Indonesia the Timor Gap Treaty, and by the ratification and the initiation of the performance of that Treaty and subsequent related measures, as well as by the exclusion of any negotiation on those matters with Portugal, had caused particularly serious legal and moral damage to the people of East Timor and to Portugal, which will become material damage also if the exploitation of hydrocarbon resources begins. In the 1995 *East Timor* Judgment, the Court found itself unable to decide the claims of Portugal in the absence of Indonesia's consent.⁹⁴ Nevertheless, apart from contribution of that Judgment to a gradual resolution of the East Timor problem within the United Nations-sponsored negotiations, the Judgment, including its Opinions, as well as the *East Timor* pleadings underlined importance of joint development of

the *Nauru v. Australia Certain Phosphates Lands in Nauru* cases were withdrawn after the Court rendered its first decision in each of those cases. The pending *Lockerbie* cases (*supra* note 6) could perhaps eventually be added to the latter category.

⁹²Statements of H.E. President Schwebel (52nd UNGA), *supra* note 3, at 3, and (53rd UNGA), *supra* note 1, at 2. Cf. Malcolm N. Shaw, Peaceful Resolution of "Political Disputes": The Desirable Parameters of the ICJ Jurisdiction, in *Peaceful Resolution of Major International Disputes* 49, 55-56 (United Nations 1999).

⁹³29 ILM 469 (1990); Australia-Indonesia (Timor Gap) Report No.6-2(5) [V. Prescott], in *International Maritime Boundaries*, *supra* note 23, Vol.II, 1245-1328 (1993). Cf. Kwiatkowska, *supra* note 66, at 95-96.

Note that in the case of disputed Spratly and Paracel Islands in the South China Sea, some Southeast Asian States entertain the idea of multilateral joint development, while China favours a bilateral approach. See Miyoshi, *supra* note 80, at 48.

⁹⁴ICJ Reports 1995, 90 (*supra* note 28).

petroleum resources⁹⁵ and that of archipelagic state regime.⁹⁶

Due to the essential relevance of resource related and other economic circumstances to maritime delimitation, the subjectivity inherent in their consideration would not seem to be a decisive factor in their evaluation, especially that even such objective factors as the geography necessarily require arbitrary or, as President Schwebel put it, "impressionistic"⁹⁷ assessments. Nor should the changeableness of resource factors, due to depletion over time, discourage the Court from taking those factors into account. This more liberal approach is also supported by the open-endedness of Articles 74/83 of the Law of the Sea Convention which leaves it to states themselves, or to the Court and other tribunals, by which methods should a goal of an equitable solution based on international law be achieved.⁹⁸ It is, moreover, supported by the fundamental duty of friendly and fruitful international cooperation of States in ocean affairs which, as the *Gulf of Maine* Judgment stated, "clearly now becomes all the more necessary, not only in the field of fisheries but also in that of hydrocarbon resources".⁹⁹ In the light of those considerations, the *Denmark v. Norway* Judgment could be viewed as marking an appreciable progress in treatment of economic factors within "more plastic than formed"¹⁰⁰ law of

⁹⁵See especially *East Timor* Separate Opinion of Judge Oda, *id.* 107-118.

⁹⁶See Dissenting Opinion of Judge Weeramantry, *id.* 204, remarking that an unreserved recognition of Indonesia's sovereignty over East Timor in important Timor Gap Treaty "is perhaps one of the highest forms of *de jure* recognition". Cf. Kwiatkowska, *supra* note 43, at 107-111.

⁹⁷*Denmark v. Norway (Jan Mayen)* Separate Opinion of Judge Schwebel, *supra* note 53.

⁹⁸See *Gulf of Maine* Judgment, ICJ Reports 1984, 294, para.95; *Libya/Malta (Merits)* Judgment, ICJ Reports 1985, 30-31, para.28.

⁹⁹*Gulf of Maine* Judgment, ICJ Reports 1984, 344, para.240. See also *Fisheries Jurisdiction* Judgments, ICJ Reports 1974, 23-24, para.53 [*UK v. Iceland*], and 192, para.45 [*FRG v. Iceland*]. For confirmation of the duty to cooperate in the equitable use and protection of international watercourses, see the *Gabcikovo-Nagymaros Project* Judgment, ICJ Reports 1997, 80, para.147.

¹⁰⁰*Gulf of Maine* Separate Opinion of Judge Schwebel, *supra* note 49.

equitable delimitation. In addition, there still exists an unstated alternative that, in spite of a formal rejection of the relevance of *justitia distributiva*, the Court and other tribunals do and will continue - within their judicial discretion perceived as intrinsic to the judicial function - to take economic factors, even those pertaining to the State's economic position, into account in the delimitation process.¹⁰¹

Whether in form of expressly articulated principle or that of unstated alternative, the fisheries and other resource related considerations do, moreover, conform with global traditions of equity aligned by Vice-President Weeramantry to the concepts of a higher trust of earth resources and their conservation for the benefit of future generations.¹⁰² A particular obligation of the multicultural Court to search in all these traditions of equity¹⁰³ has been recently fulfilled through contributions made by the 1997 *Hungary/Slovakia Gab_ikovo-Nagymaros Project Judgment* to the development of environmental law.¹⁰⁴ These contributions include recognition of the modern concept of the environmental protection for present and future generations, reaffirmation of the principle of *sic utere tuo ut alienum non laedas* and the duty of international cooperation, definition of the critical concept of sustainable development and other pronouncements, which testify to the appreciable awareness on the part of the Members of the Court of the existence and significance of the environmental right and duties of states in modern

¹⁰¹ Cf. Kwiatkowska, *supra* note 66, at 107 and 110. On the concept of a judicial discretion, see *Denmark v. Norway (Jan Mayen)* Separate Opinion of Judge Shahabuddeen, ICJ Reports 1993, 192.

¹⁰² *Denmark v. Norway (Jan Mayen)* Separate Opinion of Judge Weeramantry, ICJ Reports 1993, 273-279, paras 233-248.

¹⁰³ *Id.* 273, para.234. Cf. Christopher G. Weeramantry, Some Practical Problems of International Adjudication, 17 *Australian Yearbook of International Law* 1, 11-15 (1996).

¹⁰⁴ ICJ Reports 1997, 7 (*supra* note 30). On significance of the *Gab_ikovo-Nagymaros Project Judgment*, see Statement of H.E. President Schwebel (52nd UNGA), *supra* note 3.

international law.¹⁰⁵

CONCLUSION

In conclusion, we feel inclined to share the view of President Stephen M. Schwebel that the equitable jurisprudence provides an outstanding instance exemplifying an "intrinsic" authority of the Court's decisions and the coherence of its case-law in terms of fundamental factors which are characteristic to the unique role of the Court as the principal judicial organ of the United Nations and of the world community as a whole.¹⁰⁶ As President Schwebel rightly remarks in his essay in honour of the Former United Nations Secretary-General, Dr. Boutros Boutros-Ghali: "The best way to maintain and enhance the Court's authority and the use that is made of it is to ensure that its judicial output continues to be of the highest standard, and that its procedures respond to the needs of present-day litigant States".¹⁰⁷ As he also points out in that essay:

We are enjoying a period of unprecedented judicial activity right now, with a heavier case load in the Court than ever before. However, the question is

¹⁰⁵Cf. Plenary Address by H.E. President Schwebel, *supra* note 5, at 413-416; Keynote Speech on the International Law Commission by H.E. Judge Stephen M. Schwebel, President of the International Court of Justice, in *Making Better International Law*, *supra* note 76, at 161, 163; Alexander Ch. Kiss, The International Court of Justice and the Protection of the Environment, in *International Law*, *supra* note 5, at 73-79; Barbara Kwiatkowska, The Contribution of the International Court of Justice to the Development of Law of the Sea and Environmental Law, 8 *Review of European Community and International Environmental Law* 10-15 (1999).

¹⁰⁶See Plenary Address by H.E. President Schwebel, *supra* note 5, at 407 and 415, relying on an "intrinsic" authority of the Court's decisions expounded by Sir Hersch Lauterpacht, *The Development of International Law by the International Court* 22 (1934/1982).

¹⁰⁷Schwebel, The Impact of the International Court of Justice, *supra* note 4, at 673. On the Court's procedures, see also Statements of H.E. President Schwebel (52nd UNGA), *supra* note 3, at 4-5, (53rd UNGA), *supra* note 1, at 4-5, and (54th UNGA), *supra* note 1; ICJ Reports, *supra* note 10, A/53/4, at 72 and Annexes I-II, 82-98, and A/54/4, at 78; *Report of the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization*, Doc. A/54/33, at 17-21 (United Nations 1999).

not whether the Court is busy; it is whether the Court is effective - whether each of its judgments or advisory opinions leaves the world - or even a small corner of it - a better place.¹⁰⁸

The jurisprudence surveyed in these Lectures leaves no doubt that the answer to this question is in the affirmative. It is substantiated by the significant and leading impact effected by the Court upon the global system of international law which was appraised by President Schwebel as follows:

As the Court enters the first century of the third millenium it stands for international law, not international lawlessness; for the peaceful settlement of international disputes in conformity with international law, not with the will of the more powerful party; for international organization, not for international anarchy or for a State sovereignty which purports to be above the law; it stands for human rights, rights that can be effectively realized only within functioning systems of law, local, national and international.¹⁰⁹

¹⁰⁸Schwebel, *The Impact of the International Court of Justice*, *supra* note 4, at 668.

¹⁰⁹Statement of H.E. President Schwebel (54th UNGA), *supra* note 1.