presentations. There are suggestions in the Judgment and in the concurring and dissenting opinions that deficiencies in the parties' presentations may have contributed to the result. It is observed that both parties focused primarily on natural prolongation arguments derived from earth sciences. They did not develop fully other factors that the prior law and this Court recognize as relevant (paragraphs 48, 69). Since earth sciences were essentially eliminated as a factor guiding the delimitation, the Court found itself relatively unguided in analysis of the relevant factors. While this ought not to excuse the inadequacies that I have identified, it may explain them. Future litigants would be wise to develop and to present multiple theories using the open-ended list of equitable principles available to them. Full advocacy presentations of all relevant factors would contribute to the quality of the judicial analysis.

The function of all courts is to resolve the disputes before them and, derivatively, to promote peaceful settlement of similar disputes outside of adjudication. The mere fact of an ICJ judgment has legitimacy. In addition, the judgment must be supported by the Court's own reasoning that uses legal principles to justify the result. Such a well-reasoned analysis adds to the legitimacy of the judgment and the prestige of the Court. It also helps to guide others in their efforts to resolve disputes peacefully.

The dissenting opinions in this case appear to accuse the majority of a failure of legal reasoning. I hope that this is wrong and that analysts can find or construct sound legal theories derived from the Judgment that will promote the rule of law. That is our task now that the Judgment has been handed down. There are positive aspects of this Judgment upon which the law can be built. Unfortunately, the contents of the Judgment do make this task harder than it ought to be.

**Remarks by the Chairman**

Let me add two or three comments. First, as Professor Charney mentioned, the Court determined that natural prolongation and equitable principles are not on the same plane. It seemed to say that in the absence of some fundamental discontinuity of the continental shelf, one has to resolve the boundary delimitation on a basis other than physical features. It did say that features of the seabed might be taken into account as a relevant circumstance, among others. However, the Court did not find any such relevant circumstances in the facts before it.

Second, with respect to third states, I think the Court did take into account in one way, at least, the presence of third states in the area. Libya had been interested in narrowing the area of concern to make it more difficult for Tunisia to argue for an extreme eastward trend across the Libyan coast and also to put a better face on the proportionality calculations that would be done. Part of Libya's argument was that the proposals of Tunisia were impinging on areas that would fall for delimitation between Libya and Malta or Italy. The Court, in adopting the concept of an area relevant to the delimitation, while emphasizing the relevance of coasts whose projections overlap, was also concerned about third states in the area. It was trying to define limits so as not to permit encroachment into areas of interest to third states. The Court did not, as Professor Charney said, give any indication what the interests of those third states were or how they would be expressed or protected in the situation.

Third, there was considerable argument over the turning point of the bound-
ary line and the location of the turning point was a critical element in the case. In this connection some of the dissents questioned the justification for ignoring the large island of Jerba, which the Court treated as a promontory for some of its calculations.

Having mentioned the dissenting opinions, I should add that while we have a majority opinion by 10 judges, there are also four dissents. Judge Gros wrote an opinion in which he attacked the Court’s decision as being a split-the-difference, ex aequo et bono decision without any principles in it. Judge Oda wrote a long, distinguished opinion describing the entire history of the evolution of the law of the sea as it bears on boundary delimitation and arguing for the application of a kind of modified equidistance rule.

Judge Schwebel, in a concurring opinion, raised a serious question about the rationale or rather the absence of any rationale for discounting the Kerkennah Islands by half.

**Remarks by Ted L. Stein***

The case between Libya and Tunisia concerning the delimitation of their continental shelf presented the International Court of Justice with a special, and in some respects unique, opportunity to comment on developments in the Third United Nations Conference on the Law of the Sea since the Court’s judgments in the *Fisheries Jurisdiction Case*. That opportunity arose in part because under the agreement submitting the dispute to the Court, the Court was authorized to take into account in reaching its decision, “the new accepted trends in the Third Conference on the Law of the Sea.”

I would like to focus on the following three general problems raised by this reference to “new accepted trends” and more generally by the undoubted evolution in the law of the sea over the past decade. First, how did the Court understand the reference to these “new accepted trends”? Was the Court to consider such trends, whatever they might be and however they might be identified, as a distinct source of law or as something else? Second, what influence did those trends have on the decision of the case itself? What new, accepted trends were left out of account? Third, what do the various opinions in the case indicate is the status under customary international law of various provisions of the Draft Convention on the Law of the Sea or of concepts contained therein, in particular the Exclusive Economic Zone or EEZ?

One of the first questions the Court had to confront was the interpretation of the reference in the special agreement to “new accepted trends” at UNCLOS III. Two rather traditional approaches mark themselves as polarities. On the one hand, the reference might be taken simply to mean that the new trends incorporated in the Draft Convention or otherwise accepted at the Conference were to be taken into account by the Court only to the extent that they had become part of the corpus of customary international law. The opposite pole would be that even if such provisions or trends had not become part of customary international law, the Court was to regard them as a special set of rules binding by agreement between the two parties before the Court.

Neither of these interpretations seemed acceptable. As to the first, the Court was quick to point out that even in the absence of a specific reference in the

*Assistant Professor of Law, University of Washington.