128. THE AGENT OF THE LIBYAN ARAB JAMAHIRIYA, TO THE REGISTRAR

21 October 1981.

I have the honour to enclose the response of Libya to the questions posed by Judges Mosler, Oda and Schwebel.

Answer to Judge Mosler [1]

Noting that Judge Mosler's question refers only to paragraph 1 of Article 76 of the draft convention, the Libyan Jamahiriya regard the first part of this paragraph as representing existing, customary law. This is for the reason that, on the basis of the Court's own judgment, in 1969, it is clear that a coastal State is already entitled, *de jure*, to its natural prolongation, in accordance with customary international law. So far as the extension to the edge of the continental margin is concerned, it is arguable that a coastal State's *de jure* entitlement to its natural prolongation extends to the edge of the continental margin.

The same would not be true for an area which lies beyond the edge of a continental margin, but within 200 miles from the baseline. Therefore the second part is not customary law so far as it defines the outer limit of the continental shelf. Given that the majority of States in the conference do not raise objection on this point at the present time, it may be regarded as a new accepted trend, especially in light of the fact that this paragraph has been introduced in the draft convention according to the procedure provided in the document A/CONF.62/62 adopted by the Conference on 13 April 1978.

It is not likely that the application to adjacent States of the two parts of the definition in Article 76, paragraph 1, would lead to inconsistent results : in any event, this possibility of inconsistency is removed by Article 76 (10), which effectively distinguishes Article 76 and the question of the outer-limit *per se* from questions of delimitation between States.

Answers to Judge Oda [2]

I. The process by which new trends were accepted in the Conference was the "consensus method" – which may or may not represent the position of each State on the point. "Consensus" is a device to permit an appearance of agreement where voting would not. "Consensus" may be influential in development of a rule of customary international law, but adoption of a provision by "consensus" at an international conference does not by itself create such a rule.

II. New accepted trends, within the meaning of Article 1 of the Special Agreement, fall within the purview of the principles and rules of international law for the purposes of that Article only if and so far as the Court concludes that they are generally accepted by States so as to have become principles and rules of customary international law. Otherwise, it is for the Court to decide what weight should be given to any "new accepted trends".

III (1). The present text of Article 83 (1), draft convention, has dropped the

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[1] See pp. 244-245, *supra*.

[2] See pp. 245-246, *supra*.

reference to equidistance and represents the present compromise between conflicting views in the Third Law of the Sea Conference. The new text also places the emphasis on the achievement of an equitable solution, though it would seem that this should in any event follow from the application of equitable principles in accordance with principles of international law.

(2) Libya regards the applicable principles and rules of international law referred to in Article 1 of the Special Agreement of 10 June 1977 as not equivalent to but comprised within the term "international law" used in Article 38 of the Court's Statute.

(3) No general answer can be given to the last part of this question since it depends upon which particular trend is referred to. In any specific case it will be for the Court to decide what weight should be given to the trend in question.

IV (1). Libya considers that, as between States with opposite or adjacent coasts, the delimitation of their respective continental shelf areas and of their economic zones ought not, in the majority of cases, to be different. Nevertheless, there may be factors relevant to fishing, such as established fishing practices, which have no relevance to shelf resources ; and, conversely, there may be factors relevant to shelf resources – such as geological features controlling the extent of a natural prolongation – of no relevance to fishing. It therefore follows that the two boundaries need not necessarily coincide. For example, it is believed that Norway and Iceland have been recommended by a Conciliation Commission to contemplate boundary arrangements between Iceland and Jan Mayen Island which will involve different boundaries for fishing, and for shelf exploration purposes.

(2) The relevant circumstances could have been different, as indicated in the previous answer.

Answer to Judge Schwebel [1]

The answer is yes, for the following reasons.

1. To allow an existing fishery for sedentary species to set the geographical limits of the continental shelf boundary for all purposes would be unrealistic and perhaps highly inequitable. It would be tantamount to allowing prior rights, acquired by a form of occupation, to override the inherent, *de jure* rights of a coastal State based upon natural prolongation (see Jennings, p. 276, *supra*, for the same view). And, in the present case, it would allow fishing practices of trivial economic significance to determine the sovereignty over mineral resources of great value (Libyan Counter-Memorial, paras. 144-150).

2. There is no basis for assuming that it is impractical for two different States to exercise sovereign rights over different resources *in the same area*. What may be termed a "vertical superimposition" of rights is not unknown.

For example, continental shelf rights in the sea-bed and subsoil have long co-existed with the rights of other States to navigation and fishing above the shelf. Safeguards for the rights of other States existed in the 1958 Geneva Convention and are provided for in Article 78 (2) of the draft convention.

State practice confirms this approach (see the reference to the recommendations of the Iceland/Norway Conciliation Commission in the reply to Judge

[1] See p. 246, *supra*.

Oda). And, even in relation to a sedentary species, a shelf resource, there is no reason to suppose that mutual accommodation on the basis of reasonable regard for the rights of others cannot be reached. For example, the sedentary fisheries were accommodated by a "Protected Zone" in the 1978 Australia/Papua New Guinea Agreement, without affecting the delimitation of the continental shelf boundary (see Libyan Counter-Memorial, para. 164).

3. The mutual incompatibility between fishing for sedentary species and oil drilling might never occur, or might be avoided by directional drilling. Even if unavoidable, the rights of the one Party could be respected by abstention, from oil drilling, or by compensation for the loss of catch if needs be : the mechanisms of adjustment are well known to international law. And the results would be more consistent with an equitable result than allowing a sedentary species to predetermine the shelf boundary.

129. L'AGENT DE LA TUNISIE AU GREFFIER

21 octobre 1981.

J'ai l'honneur de vous transmettre ci-joint les textes des réponses du Gouvernement tunisien aux questions posées respectivement par MM. les juges Mosler, Oda et Schwebel.

Réponse à la question posée aux deux parties par S. Exc. le juge Mosler [1]

1. Le Gouvernement tunisien considère que l'article 76, paragraphe 1, représente une des tendances récemment admises à la troisième conférence sur le droit de la mer. Le texte de l'article 76 tout entier est le résultat d'une négociation longue et ardue, qui a porté sur chaque paragraphe et chaque phrase des divers paragraphes qui le composent. Son inclusion dans le projet de convention s'est opérée après un long débat en séance plénière de la conférence et conformément aux paragraphes 10 et 11 du document A/CONF.62/62 (Organisation des travaux : décisions prises par la conférence à sa quatre-vingt-dixième séance concernant le rapport du bureau). La pratique des Etats tend, d'autre part, à s'y conformer et ne tient plus compte des limites posées par l'article 1 de la convention de 1958, que la Cour avait considéré en 1969 comme l'expression du droit coutumier.

2. La limite des 200 milles mentionnée à l'article 76, paragraphe 1, n'est déterminante que dans l'hypothèse où le rebord externe de la marge continentale se trouve en deçà de cette limite. De l'avis du Gouvernement tunisien, la mention de cette limite de 200 milles n'a pas pour conséquence d'imposer une méthode particulière de délimitation pour la partie de la délimitation qui concerne la marge continentale jusqu'à son rebord externe. Il en résulte que l'application des deux éléments de la définition ne peut pas aboutir à des résultats mutuellement incompatibles.

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[1] Ci-dessus p. 244-245.