REPLY OF THE REPUBLIC OF MALTA

RÉPLIQUE DE LA RÉPUBLIQUE DE MALTE

INTRODUCTION

1. This is the Reply of the Republic of Malta filed pursuant to the Order made by the President of the Court on 21 March 1984.

2. The Reply, which is divided into six Parts, is intended primarily to rebut the arguments of the Socialist People's Libyan Arab Jamahiriya tending to distort the geographical and legal framework of the present case. The Reply, therefore, also restates the principles and rules of international law which, in the view of Malta, are applicable for the purposes of the delimitation of the continental shelves of Malta and Libya. These are preceded by an opening Part in which Malta deals with some preliminary points arising out of Part I of the Libyan Counter-Memorial.

PART I

SOME FACTUAL ELEMENTS

INTRODUCTION

3. The Libyan Counter-Memorial deals in Part I, under the heading of "The Factual Elements", with three matters: (1) the background to the dispute; (2) the physical factors of geography, geomorphology and geology; and (3) economic and other considerations introduced by Malta. The second of these matters – the physical factors – will be dealt with in Parts II and III below. The first and third of these matters will be dealt with in the present Part.

4. This Part will not attempt to restate the whole of Malta's position regarding the background to the dispute and the economic and other considerations. The nature of the items under reply calls for an approach which is necessarily selective. On the whole, this Part of the Reply will follow the headings of Part I, Chapters 1 and 3, of the Libyan Counter-Memorial. However, the fact that Malta does not in this Reply deal with every allegation of fact made by Libya which may call for comment or qualification should not be regarded as meaning that Malta accepts the correctness or validity of all that is said in the Libyan Counter-Memorial. Should the Libyan Reply, or statements which Libya may make during the Oral Hearings, indicate that other matters require comment, Malta reserves the right to deal with them at the latter stage.

CHAPTER I

THE BACKGROUND OF THE DISPUTE

1. Legislation

5. In the opening Chapter of the Libyan Counter-Memorial some attention is devoted to what is described as Malta's "'*status quo*' contention, the total invalidity of which is apparent".[1]

6. Libya asserts, first, that "Malta has chosen to ignore the effect of the Libyan legislation of 1955 which patently did not respect 'the equidistance line' for the northern boundary of Libyan continental shelf jurisdiction in the direction of Malta".[2]

7. The fact is that non-recognition by Libya of an equidistance line for the northern boundary of its continental shelf is by no means evident from a consideration of that legislation.[3] The relevant provision of the Petroleum Law of 1955 is Article 4, entitled "Boundary". It provides that the Law shall

> "extend to the seabed and subsoil which lie beneath the territorial waters and the high seas contiguous thereto... under the control and jurisdiction... of Libya".

It adds that if there is doubt as to the boundary of the zone it shall be determined by the Petroleum Commission. There is thus nothing in the legislation which suggests non-acceptance of an equidistance line as the northern boundary of the Libyan continental shelf. Libya simply did not determine that boundary, but left it open – thus providing no overt "opposition" to any claim which Malta might make.

8. Nor was the matter made any clearer by Libya's Petroleum Regulation No. 1 of 1955.[4] In defining in Article 2 the "First Zone", the Regulations stated that it

> "consists of the Province of Tripolitania bounded on the North by the limits of territorial waters and high seas contiguous thereto under the control and jurisdiction of... Libya...".

The description of the Second Zone also contained identical words relating to Cyrenaica. The accompanying sketch map[5] merely shows

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[1] Libyan Counter-Memorial, p. 9, para. 1.02.
[2] *Ibid.*, pp. 9–10, para. 1.04.
[3] Libyan Petroleum Law, 1955, Libyan Memorial, Annex 32.
[4] Libyan Memorial, Annex 33.
[5] *Ibid.*, at end of Arabic text.

land boundaries stretching northwards into the Mediterranean, but the projection does not go anywhere near the equidistance line at those longitudes. This is certainly no indication that Libya was seeking to assert a claim even to an equidistance line, let alone to a line lying north of an equidistance line.

9. It appears that apart from actions specifically taken in relation to its litigation with Tunisia and Malta and the boundary implications of its grant of concessions, Libya has never given any publicity to any claim to continental shelf boundaries. No statement regarding Libya's position appears, for example, in the volumes of the United Nations Legislative Series containing "National Legislation ... relating ... to the Continental Shelf... ",[1] whereas Malta's legislation of 1966 – containing a reference to the median line – appears in the United Nations volume for 1974, having been communicated to the United Nations in 1972.[2]

10. Libya further asserts that "the plain fact is... that... [Malta's] 1966 Continental Shelf Act... did not call for any reaction on the part of Libya" and observes that "Malta *did not notify the 1966 Continental* Shelf Act to Libya".[3] The assertion assumes that notification is called for. But in international law there is no such obligation. As the Court has itself observed in the *Norwegian Fisheries* case the duty rests on the State which may be affected by adverse legislation to keep itself informed of such legislation and to react promptly to it.[4] In any event, there is no room for any suggestion that Libya could have been unaware of Malta's reliance upon the equidistance approach. In truth, "the plain fact" is that as early as 5 May 1965 Malta had addressed to Libya a Note Verbale informing Libya of Malta's intention to adhere to the 1958 Convention on the Continental Shelf and to be guided by the equidistance provisions of Article 6(1). As pointed out in the Maltese Counter-Memorial, this Note concluded with the words:[5]

> "the Government of Malta will be grateful to know that the Government of Libya is in full accord with this determination".

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[1] See, for example, ST/LEG/SER. B/15 (1970) or ST/LEG/SER. B/16 (1974).

[2] *National Legislation and Treaties relating to the Law of the Sea*, ST/LEG/SER. B/16, p. 156.

[3] Libyan Counter-Memorial, pp. 10–11, para. 1.06.

[4] The relevant passage of the Judgment of the Court is so striking as to merit quotation:

> "The United Kingdom Government has argued that the Norwegian system of delimitation was not known to it and that the system therefore lacked the notoriety essential to provide the basis of an historic title enforceable against it. The Court is unable to accept this view. *As a coastal State in the North Sea*, greatly interested in fisheries in this area, as a maritime Power traditionally concerned with the law of the sea and concerned particularly to defend the freedom of the seas, *the United Kingdom could not have been ignorant of the decree of 1969* which had at once provoked a request for explanations by the French government. *How, knowing of it, could it have been under any misapprehensions as to the significance of its terms...*" (*I.C.J. Reports, 1951*, pp. 138–139. Emphasis supplied).

[5] Maltese Counter-Memorial, p. 85, para. 183.

And Malta followed this up on 19 May 1966 by sending to the Secretary-General of the United Nations a declaration giving notice of succession to the Geneva Convention on the Continental Shelf and thus publicly proclaimed that its position regarding the boundaries of its continental shelf would be determined within the framework of Article 6 of that Convention.

2. Exchanges between the Parties in 1972–73

11. Libya appears to consider it material to mention what it cares to call "the mystery surrounding 'Malta's baselines' ".[1] The fact that Libya finds it appropriate to make something of this point is perhaps more significant than the point itself. The precise delineation of Malta's baselines has never been a relevant issue between the Parties. Certainly that delineation is a material fact in so far as the equidistance line between Malta and Libya is to be measured, on Malta's side, from those baselines. But the elements in it were identified to Libya's representatives in July 1973, as is evident from the fact, acknowledged by Libya in paragraph 1.10 of its Counter-Memorial, that discussion took place regarding the position of Filfla, upon which there are three basepoints, Nos. 22, 23 and 24. In no subsequent discussions did Libya indicate any difficulty from any supposed uncertainty regarding Malta's baselines. The lines are clearly set out in Map No. 2 in Vol. III (Maps) of Malta's Memorial.

12. Contrary to Libya's contention in paragraph 2.35 of its Counter-Memorial, Malta has not presented its baselines for the purpose of showing "the general direction of various portions of the coasts of the Maltese Islands". Malta's case does not involve reliance upon any assertion of a "general direction" of its coasts. That concept reflects a projection by Libya of thinking material to its own case, but not to Malta's. Moreover even if Malta had not drawn any baselines the operation of any system of base points on Malta's coasts would have led to a median line not significantly different from the one actually used by Malta.

13. For some reason, not specified, Libya appears anxious to reject the statement made in paragraph 72 of the Maltese Memorial, that Mr Ben Amer suggested on behalf of Libya in the meeting of 10 April 1974 "that each side should abandon its position in favour of a compromise proposal". To this end, the Libyan Counter-Memorial states that[2]

> "to avoid any risk of misunderstanding, it should be noted in this connection that the remark, attributed in paragraph 72 to Mr Ben Amer, about a compromise (said to have been made on 10 April 1974) related not to the substance but to the means of resolving the matter".

[1] Libyan Counter-Memorial, p. 13, para. 1.11.

[2] *Ibid.*, p. 14, para. 1.13 (last sentence).

This is contrary to the facts as known to Malta. From Malta's notes of the meeting between the Prime Minister of Malta and Minister Ben Amer it emerges clearly that at one stage, when both parties still stuck to their original stand, Mr Ben Amer proposed that "both sides would forget their stands and would reach a compromise agreement". Prime Minister Mintoff immediately reacted by saying that that proposal (i.e. a compromise agreement)

> "had already been made before through Mr Ben Amer and that he had already informed Mr Ben Amer himself and later also the President that this was not acceptable".[1]

3. Petroleum Activities of the Parties

14. *In paragraph 1.14 the Libyan Counter-Memorial* appears to attach "particular significance" to "the omission in the Maltese Memorial of reference to Malta's 1970 offer for bidding for two 'blocks' to the north and east of Malta mentioned in paragraph 4.29 of the Libyan Memorial...". What the relevance of this "omission" to the present case may be is far from clear, since the issue before the Court relates to the boundary south of Malta. But the Libyan Counter-Memorial then goes on to say that

> "it was not until the end of May 1974 that Malta in fact purported to extend its reach southward in the direction of 'Malta's Equidistance Line' by the grant of the concession to Texaco Malta Inc.".

That is not entirely true. The process of granting concessions to the south of Malta had begun three years earlier with the licence to Aquitaine in Block P3 of the Area No. 1. This can be seen clearly from Map No. 3 in Volume III of Malta's Memorial illustrating the grant of concessions by both Parties.

15. Paragraph 1.16 of the Libyan Counter-Memorial appears to make an issue out of the sequence of events in the grant of concessions. The facts are hardly disputed and are set out in convenient form on Map No. 3 of Volume III (Maps) of Malta's Memorial.

16. Malta takes this opportunity, however, to observe that the dates set out in footnote 1 to paragraph 1.17 of the Libyan Counter-Memorial do not seem to tie in with, at any rate, one of the documents filed with the Libyan Memorial. These dates purport to represent a "chronology of events in 1974" and begin with a reference to the conclusion on 14 April of "Principles of Agreement" between Libya and Total. Libya invokes this episode as revealing that "Libya entered into agreements before the Texaco concessions granted by Malta". But the letter from Total to the Chairman of Malta's Oil Committee, dated 31 July 1975, does not support this position.[2] In that letter Total describes

[1] See Annex 1 of this Reply.

[2] See Libyan Memorial, Documentary Annex No. 57.

to the Chairman the basis on which Total was operating in the area. The letter does not refer to any "Principles of Agreement" of 14 April 1974. Instead it refers to a contract

> "concluded on 15 October 1974 with the Libyan NOC duly authorized to this effect by a Libyan law of 23 September 1974, and that this contract was ratified by a law promulgated by the Revolutionary Council of the Libyan Arab Republic on 13 November 1974".

Malta therefore also takes this opportunity to again invite Libya to produce to the Court, in time for examination before the commencement of the Oral Hearings, the texts of the "Principles of Agreement", the concession and the Exploration and Production Sharing Agreements mentioned in footnote 1 to page 16 of the Libyan Counter-Memorial.

17. The Libyan Counter-Memorial refers in paragraph 1.22 to evidence which is said to rebut the statement made in the Maltese Memorial, paragraph 79, that "no activities were carried out by [Libya's concessionaires] north of the equidistance line". The Libyan Counter-Memorial says[1]:

> "The reply, if any, from Exxon is not annexed to the Maltese Memorial and accordingly the suggestion in paragraph 79 that the absence of activities north of the equidistance line 'is confirmed by the replies received from the Libyan concessionaires' is not supported by any evidence produced by Malta and is contradicted by implication by the reply from Total of 31 July 1975".

Exxon's reply is annexed to this Reply[2] and does not bear out the Libyan contention. The material part says:

> "However, Esso advises that no seismic operations had been conducted within the area claimed by Malta, nor has Esso Libya conducted any drilling operations within such area".

Indeed a letter[3] addressed by Esso Standard Libya Inc. to the National Oil Corporation of Libya on 29 September 1974, and which in effect is an agreement supplementary to the Exploration and Production Sharing Agreement of 29 September 1974, above referred to, it is expressly agreed between Esso Standard and the National Oil Corporation that "until such time as there has been a demarcation of the offshore area subject to the jurisdiction of the Libyan Arab Republic from the offshore area subject to the jurisdiction of Malta ... Second Party [Esso Standard] will not be obliged to commence Petroleum Operations ... in waters north of latitude 34° 10'00" North". That latitude is to the south of the point, on the equidistance line between Malta and Libya, which is nearest to Libya.

[1] At p. 18, end of para. 1.22.
[2] Annex 2.
[3] Reproduced as Annex 46 of the Libyan Memorial.

4. THE "NO-DRILLING UNDERSTANDING"

18. It is not so much the facts relating to the "no-drilling understanding" which merit clarification at this juncture as the manner in which Libya now seeks to present those facts. Paragraphs 1.23–1.27 of the Libyan Counter-Memorial contain no less than three significant distortions of fact:

(i) Libya quotes in paragraph 1.23 one sentence from paragraph 6 of the Secretary-General's Report, namely:

> "Malta has confirmed that it had accepted the implicit understanding, when the Agreement was signed in 1976, that it would not begin drilling operations until the Court had reached a decision and an agreement on delimitation had been concluded in accordance with article III of the Agreement."

Libya did *not* quote the next sentence which would have presented a more balanced picture of the situation.

> "*Malta considered that since the Libyan Arab Jamahiriya had failed to ratify the Agreement* [*the Special Agreement in this case*], *it was legally entitled to commence drilling operations*".[1]

The fact that Libya states that "it does not accept unilateral responsibility for the non-ratification of the 1976 Agreement" does not, as a matter of objective analysis, relieve it of that responsibility.

(ii) At the end of paragraph 1.26, when referring to the account in Malta's Memorial of the meeting between the Prime Minister of Malta and the Prime Minister of Libya on 23 April 1980, the Libyan Counter-Memorial fails to mention the last sentence of that account which put developments in an entirely different light:

> "At the end of the meeting the Prime Minister of Libya said that the 1976 Agreement would be ratified and that the two sides would go to the Court in June (1980)".[2]

(iii) Yet, again, in paragraph 1.27 Libya bluntly asserts that "the no-drilling understanding had been breached by Malta", without appearing to appreciate that the basic conditions underlying the understanding had not been satisfied by Libya. In other words, Libya had persistently failed to act promptly, or indeed at all, in taking the steps necessary to secure the approval of the submission of the present case to the Court. In the face of such extended delay in placing the case before this Court, and in the absence of any indication of movement by Libya, Malta could not be expected indefinitely to forego exploration in the area of continental shelf to which in its view it was entitled.

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[1] For the full text, see Libyan Memorial, Annex 72. Emphasis supplied.

[2] Maltese Memorial, p. 29, para. 100. For an account of the meeting of 23 April 1980, see Annex 3 of this Reply.

CHAPTER II

ECONOMIC CONSIDERATIONS

19. Chapter 3 of the Libyan Counter-Memorial is devoted to a consideration of certain economic and other considerations introduced by Malta.

1. General Economic Considerations

20. Malta maintains its position that any delimitation in accordance with equitable principles in order to lead to an equitable result must take account of economic factors.

21. Malta also maintains its submission that the reference in paragraph 107 of the Court's 1982 Judgment in the *Libya/Tunisia Continental Shelf* case does not exclude recourse to economic considerations. The Court was not absolute in stating that the economic considerations mentioned in the case could not be taken into account. The Court said "they are *virtually* extraneous factors". This must necessarily mean that they are not entirely, or *a priori*, extraneous factors: only that in that particular case, the particular considerations were thought to be extraneous. Moreover, the Court acknowledged the possibility that

> "the presence of oil-wells in an area to be delimited... 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"[1]

In any event, these passages must be read within the framework of the Court's more general and compelling observation in paragraph 71 of that Judgment:

> "Equity as a legal concept is a direct emanation of the idea of justice. The Court whose task is by definition to administer justice is bound to apply it".

It would be a strange view of justice which, in relation to the determination of the boundaries of wealth (for that is what the determination of any boundary affecting resources involves), were to say that economic considerations have no bearing on the matter.

22. Paragraph 3.03 of the Libyan Counter-Memorial takes issue with Malta regarding Malta's argument in paragraphs 224 and 225 of its Memorial on its lack of land-based energy resources. In suggesting that

[1] *I.C.J. Reports*, 1982, pp. 77–78, para. 107.

it is by no means certain that Malta will be permanently deprived of petroleum resources, that Libya's resource of oil is a diminishing asset and that Malta has other "natural" resources in the shape of a large tourist trade and rewarding ship repair work, Libya seeks to direct attention away from the one really important fact in this case: Libya has now, and for the last two decades has had, access to huge quantities of crude oil capable of generating for the people of Libya sufficient capital to satisfy all reasonable needs in terms of investment for the future. In comparison with all this, Malta has no truly natural resources. Though its weather may remain constant, the extent of its tourist trade depends entirely on world economic conditions. In this respect Malta does not enjoy the protection which Libya's large liquid capital resources afford that country. And the same is no less true of ship repair work – an industry which is directly and immediately affected by fluctuations in the world economy reflected in greater or less use of shipping. The fact that Libya may not be able to look forward indefinitely to an undiminished flow of oil from its on-shore works, in addition to its off-shore entitlement in areas unaffected by the present case, does not constitute a circumstance which supports Libya in its view that the area available to Malta for prospective development should be hugely reduced.

23. Apart from the disagreement between the Parties as to the relevance of economic considerations, there appears to be some difference between them as to the appropriate factors to weigh in assessing their respective equities in the situation.

24. Libya does not deny that it has more oil than Malta. Indeed this is indisputable. Nonetheless, it is appropriate to recall what this implies. In April 1982 as authoritative a source as the Economic Report on Libya published by the National Westminster Bank stated not only that Libya is the third largest oil exporter in OPEC but also that it has "proven reserves sufficient to last at least 40 years at prevailing rates of extraction". Moreover, even more recently, on 26 March 1984, *Petroleum Intelligence Weekly* wrote:

> "Development of Libya's first offshore oil field – largest to date in the Mediterranean – could add nearly 10% to the country's production capacity in one sweep."

There is, therefore, every prospect of Libya being able to maintain a massive income from the sale of oil for virtually half a century at least, with quite reasonable prospects of being able to go on even beyond that date.

25. Unable, therefore, convincingly to deny its evidently and disproportionately greater wealth, Libya seeks to eliminate the disparity between itself and Malta by the observation that "neither State can be classified as poor".[1] That suggestion quite distorts the discussion. The issue is not "are both rich or poor?" but "what is the comparative

[1] Libyan Counter-Memorial, p. 59, para. 3.06.

wealth of one as against the other?". Of course, if Malta were truly a country of means, the comparison with Libya, even if it showed that Libya is much richer than Malta, would perhaps be less significant than in truth it is. But the real point is that Malta is not a country of means, and the assertion that "by any standards Malta is among the more prosperous developing nations of the world" is quite beside the point. Quite simply, the people of Malta work hard for their income. With no natural resources to support them, they have no alternative but to use their skills, in combination with their weather and geographical location, to make a living. But, even so the discrepancy between the capital resources of the two countries is irreconcilable.

26. Libya admits the disparity of wealth in terms of Gross Domestic Product (GDP) per head of population, though tucking away in a footnote the fact that Libya had in 1981 an income per head of some US$8450, as against US$3380 for Malta.[1] Libya's per capita income is thus some two and a half times as great as that of Malta. This admission is immediately qualified, however, by Libya's observation that this is a "crude measure" and is operative only at "the most superficial level". This qualification is in part true, though it does not operate in favour of Libya.

27. Malta agrees that considerations of per capita income do not necessarily reflect a country's particular economic conditions or situation. Indeed, Malta's *Development Plan 1981–85 – Guidelines for Progress* states, at p. 93:

> "By itself, however, growth in domestic product is not really a fair and reliable yardstick of economic expansion or of social progress. Taken in isolation, it does not adequately reflect the structure of domestic output or any changing trends in its composition and distribution or the social environment and institutional framework in which growth of national product has been registered."

28. In Malta's case per capita considerations do not show the weaknesses inherent in the island's economic structure and other factors and limitations which directly influence the local economy. In particular, such considerations fail to reveal the extreme openness and fragility of the Maltese economy resulting especially from the small size of the country, the small population and the lack of natural resources and raw materials. This means that Malta's efforts to develop its economy and improve national living standards have to rely almost exclusively on international trade.

29. This reliance on international trade for economic growth is shown by the fact that a large proportion of local manufacturing output has to be geared for export in view of the limited domestic base and that all semi-processed supplies required for further processing by Maltese manufacturing industries also have to be secured from abroad.

[1] *Ibid.*, page 59, footnote 2.

Moreover, capital goods as well as fuel requirements also have to be procured completely from overseas sources. Furthermore, a strong thrust is given to the Maltese economy by tourists and ship repair work: both types of activity are of an international nature and thus further contribute to the openness of the local economy.[1]

30. There can be no doubt that Malta is at a great economic disadvantage vis-à-vis Libya on GDP per capita criteria even though this yardstick leaves unmeasured a number of crucial items which severely limit Malta's options and prospects for economic growth. In the circumstances, putting Malta "among the most prosperous developing nations of the world" – as the Libyan Counter-Memorial does – is a facile conclusion which completely ignores the limitations referred to above.

31. The Libyan Counter-Memorial also refers to the economic structure of the two countries and draws the conclusion that Malta's economic structure is more "mature" than Libya's and that Malta has a "diversified" range of goods and services. In this context it should be pointed out that:

(a) The local manufacturing industry relies fairly heavily on textiles and clothing which are traditionally low-skill activities and subject to volatile international market demand conditions. Total production in firms employing more than 10 workers during 1982 stood at Lm239.9 million: textiles and clothing accounted for Lm73.2 million (30.5 per cent).

(b) Total employment in these establishments at the end of 1982 stood at 23,556 of which 8,887 (37.7 per cent) were engaged in the production of textiles and clothing.

(c) The local tourist industry is heavily dominated by UK tourist traffic. Out of 510,956 visitors during 1982, no less than 331,712 (65 per cent) were UK arrivals.

(d) Domestic exports are heavily biased towards clothing items. Total domestic exports during 1982 reached Lm150.1 million: of this amount exports of clothing stood at Lm68.1 million (45.4 per cent).

32. On the other hand, the underlying strength and prospects of the

[1] The following table compiled from Government Statistics indicates clearly the openness of the Maltese economy and hence its vulnerability to international economic events – a point which GDP per capita measurements fail to highlight. In brackets are the corresponding figures for Libya (for 1981, the latest available) taken from Lloyd's Bank Economic Report 1983.

	1982	
(i) GDP at factor cost	Lm417.8 million	(US$30,329 million)
(ii) Exports of goods and services	319.8 million	16,562 million
(iii) Imports of goods and services	394.6 million	17,458 million
(iv) (ii) as a % of (i)	76.5%	54.6%
(v) (iii) as a % of (i)	94.4%	57.6%

Libyan economy compared to the "chronic" weaknesses of the Maltese economy are demonstrated by the following observations:

(a) Largely by virtue of its oil resources and proven oil reserves, Libya has enjoyed and is expected to continue to enjoy in the coming years a favourable surplus in its external trade transactions. Malta has persistently suffered from a deficit in its visible trade transactions and will continue to do so given the limitations referred to above.

(b) Again, given the peculiar characteristics of the economy of the two countries, development policy in both Malta and Libya attaches considerable importance to the development of the productive sectors. Whereas Libya can continue to allocate enormous outlays out of its substantial oil revenues towards the development of productive activities, funds at Malta's disposal to stimulate the development of the productive sectors are severely limited. In this regard Libya finds itself in an advantageous situation in the sense that its extensive natural resources can provide raw materials around which its productive sectors can be structured. Obviously Malta cannot do this; and although economic activity in the island is spread among various sectors, these activities (with the exception of agriculture) derive, and will of course continue to derive, their main thrust from international trade rather than from domestic-oriented and locally-generated sources.

33. The Libyan Counter-Memorial, in suggesting that Malta "ignores the question of population", seeks to contrast Libya's high rate of natural population increase ("one of the highest rates of natural population increase in the world") with what it claims is Malta's declining growth.[1] But, to use Libya's own expression, Libya "has the facts wrong". Malta's population trend has always shown an upward trend. The natural increase in population was prevented from becoming an actual increase, at an alarming rate, of the number of Maltese living in Malta, by an exodus through migration, unprecedented in Maltese history and probably unrivalled by any other country. Between 1950 and 1970 alone, there was a net flow of more than 100,000 emigrants from Malta to Australia, the United Kingdom, Canada, the United States of America and other countries. In more recent years the population of Malta has again been registering a systematic increase. Not only have States ceased to encourage immigration, as was the case before the 1974 oil crisis; they are now suffering from a recession which is causing many Maltese migrants to return to their native land. As can be seen from the Table in the footnote overleaf there has been an increase from 303,263 in 1975 to 326,178 in 1982. Contrary to Libya's statement, there have been in each year after 1974 (with the exception

[1] Libyan Counter-Memorial, p. 60, para. 3.10.

of 1981) more immigrants returning than there have been emigrants departing.[1]

2. Fishing

34. In approaching the question of the relevance and role of fisheries in Malta's case, it is important to keep the point in proportion. It is merely one aspect, and not the dominant one, of the statement of economic circumstances relevant to the determination of the continental shelf boundary. However, the Libyan Counter-Memorial accords to it virtually twice the discussion that it gives to the wider economic considerations. The opening sentence of paragraph 3.12 of the Libyan Counter-Memorial should therefore be read with some caution. There is no justification for the statement there made that "it is evident that the Maltese Memorial accords fishing activity a major role in the present case". Malta is as aware as Libya of the interrelationship of fisheries, the continental shelf and the exclusive economic zone. It does not seek to exaggerate the role of fisheries.

35. But that does not mean that Malta's reference to fishing activity is "legally invalid", as is suggested in the Libyan Counter-Memorial, paragraph 3.14. *Kannizzati* fishing, which involves the anchoring of a cluster of palm leaves, is an activity of which an essential element is the continuous contact of the stone anchor with the seabed during the whole fishing season and is thus directly related to the use of the continental shelf resources.

36. The Libyan Counter-Memorial raises, in paragraph 3.65, a false issue when it seeks to correct "an impression ... that fishing is important to the Maltese economy". That is not what Malta argued. Fishing does not have to be an important part of the economy to be a circumstance relevant to continental shelf delimitation. It merely has to be an activity related to continental shelf resources in which a signi-

[1] (Taken from published Maltese Government Statistics)
The following table shows that the Maltese population is on the increase and that net migration flows have contributed to this increase.

Year	Maltese population at the beginning of the year	Natural Increase	Migration Balance*	Total Change	Population at end of year
1975	298,903	2824	+1536	+4360	303,263
1976	303,263	2729	+1571	+4300	307,563
1977	307,563	2921	+1096	+4017	311,580
1978	311,580	2378	+ 77	+2555	314,135
1979	314,135	2855	+1061	+3916	318,051
1980	318,051	2387	+ 500	+2887	320,938
1981	320,938	2230	- 175	+2055	322,993
1982	322,993	2862	+ 323	+3185	326,178

*Difference between the number of migrant outflows and inflows.

ficant number of people are involved and which forms an identifiable feature of Maltese life. Nothing said in the Libyan Counter-Memorial runs counter to this.

On the point made specifically regarding *kannizzati* fishing, the Libyan Counter-Memorial provides no evidence to support its blunt contradiction of the statement in Malta's Memorial.[1]

3. Malta's Status as an "Island Developing Country"

37. The Libyan Counter-Memorial[2] seeks to meet, as it puts it, "head on" Malta's reference to its status as an island developing country by noting that the 1982 Law of the Sea Convention makes no reference to this category of States. There is no reason why it should have. It is true that the Preamble to the Convention refers to the interests and needs of "developing countries, whether coastal or land-locked" and does not refer to "island developing States". But why should it do so? The expression "coastal or land-locked" is a comprehensive one and clearly includes "islands". There was, therefore, no need for a specific reference of this kind.

38. The inadequacy of this textual approach of the Libyan Counter-Memorial is even more marked when one comes to Article 83 of the Convention which deals specifically with continental shelf delimitation. The clear implication of the Libyan argument is that one might have expected to find some reference to "island developing countries" in that Article. But given the history of the emergence of that Article, the wide range of conflicting positions which stood in the way of the adoption of a detailed text and the eventual last-minute appearance of the present generalized provision, it is hardly surprising that it contains no reference to the position of island developing States or indeed any other particular kind of State.

39. The point which the Libyan Counter-Memorial studiously disregards and, indeed, seeks to obscure is that the United Nations has identified "island developing countries" as a group of States whose special position should be acknowledged and for whose particular needs some special provision should be made. Libya's response to this reference is to attempt to differentiate Malta from other island developing States by saying that the reasons why the United Nations or its agencies concerned themselves with island developing States did not apply to Malta.[3] The attempt is, however, defeated by the words of the resolution which Libya itself quotes. Thus, while Libya sees in the Preamble to UNCTAD Resolution 65(III) of 1972 references to "difficulties in respect of transport and communications" which – so Libya asserts – are problems that do not face Malta, Malta notes in that same Preamble that these difficulties are identified as being, "amongst others" and are "limited to their geographical nature".

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[1] See Libyan Counter-Memorial, p. 64, para. 3.20.

[2] p. 66, para. 3.27.

[3] See Libyan Counter-Memorial, p. 67, para. 3.29.

40. Nor is it correct, as is done in paragraph 3.33 of the Libyan Counter-Memorial, to liken Malta to Hong Kong and Singapore. By no stretch of the imagination can the economy of those two entities be compared with that of Malta. Each is one of the world's leading financial and commercial centres generating huge amounts of income by virtue of the provision of international air transport and of *entrepot* traffic.

41. Lastly, it is to be noted that the Libyan Counter-Memorial[1] misstates and, therefore appears to misunderstand the nature of Malta's reference to its position as an island developing country. Libya suggests that Malta is "precluded on any rational grounds from claiming the protection of any notional concessions due from the international community to the really poor developing countries of the world". But the real point is that Malta is not asking for concessions from the international community. It is asking the Court to bear in mind that Malta is an island developing country and Libya is not; that Malta's economic needs are vastly greater than Libya's; that this has been recognized by the United Nations including Malta within the classification of island developing countries. For the Court to disregard this consideration would not be consistent with the controlling requirement of the law in this situation, namely, that equitable principles must be applied to reach an equitable result. Malta is not asking in this case for something from the international community. It is asking only that an internationally and objectively determined difference between itself and Libya should be borne in mind in determining where it is equitable that the resource boundary between the two States should run.

[1] P. 69, para. 3.34.

PART II

THE PRINCIPLES AND RULES OF INTERNATIONAL LAW GOVERNING DELIMITATION

INTRODUCTION

42. Malta has set out its views on the principles and rules of international law applicable to the present case in Part III, Chapters I and II, of its Counter-Memorial.[1] Malta does not propose to restate its position on these questions and will limit itself to a number of clarifications which appear to be necessary in the light of the Libyan Counter-Memorial.

[1] Maltese Counter-Memorial, pp. 45–83, paras. 75–176.

CHAPTER III

THE NATURE OF THE DELIMITATION SOUGHT AND THE SOURCES OF THE APPLICABLE LAW

1. The Law Applicable to the Delimitation of the Continental Shelf

43. The delimitation in respect of which the Parties have sought the assistance of the Court by the Special Agreement is that of their common continental shelf. Malta has shown that the law applicable to this delimitation is customary international law as it has developed in the practice of States, in the work of the Third United Nations Conference on the Law of the Sea and in the cases. Of special importance in this connection are the terms of Article 76(1) of the 1982 Law of the Sea Convention and the emergence in international law of the concept of the exclusive economic zone.[1]

44. Libya does not deny that the provisions of Article 76 of the 1982 Convention declare rules of customary international law. It seeks, however, to reduce their effect in two ways. First, it maintains that these provisions relate exclusively to the outer limit of the continental shelf and are, therefore, irrelevant to its delimitation. In the second place, Libya maintains that, even on the plane of entitlement and of the outer limits of the shelf, the principle of distance expressed in this article possesses no more than a "subsidiary character", while natural prolongation, in the physical sense of the term, "remains the primary basis for the entitlement to continental shelf rights".[2] Malta will revert later to these two aspects of the Libyan argument. For the moment, however, it is sufficient to observe that this thesis amounts to a pure and simple denial of the important development of the concept of the continental shelf, as reflected in particular in the work of the Third Conference on the Law of the Sea and in the cases.

2. The Relevance of the Exclusive Economic Zone to the Delimitation of the Continental Shelf

45. In the same perspective, Libya, though not denying the emergence in international law of the concept of the exclusive economic zone and of the principle of distance which is its inseparable corollary,

[1] *Ibid.*, paras. 76–82.
[2] Libyan Counter-Memorial, pp. 98–101, paras. 4.46–4.52.

tries again to minimize its significance in the present case. On several occasions the Libyan Counter-Memorial recalls the fact that the Court is called upon to delimit the rights of the Parties in the seabed and its subsoil to the exclusion of the superjacent water column:

> "... fishing bears no relation to the continental shelf ... the Maltese fishing activities ... might only have relevance to any Exclusive Economic Zone of Malta. (To date, Malta has claimed no Exclusive Economic Zone but has legislated for a 25-mile fishing zone around the Maltese Islands ...)[1]
>
> "The delimitation of the continental shelf in the present case does not prejudge delimitation of the Exclusive Economic Zone (or fishing zone)".[2]
>
> "... it is not the column of water – which is the primary concern of the Exclusive Economic Zone – that is before the Court in this case ..."[3]

From these remarks, Libya seeks to conclude that the criterion of distance, the place of which in the concept of the exclusive economic zone it does not deny,[4] has no role to play in the present case, which is concerned solely with the continental shelf.

46. Malta agrees with Libya in regarding the present case as relating exclusively to the delimitation of areas of the continental shelf appertaining to the two countries. Malta considers, however, that the evolution of the concept of the continental shelf and its absorption in the multi-purpose jurisdiction of the exclusive economic zone (as defined in Article 56 of the 1982 Convention), cannot be regarded as without relevance or influence upon the rules governing the delimitation of the continental shelf. In other words, Malta considers that the delimitation of the continental shelf between Malta and Libya cannot be carried out without bearing in mind the evolution of the concept of the continental shelf and its relationship with that of the exclusive economic zone. In this connection one may recall that the Court has referred to "... the historic evolution of the concept of continental shelf, from its inception in the Truman Proclamation ..., through the Geneva Convention of 1958, through the *North Sea Continental Shelf* cases and subsequent jurisprudence, up to the draft convention of the Third Law of the Sea Conference, and its evolution in State practice".[5] The Court has also stated that it has "endorsed and developed those general principles and rules which have thus been established",[6] and has emphasized that the concept of natural prolongation, introduced by the Court itself in 1969 as part of the vocabularly of the international law of the sea, "was and

[1] Libyan Counter-Memorial, p. 62, para. 3.14.
[2] *Ibid*, p. 62, footnote 1.
[3] *Ibid*, p. 71, para. 3.39.
[4] *Ibid*, p. 100–101, para. 4.52.
[5] *Tunisia-Libya Continental Shelf* Case, *I.C.J. Reports*, 1982, p. 92, para. 132.
[6] *Ibid*.

remains a concept to be examined within the context of customary law and State practice".[1] Accordingly, it seems inconceivable to Malta that the delimitation of the continental shelf between Malta and Libya could be carried out, as Libya apparently would like, in complete disregard of the evolution of the continental shelf and of its relationship with the exclusive economic zone.

47. Malta believes that one cannot overlook the fact that the concept of the exclusive economic zone confers upon the coastal State up to a distance of 200 miles from its coasts sovereign rights relating to natural resources, both in the seabed and subsoil and in the superjacent waters (as appears clearly from the terms of Article 56 of the 1982 Convention). One may not, therefore disregard the fact that either or both of the Parties may at any time declare an exclusive economic zone. Nor can one ignore the significant practice of States of adopting, more and more often, "maritime" as opposed to merely "continental shelf" boundaries. Libya recognizes the existence of this practice,[2] and Malta notes with satisfaction that Libya thus shows to be aware of the evolution of customary international law and of the practice of States in this matter. It regrets, however, that Libya nonetheless persists in proposing to the Court a delimitation which takes no account of this development.

[1] *Ibid.* p. 46, para. 43.
[2] Libyan Counter-Memorial, p. 108, para. 5.21.

CHAPTER IV

ENTITLEMENT AND DELIMITATION

1. The Relationship Between Entitlement and Delimitation

48. Libya forcefully restates in its Counter-Memorial "the elementary distinction between continental shelf entitlement, on the one hand, and continental shelf delimitation between conflicting claims to the same continental shelf, on the other hand"[1] – a distinction to which it had already claimed to attach great importance in its Memorial.[2] Malta has already said in its Counter-Memorial that it "sees no objection to the legal distinction" between these two concepts.[3] However the fact that the two concepts are distinct in no way means that they have no juridical relationship, nor does it mean that entitlement can have no impact upon delimitation. It is on this very point – of great importance in the search for the law applicable to the delimitation – that the views of the Parties diverge.

49. Libya's position on the question of the relationship between entitlement and delimitation is confused and contradictory.

50. The legal basis of title, as defined in Article 76, i.e. the distance principle, is relevant, so we are told, in relation to "outer limits" but has no bearing in the quite different sphere of delimitation:

> "The 200-mile distance from the coast determines only the outward limit up to which a coastal State may claim jurisdiction over the maritime areas before its coasts but does not provide criteria for the delimitation of these jurisdictional zones vis-à-vis other States"[4].

According to Libya, there is an impenetrable barrier between, on the one hand, the entitlement to continental shelf, even though such entitlement is based not on "physical facts" but on distance from coasts,

[1] Libyan Counter-Memorial, pp. 80–81, para. 4.10; cf., p. 81, para. 4.12; p. 97, para. 4.43; p. 98, para. 4.46; p. 101, para. 4.52.

[2] Libyan Memorial, p. 81, paras. 6.01–6.02.

[3] Maltese Counter-Memorial, pp. 54–56, paras. 96–100.

[4] Libyan Counter-Memorial, p. 101, para. 4.52; cf. p. 80, para. 4.10; p. 81, para. 4.12. Also in the same sense see Libyan Memorial p. 82, paras. 6.04 and 6.06; pp. 89–90, para. 6.22.

and, on the other, delimitation between neighbouring States. This leads Libya to the following sweeping affirmation :

> "... there is no so-called 'distance principle' in international law that would apply to the delimitation in the present case ..."[1]

51. This also leads Libya, each time that Malta refers to the distance criterion and to Article 76 for the purpose of drawing therefrom consequences relevant to the delimitation of the continental shelf, to accuse Malta of confusing matters which should be kept separate.[2] But one is tempted to ask, if Libya were truly convinced that the notion of the continental shelf, as set out in Article 76, has no bearing whatsoever on delimitation but only on the seaward extent to which a State is entitled to continental shelf rights, why does Libya take so much trouble to attempt to establish that the distance criterion has – even for entitlement – a subsidiary character and that natural prolongation in the physical sense of the term remains – even for entitlement – the primary and fundamental base?[3] Malta will revert to this point when it examines more fully the true legal basis for entitlement.

52. On the other hand, when it is a matter of natural prolongation in the physical sense of the term and of what Libya calls the "physical factors",[4] a close link is asserted in the Libyan pleadings between entitlement and delimitation: distance is removed to an orbit away from entitlement and the outer limit, while natural prolongation – in the physical sense of the term – is accorded a place both in entitlement and in delimitation:

> "... each Party must as a first step establish the basis of its claim for legal entitlement before turning to the operation of delimitation. The physical factors that constitute the respective natural prolongations of the Parties – and hence their legal entitlement – logically come first in the discussion of relevant circumstances".[5]

> "These physical facts ... relate both to the legal entitlement of the Parties to areas of the continental shelf lying between the Parties and to the delimitation of such areas between them.[6]

53. The link between entitlement and delimitation is especially strong, so Libya maintains, when "there are basic discontinuities in the seabed and subsoil which arrest the natural prolongation – and hence the legal entitlement – of a particular State or States"[7] and when one is thus confronted by two States situate on different continental shelves. In such a situation, so it is said, the physical facts "bear directly

[1] Libyan Counter-Memorial, p. 102, fn. 3.
[2] *Ibid.*, p. 98, para. 4.46.
[3] *Ibid.*, pp. 98–99, paras. 4.47–4.48; cf. Libyan Memorial, p. 89, paras. 6.20–6.21.
[4] Libyan Counter-Memorial, p. 23, para. 2.04.
[5] *Ibid.*, p. 23, para. 2.05.
[6] *Ibid.*, p. 56, para. 2.84.
[7] *Ibid.*, p. 23, para. 2.05.

on the question of which areas do, in fact, lie between the Parties"[1] and "legal entitlement and delimitation go hand in hand".[2] "Such is the case" it is said "in the present delimitation between Libya and Malta",[3] and it is thus the so-called Rift Zone and the line of the escarpments which, according to Libya, mark at the same time the seaward entitlement of each of the two States and the delimitation between them:

> "the same evidence which determines title will demonstrate not only the area of entitlement, but also the limits of the natural prolongation with sufficient precision to provide a basis for delimitation ..."[4]

54. It is difficult to understand why entitlement and delimitation should be totally separated when entitlement rests on a given distance from coasts and may "go hand in hand" when entitlement is dependent upon natural physical prolongation. This mystery still remains unresolved.

2. Entitlement and Delimitation go Hand in Hand

55. The truth is that entitlement and delimitation – even though distinct concepts – always go hand in hand. For this there are two reasons.

(a) *Natural Prolongation and the Distance Criterion*

56. The first is that it is totally inconceivable that the delimitation of the continental shelf between two States should be achieved in the same manner whatever may be the legal basis of title to the continental shelf. Delimitation in accordance with the principles and rules of international law cannot be the same, regardless of whether the legal basis of the title of the coastal State lies in the physical facts, or rests on the principle of distance from the coasts. When the Court stated in 1969 that "delimitation is to be effected ... in such a way as to leave as much as possible to each Party all those parts of the continental shelf that constitute a natural prolongation of its land territory into and under the sea",[5] this was because the Court had previously affirmed that the legal basis of a State's continental shelf rights rested on the "natural prolongation of its land territory into and under the sea".[6] Again, when the Court in 1982 stated that, within the framework of the new conception of the continental shelf, as expressed in Article 76, "it is only the legal basis of the title to continental shelf rights – the mere distance from the coast – which can be taken into account as possibly having

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[1] *Ibid.*, p. 56, para. 2.84.
[2] Libyan Memorial, p. 83, para. 6.09.
[3] Libyan Counter-Memorial, p. 23, para. 2.05.
[4] Libyan Memorial p. 91, para. 6.25.
[5] *I.C.J. Reports*, 1969, p. 53, para. 101.
[6] *Ibid.*, p. 22, para. 18 and p. 31, para. 43.

consequences for the claims of the Parties", it was only because the Court had just observed that distance from the coasts now suffices in certain circumstances to establish the title of the coastal State.[1] Thus, according to the Court, the evolution of entitlement to continental shelf rights had direct and immediate consequences for delimitation. The Court stated the existence of this link in the clearest possible way when it said that the law applicable to the delimitation of the continental shelf "must be derived from the concept of the continental shelf, as understood in international law".[2] If "the concept of the continental shelf, as understood in international law" has evolved from natural physical prolongation towards a given distance from the coasts, then there cannot be the least doubt that the law applicable to delimitation must find a place today for the criterion of distance from the coasts, just as it had previously found a place for the physical facts of natural prolongation.

(b) *The Method of Delimitation Must Be Rooted in the Legal Basis of Title.*

57. There is a second reason why entitlement and delimitation always go hand in hand. In order to conform to the requirements of international law, the delimitation of the continental shelf must lead to an equitable result. On this point both Parties are in agreement. However, this is not the only requirement. Not every method capable of leading to an equitable delimitation is, simply by virtue of this conclusion, legally appropriate. It is also necessary that the method selected should be rooted in the legal basis of title to continental shelf rights -- or in other words that it should be "derived from the concept of the continental shelf, as understood in international law". Thus the Anglo–French Court of Arbitration said that it did not possess "carte blanche to employ any method it chooses in order to effect an equitable delimitation of the continental shelf",[3] and declined to use a method which, even if it might have led to an equitable result, "did not appear to the Court to be one that is compatible with the legal régime of the continental shelf".[4]

3. The Process of Delimitation

58. It is in the perspective of this relationship between entitlement and delimitation that one must view Malta's statement in its Counter-

[1] *I.C.J. Reports*, 1982, p. 48, para. 48.
[2] *Ibid.*, p. 43, para. 36.
[3] *Anglo–French Continental Shelf Arbitration*, Decision of 30 June, 1977, para. 245.
[4] *Ibid.*, para. 246.

Memorial that the process of delimitation involves two steps: first, as a starting point, the taking into consideration of a line dictated by a method "derived from the concept of the continental shelf, as understood in international law" (to use an expression of the Court) and "compatible with the legal régime of the continental shelf" (to use the language of the Anglo–French Court of Arbitration); and second, testing the equity of the result and, if need be, adjusting the line in order to reach an equitable result.[1] Libya, it seems, takes a position similar to that of Malta as regards the function of relevant circumstances in the process of delimitation.[2] As has been noted, Libya accepts the link between entitlement and delimitation so long as the legal basis of title may be seen as resting in natural prolongation, but disputes the existence of any such link as soon as it involves the principle of distance.

59. Malta does not consider it necessary to restate its views on the delimitation process, and respectfully requests the Court to refer on this subject to the relevant passages in its Counter–Memorial.[3] The observations which follow will thus be limited to the two aspects of the delimitation process on which the Parties are the most sharply divided: the legal basis of title to continental shelf rights from which the delimitation method must "be derived" and the place of equidistance in the delimitation of the continental shelf.

[1] Maltese Counter–Memorial, pp. 57–58, paras. 103–117; pp. 74–83, paras. 152–176.
[2] Libyan Counter–Memorial, p. 117, para. 5.48.
[3] Maltese Counter-Memorial, pp. 57–61, paras. 103–117.

CHAPTER V

LEGAL BASIS OF TITLE: THE CONCEPT OF NATURAL PROLONGATION

1. The So-Called "Physical Facts" of Natural Prolongation

60. The Libyan Counter–Memorial repeats the argument already developed in its Memorial: the legal basis of title to continental shelf rights, it explains again, rests in natural prolongation in the physical sense of the term; and, since in this case there are two physically distinct continental shelves, the delimitation must follow the line of the separation of these two shelves.[1]

61. Upon closer examination the Libyan argument now seems to have undergone some change. When Libya spoke in its Memorial of natural prolongation "in its traditional character as a physical concept" it appeared to be referring essentially to the geomorphological and geological aspects of the seabed and its subsoil; and it was in this connection that it emphasized the so-called Rift Zone and the Escarpments–Fault Zone, which it described as major geological and geomorphological features.[2] It is true that this geological and geomorphological view of natural prolongation reappears in the Counter–Memorial, where it is invoked, as it was in the Memorial, in support of the Libyan thesis of a delimitation "within the Rift Zone" and terminating east of the Escarpments–Fault Zone.[3] The Counter–Memorial, however, – and this is the new element – adds to the geological and geomorphological features of the natural prolongation the feature of geography and, more especially, that of the configuration of the coasts. Of course, geographical factors were not entirely absent from the Memorial, but they were presented rather as some amongst a number of other relevant circumstances.[4] In the Counter–Memorial, geography is in fact integrated into the very concept of natural prolongation, which is henceforth to be composed of the three elements of geography, geomorphology and geology, brought together under the generic description of "physical facts".[5] The geological and geomorphological components, on the one hand, and the geographical component, on the

[1] Libyan Counter–Memorial, p. 23, para. 2.05; pp. 49–56, paras. 2.70–2.84.

[2] See e.g., Libyan Memorial, p. 92, para. 6.28, p. 127, para. 8.01; p. 132, paras. 8.13 and 8.14; p. 133, paras. 8.17 and 8.18.

[3] Libyan Counter–Memorial, pp. 42–56, paras. 2.52–2.84.

[4] See e.g., Libyan Memorial, p. 104, para. 6.61; p. 135, para. 9.03.

[5] Libyan Counter Memorial, pp. 23, para. 2.05 and fn. 2.

other, although combined in the idea of the "physical facts" of natural prolongation, perform different functions. The first two support the argument of the "Rift Zone" and of the Escarpments–Fault Zone; the third is used to counter equidistance and support the argument of proportionality.

62. Before examining these two aspects of the Libyan argument more closely, it is to be observed that the different components of the new concept of natural prolongation as advanced by Libya do not necessarily agree with, and indeed may contradict, one another. This was already true of geology and geomorphology. In the *Tunisia/Libya* case, for example, the two Parties both relied on natural prolongation in the scientific sense of the expression, but one referred to geomorphology and the other to geology, and the results which each reached were by no means the same. The same case also showed that, even as a geological concept, natural prolongation might refer to different aspects of geology. There is therefore all the more reason for asserting that there is no necessary or inherent correlation between geographical considerations on the one hand and geological or geomorphological considerations on the other. Suppose for the sake of argument that title depends on natural prolongation, as revealed by geology or geomorphology, and that the delimitation must reflect any major discontinuity in the geology or geomorphology of the seabed. One still cannot see why coastal geography should lead necessarily, and in every case, to an identical delimitation line. Indeed, in actual fact, the contrary is at least equally likely to be the case. One may here recall the observation already made in the Maltese Counter-Memorial that between proportionality and natural prolongation in the geological or geomorphological sense there exists no logical or necessary relationship.[1]

63. However it may be, neither in its traditional geological and geomorphological components nor in its new geographical version does the concept of natural prolongation, as developed by Libya on the basis of an enlarged theory of "physical facts", constitute – in contemporary international law – the entitlement to continental shelf rights. It is in the *legal* concept of natural prolongation, centred on distance from the coasts, that one can now find the legal basis of title to continental shelf rights – and at the same time the point of departure for the process of delimitation – and not in the strange collection of "physical facts" advanced by Libya.

2. Geology and Geomorphology: Their Irrelevance in the Present Case

64. Malta does not consider it useful at this juncture to comment in detail on the geological and geomorphological components of the Libyan theory of natural prolongation. This has already been criticized

[1] Maltese Counter-Memorial, p. 19, para. 39; pp. 103–105, paras. 231–236.

in the Maltese Counter-Memorial on the scientific plane,[1] as well as on the legal plane,[2] and Malta respectfully requests the Court to refer to the appropriate passages. Malta will merely add a few brief comments.

(a) *The Evolution of the Concept of Continental Shelf*

65. Libya continues to see the continental shelf as an essentially geological and geomorphological phenomenon. It disregards the trend away from the geological and geomorphological concept of natural prolongation which has characterized the evolution of the theory of the continental shelf. It develops its argument as if the legal concept of the continental shelf had not changed at all since the stage – which had already been left behind during the work of the International Law Commission – when the continental shelf was still the "species of platform" mentioned in the Court's judgment of 1969 "which has attracted the attention first of geographers and hydrographers and then of jurists".[3] Libya seems to disregard the evolution of the concept over a period of 30 years which has increasingly led to the detachment of the concept of the shelf itself – and, consequently, the delimitation of the shelf – from purely geological and geomorphological considerations. Even in the 1958 Convention, as the Court has observed, there was a "lack of identity between the legal concept of the continental shelf and the physical phenomenon known to geographers by that name".[4] Since then this aspect of the evolution has been emphasized, and "the legal concept, while it derived from the natural phenomenon, pursued its own development".[5] Thus, as the Court has also remarked, the continental shelf

> "... is an institution of international law which, while it remains linked to a physical fact, is not to be identified with the phenomenon designated by the same term ... in other disciplines".[6]

In terms of this "widening of the concept for legal purposes",[7] it is certainly not natural prolongation in the geological and geomorphological sense which constitutes the legal basis of title to continental shelf rights:

> "... at a very early stage in the development of the continental shelf as a concept of law, it acquired a more extensive connotation, so as eventually to embrace any seabed area possessing a particular relationship with the coastline of a neighbouring State, whether or

[1] Maltese Counter-Memorial, pp. 20–32, paras. 41–62.
[2] *Ibid.*, pp. 62–74, paras. 118–151.
[3] *I.C.J. Reports*, 1969, p. 51, para. 95.
[4] *I.C.J. Reports*, 1982, p. 46, para. 42.
[5] *Ibid.*
[6] *Ibid.*, p. 45, para. 41.
[7] *Ibid.*

not such area presented the specific characteristics which a geographer would recognize as those of what he would classify as 'continental shelf'".[1]

(b) *Article 76 (1) of the 1982 Convention*

66. In a desperate effort to negate the effect of the evidence, Libya does not hesitate to give to Article 76(1) of the 1982 Convention – which reflects the outcome of this evolution – an interpretation which deprives it of all sense. The provision, so the Counter-Memorial contends, has no more than a subsidiary character, and the principle remains that of natural prolongation in its physical sense.[2]

67. The truth is quite otherwise. It was in response to the requirements of States with a narrow continental margin, and with a view to maintaining equality between all coastal States, that the Law of the Sea Conference enlarged to 200 miles the continental shelf rights of all coastal States, regardless of the geomorphological and geological configuration of the seabed lying off their coasts. Only those few States whose continental margin stretches further than 200 miles would have been adversely affected by this provision, since the 1958 criterion gave them rights to a depth of 200 metres, even though these might lie further out than 200 miles. That is why it was decided to provide that these States might continue to enjoy continental shelf rights even beyond 200 miles on the basis of physical natural prolongation. But it is not correct to say, as Libya does, that Article 76 contains a "primary basis for the entitlement to continental shelf rights" – physical natural prolongation – and a "subsidiary title to continental shelf rights" – a distance of 200 miles. Article 76 sets out two rules of equal force: up to 200 miles from the coasts, distance is the basis for the legal title of the State; beyond 200 miles, the coastal State has rights based on physical natural prolongation, these rights themselves being limited to a distance not exceeding 350 nautical miles.

68. Again, contrary to what Libya appears to think,[3] the Court has not in any way contemplated that the title of a State based on distance is a "subsidiary title": paragraphs 47 and 48 of the judgment in the *Tunisia/Libya* case say nothing of the kind. What the Court said is that paragraph 1 of Article 76 "consists of two parts, employing different criteria".[4] There is not the slightest trace of any hierarchy between the two. Again what the Court said is that "the distance of 200 nautical miles is in certain circumstances the basis of the title of a coastal State"[5] – "in certain circumstances", that is to say, in all cases save that of a broad-margin State. Again, what the Court said is that "in so far ... as

[1] *I.C.J. Reports*, 1982, p. 45 para. 41.
[2] Libyan Counter-Memorial, p. 99, para. 4.48.
[3] *Ibid.*, p. 98, para. 4.47.
[4] *I.C.J. Reports*, 1982, p. 48, para. 47.
[5] *Ibid.*

the paragraph provides that in certain circumstances the distance from the baseline, measured on the surface of the sea, is the basis for the title of the coastal State, it departs from the principle that natural prolongation is the sole basis of the title".

(c) *Case Law and Physical Features*

69. Since it is not in the geology or the geomorphology of the seabed or its subsoil that one can find the legal basis of title but in the combination of coasts and distance, the geological and geomorphological configurations cannot play any controlling role in the process of delimitation. Just as the entitlement of a coastal State towards the open sea is not affected by geological or geomorphological features, such a trench or a depression lying less than 200 miles from its coasts, so there is no legal reason for attributing to such features any role in delimitation between neighbouring States. That two States may agree between themselves to delimit their continental shelf by reference to the geological or geomorphological configuration of the seabed is no doubt true; no rule of *jus cogens* prohibits it. But examination of State practice shows – as will presently be explained – that States hardly ever do this. To reduce the function of the Court when charged with delimitation in accordance with the law to identifying the "basic discontinuities in the seabed and subsoil which arrest the natural prolongations of the Parties – and hence their legal entitlement",[1] is inconceivable in the present state of international law. It is necessary to recall that in 1977 the Anglo–French Arbitration Tribunal considered that

> "... there does not seem to be any legal ground for discarding the equidistance or any other method of delimiting the boundary in favour simply of such a feature as the Hurd Deep–Hurd Deep Fault Zone".[2]

One should also recall that in 1982 the Court refused to delimit the boundary by a simple identification of an alleged interruption or physical separation of the natural prolongations of the two Parties.[3] On the contrary, the Court said that in certain circumstances – that is to say beyond 200 miles –

[1] Libyan Counter-Memorial, p. 23, para. 2.05.

[2] *Anglo–French Arbitration* Case, para. 108.

[3] See Maltese Counter-Memorial, pp. 67–68, paras. 134–135. Libya once again puts forward in the present case the argument which it advanced in the *Tunisia/Libya* case:

> "... the questions of geology and geography become of decisive importance since, once the natural prolongation of a State is determined, delimitation becomes a simple matter of complying with the dictates of nature" (Pleadings, Vol. I, p. 487, para. 89).

The Court expressly stated that it is "unable to accept [this] contention" (*I.C.J. Reports* 1982, p. 47, para. 44).

> "... it is only the legal basis of the title to continental shelf rights – the mere distance from the coast – which can be taken into account as possibly having consequences for the claims of the Parties".[1]

It is true that Libya objects to this, saying that "the Court did not have recourse to any distance criterion in the delimitation between Tunisia and Libya".[2] This is correct, but Libya does not appear to have noticed the conclusion of the paragraph just quoted:

> "Both Parties rely on the principle of natural prolongation: they have not advanced any argument based on the 'trend' towards the distance principle. The definition in Article 76, paragraph 1, therefore affords no criterion for delimitation *in the present case*".[3]

How, after all that, can Libya say that "there is no so-called 'distance principle' in international law".[4] Any such assertion runs counter to all the evidence.

(d) *Physical Features and State Practice*

70. It is not only the case law that Libya disregards. It also leaves State practice out of consideration, as Malta has shown in its Counter-Memorial.[5] It is sufficient to glance through the *Annex of Delimitation Agreements* produced by Libya to see that, apart from the Timor Trench,[6] geological and geomorphological configurations do not appear to have been treated by States as controlling the delimitation of their continental shelf boundaries. The agreement between France and Spain disregards the Cap Breton Trench.[7] The agreement between the United States and Mexico adopts a simplified equidistance line without reference to the Sigsbee Deep.[8] The agreement between Cuba and Haiti establishes an equidistance line which disregards the Cayman Trench.[9] The India–Thailand delimitation takes no account of the Andaman Basin.[10] The agreements between the Dominican Republic and Colombia and the Dominican Republic and Venezuela take no account of the Aruba Gap. The delimitation between the United States and Venezuela does not give any weight to the Venezuela Basin.[11] The delimitation between France and Venezuela uses a line of longitude which is unconnected with the geomorphology of the region.[12]

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[1] *I.C.J. Reports*, 1982, p. 48, para. 48.
[2] Libyan Counter-Memorial, p. 100, para. 4.51.
[3] Emphasis supplied.
[4] Libyan Counter-Memorial, p. 102, fn. 3.
[5] Maltese Counter-Memorial, pp. 70-74, paras. 144-150.
[6] Libyan Counter-Memorial, Annex of Delimitation Agreements, Annex 24.
[7] *Ibid.*, Annex 34.
[8] *Ibid.*, Annex 23.
[9] *Ibid.*, Annex 52; See also Maltese Memorial, Annex 55.
[10] *Ibid.*, Annex 59; See also Maltese Memorial, Annex 53.
[11] *Ibid.*, Annex 56; See also Maltese Memorial, Annex 52.
[12] *Ibid.*, Annex 67. See for details Annex 4 of this Reply.

71. As against these cases Libya notes that the line established by the agreement between Cuba and Mexico "also coincides generally with the Yucatan Channel, a deep geomorphological depression".[1] Yet a glance at the map is sufficient to show how wrong this interpretation is – the bolder because *the agreement states expressly that it has been drawn up on the basis of equidistance!* Annex 4 to this Reply shows that the agreed line is infact a median line ignoring completely the physical features of the area. As for the North Sea to which Malta has already referred,[2] both the Maltese and the Libyan maps show the extent to which the numerous delimitation agreements in this area are independent of the configuration of the seabed.[3]

3. Coastal Geography

(a) *Coasts and Not Landmass Generate Entitlement*

72. The Libyan Counter-Memorial does not stop at tying entitlement – and thus delimitation – to geology and geomorphology. As has already been pointed out, it adds a new dimension to the concept of prolongation: geography – and it sees in the coasts both "the basis of continental shelf entitlement"[4] and an element of "major importance ... in any delimitation of the continental shelf".[5]

73. Malta, of course, would welcome this acceptance by Libya of "the importance of the coasts", "the major importance of the coasts of the Parties", "the coastal basis of continental shelf entitlement",[6] if, on the one hand, this acceptance is accompanied by a correlative abandonment of the geological and geomorphological approach, and if, on the other, the word "coast" were not given a very special meaning in Libya's vocabulary. The Libyan Counter-Memorial certainly speaks of "coasts" – and it is right to do so. But it sees this word as synonymous either with the "landmass behind the coasts" or with "coastal lengths". For the "geographical configuration of the coastlines" which the Court sought to examine closely,[7] Libya thus substitutes two other concepts: the first is that of the "landmass behind the coasts", which has only a verbal relationship with the idea of coasts; and the second is that of "coastal lengths", which favours only one particular aspect of coastal configuration and which serves entirely to deprive basepoints of their proper role. The Counter-Memorial does not deal in any way with the relationship between coasts and distance.

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[1] *Ibid.*, Annex 47; See also Maltese Memorial, Annex 23.

[2] Maltese Counter-Memorial, p. 73, para. 148.

[3] See Reduced Map No. 1 at page 72 of the Maltese Counter-Memorial and Annex 12 of the Annex of Delimitation Agreements of the Libyan Counter-Memorial. For ease of reference the map is reproduced in this Reply as Map No. 1 at page 40.

[4] Libyan Counter-Memorial, p. 84, para. 4.18.

[5] *Ibid.*, p. 32, para. 2.29.

[6] *Ibid.*, pp. 32, 38 and 83 respectively.

[7] *I.C.J. Reports* 1969, p. 51, para. 96.

74. Before examining Libya's attempt to change the nature of the concept of "coasts", it is necessary to observe that the theme of coastal geography lies on an entirely different plane from that of the "Rift Zone" and of the Escarpments–Fault Zone. It is not a matter, this time, of justifying the quasi-enclavement of Malta within the alleged natural geological and geomorphological prolongations, but of justifying a non-equidistance delimitation based upon a criterion of proportionality. The purpose here is to confront the insignificance of the small island group of Malta with the importance of the immense Libyan continental landmass. By dint of repeating that Malta is small and Libya large, Libya hopes to persuade the Court to draw broad legal consequences from this statement of the obvious: if Malta is so small and Libya so large, is it not inequitable to adopt an equidistance delimitation which will give equal weight to the two countries, and which will divide the continental shelf between them accordingly? Would it not be more equitable to abandon this approach in favour of one based upon proportionality?

75. Malta would not for a moment think of comparing itself with Libya by reference either to the area of its territory or the length of its coasts. Certainly Malta is a small island State while Libya is a huge continental one. But what is the relevance of this on the legal plane? The law does not demand a just and equitable division which would, according to the subjective opinion of the judges about distributive justice, attribute to each State a part of the continental shelf proportional or, on the contrary, in inverse proportion to its size or the length of its coasts, or its economic power. The question to be decided is what are, according to international law, the consequences to be drawn from the reference to size which Libya repeats untiringly from the first to the last page of its Pleadings. In other words, what is the legal impact of the differences in area and coastal length of insular Malta and continental Libya on the delimitation of their respective areas of continental shelf? Malta will answer this in more detail presently.

76. The first Libyan modification that calls for comment concerns the concept of "coasts": "coasts" becomes "the landmass behind the coasts". This assimilation had already appeared in the Libyan Memorial, and Malta has already taken the opportunity of criticizing it in its Counter–Memorial.[1] In the Libyan Counter–Memorial this assimilation is given a quite unexpected prominence and the theme constantly reappears as a leitmotiv.[2] Two quotations will suffice by way of illustration:

> "... the extent of the land territory behind the coast must be regarded as linked to the factor of the natural prolongation ... the land territory behind Libya's extensive coast is immense, whereas

[1] Maltese Counter–Memorial, pp. 50–51, paras. 87–88.

[2] Libyan Counter–Memorial, p. 25, para. 2.10; p. 38, para. 2.42; pp. 40-42, paras. 2.46–2.50; p. 83, para. 4.16; p. 84, paras. 4.18 and 4.19; pp. 85–86, paras. 4.21–4.23; p. 87, para. 4.25; p. 90, para. 4.30.

both the coast and land territory of Malta are very small. Surely, *the intensity of the natural prolongation must be greater – the prolongation, more natural – from the Libyan coast in arriving at a line of delimitation*".[1]

"It is the landmass behind the coast which ... provides the factual basis and legal justification for a State's entitlement to continental shelf rights over maritime areas before its coast ...".[2]

77. The rendering of "coasts" by "the landmass behing the coasts" rests on an evidently false basis. It is not the landmass of the State which confers maritime rights upon it, but the fact that it possesses *coasts*. Maritime rights flow not from the quality of being a State but from that of being a *coastal* State. It is the existence of a coastal façade which generates maritime rights, and not the existence of a territorial mass or *hinterland* behind this façade. A landlocked State of even enormous area acquires no maritime rights simply from the fact that it possesses a large landmass; and conversely a coastal State has the same maritime rights regardless of whether its territory penetrates deeply into the interior of the continent or is merely a narrow strip alongside the sea. The Court said this clearly in 1969:

"... the land dominates the sea: it is consequently necessary to examine closely the geographical configuration of the coastlines of the countries whose continental shelves are to be delimited".[3]

One may thus see that it is not the size of the landmass that the Court feels must be examined closely, but the "geographical configuration of the coastlines". Certainly "the land dominates the sea"; but this is a matter of "land territory", that is to say a political concept, and not of the "landmass" in its physical sense. It was of the "natural prolongation of the land territory" that the Court spoke in 1969,[4] and not of the "natural prolongation of the landmass". The Anglo–French Court of Arbitration confirmed this in a passage which has already been quoted:

"In international law ... the concept of the continental shelf is a juridical concept which connotes the natural prolongation under the sea *not of a* continent or *geographical landmass* but of the land territory of each State".[5]

Libya distorts the law in pretending that the source of continental shelf rights of a State lies in its territorial mass and in presenting natural prolongation as being not that of the territory of the State in the legal and political sense of the term, but that of the land area in the geographical sense of the word. No, it is not "the *landmass* behind the

[1] *Ibid.*, p. 41, para. 2.48. Emphasis supplied.
[2] *Ibid.*, p. 84, para. 4.19.
[3] *I.C.J. Reports* 1969, p. 51, para. 96.
[4] *Ibid.*, p. 22, para. 19.
[5] *Anglo–French Continental Shelf Arbitration*, para. 191. Emphasis supplied.

coastline ... which provides the ... legal justification for a State's entitlement to continental shelf rights ...",[1] but, as the Court has said, "the geographic correlation between *coast* and submerged areas off the coast".[2]

78. Since continental shelf rights are derived *not* from the *landmass* but from the *coasts*, the area of continental shelf rights belonging to a coastal State has nothing to do with the area of its landmass. It is the character of the coasts which determines the extent of the areas of continental shelf belonging to each coastal State and that alone. There is no correlation between the area of the coastal State and the area of its continental shelf, or indeed, more generally, the area of all its maritime jurisdictions. The two matters are quite independent of each other and the ratio between the area of the State and that of its continental shelf or of its economic zone may vary considerably from one situation to another. A small island located in the middle of an ocean may generate areas of maritime jurisdiction which are considerable in comparison with its area. Thus the Island of Nauru, with an area of 21 square kilometres, gives rise to an exclusive economic zone nearly ten thousand times larger than itself.[3]

(b) *Landmass Irrelevant for the Purposes of Delimitation*

79. This observation is true when the State concerned is able to benefit from the whole of its entitlement. It is no less true when the case is one involving a delimitation between neighbouring States: in no case has this delimitation ever involved identifying a correlation between the area of the landmass and that of the continental shelf. It may be recalled in passing that the historical evolution of the territorial sea was not marked by any proposal that its outer limit should depend either on the length of the respective coasts of opposite States or on their relative size. In cases of delimitation between opposite or adjacent coasts, the practice of States does not appear to give weight to the size of the landmass. The Soviet Union, for example, has made delimitation agreements on the basis of equidistance with Finland, Poland and Norway[4] without the gigantic landmass of the Soviet Union having been used to give the latter any advantage. Much the same is true for the United States in relation to its agreements with Mexico and Cuba.[5] A glance at the *Annex of Delimitation Agreements* appended to the Libyan Counter-Memorial serves to show that there are many cases in which the considerable disproportion in the size of the parties to the

[1] Libyan Counter-Memorial, p. 84, para. 4.19.
[2] *I.C.J. Report*, 1982, p. 61, para. 73.
[3] See Lucchini and M. Voelckel, *Les Etats et la Mer*, Paris *La Documentation Française*, 1978, p. 71.
[4] Libyan Counter-Memorial, Annexes Nos. 9, 20 and 4 respectively.
[5] *Ibid.*, Annexes Nos. 23 and 53.

agreement finds no reflection in the settlement.[1] One may also note that the Federal Republic of Germany never invoked the greater size of its land territory in its claims against Denmark and the Netherlands in the *North Sea Continental Shelf* Cases.

80. It may be added too that if one were to attach legal importance, whether in the basis of title or in the delimitation of the continental shelf, to the area of the landmass, one would risk finding on a number of occasions that there is a contradiction with another geographical aspect of the situation to which Libya attaches great importance in its conception of natural prolongation, namely, the length of the coastlines. A State may have a large landmass but a short coastal façade; or, on the contrary, a small landmass which stretches all the way along an extended coastal front. Between these two factors, which Libya suggests are linked[2], there is no logical or necessary relationship. The Libyan argument on this point is quite simply unintelligible.

81. The Libyan argument regarding its landmass is affected by a double error. The first lies in maintaining that it is the landmass which constitutes "the legal justification for a State's entitlement to continental shelf rights"; the second lies in the contention that there exists a necessary correlation – in other words a necessary proportion – between the area of a State's territory and the area of its continental shelf. Libya tries to link the landmass to the coasts by speaking systematically of "the landmass behind the coasts"; but this does not serve to provide a legal foundation for its argument. It is the relationship between the submerged areas and the *coasts* which is the legal basis for the rights of the coastal State and not the relationship between the submerged areas and the territories lying landward of or "behind" the coasts. Libya's case is not improved by linking the area of the landmass to the natural prolongation or by arguing that the greater the landmass the more the natural prolongation is "intense" and "natural". The idea clearly advanced in the Counter-Memorial that Libya's natural prolongation would by reason of the greater size of its land territory be more intense and "more natural"[3] than that of Malta is truly staggering. To borrow a Libyan expression, this is an "unfathomable statement".[4]

82. One last comment may be made regarding Libya's emphasis on

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[1] See for example the following Agreements: Iran–Qatar (Annex 21); Australia–Indonesia (Annex 24); Bahrain–Iran (Annex 25); Argentina–Uruguay (Annex 32); Iran–Oman (Annex 40); India–Indonesia (Annex 41); India–Maldives (Annex 49); Netherlands–Venezuela (Annex 57); and Australia–Papua New Guinea (Annex 60). Almost all these agreements had already been reproduced by Malta in Annexes to its Memorial, but for ease of reference the numbers here given are those of the Libyan Annex of Delimitation Agreements.

[2] See, e.g., Libyan Counter-Memorial, p. 25, para. 2.10; p. 41, para. 2.48; p. 42, para. 2.50; p. 84, para. 4.18.

[3] *Ibid.*, p. 41, para. 2.48.

[4] *Ibid.*, p. 26, fn. 2.

the landmass behind the coasts. The Libyan proposition that minuscule Malta is not entitled to as extended a continental shelf as immense Libya is entirely fallacious. Quite apart from the obvious fact that even an equidistance line would leave to Libya an area of continental shelf very much larger than that of Malta, the question of the relative area of the two States is entirely without legal pertinence.

83. After the unjustified assimilation of "coasts" with "the landmass behind the coasts", there occurs a second assimilation, more subtle but no less misleading, of "coasts" with "coastal lengths". The argument runs that the coasts of Malta are much shorter than those of Libya, and therefore one should replace the equidistance method with one based on or coinciding with a delimitation that is proportional to the coastal lengths of the two States. The question of proportionality will be examined in greater detail later. At this point the Libyan argument will be examined from a different angle.

(c) *Coasts and Distance from Coasts are the Relevant Considerations*

84. It is, of course, true that coasts occupy a central place in identifying entitlement to, and delimitation of, the continental shelf. But this proposition requires clarification in two respects. First, it is necessary to take account of the configuration of the coasts as a whole and not accord a special position to merely one aspect of this configuration. As will be seen the emphasis placed by Libya of the single aspect of the length of the coast and the correlative tendency to minimize the role of basepoints which reflect the configuration of the coast are not acceptable. Second, it is by reference to the sea areas which lie off the coasts that the latter have any importance, so much so that it is in the distance from the coasts that one finds the legal basis of title to the offshore areas and thus the point of departure for delimitation. It is not the length of the coasts by themselves, taken without reference to the element of distance, that matters.

85. This last point appears with particular clarity in the observations of the Court in the *Tunisia/Libya* judgment. The Court said that the continental shelf embraces "any seabed area possessing a particular *relationship with the coastline* ...".[1] "The geographic *correlation between coast and submerged areas* off the coast is the coastal State's legal title".[2] It is thus the spatial relationship between the coast and the offshore areas which is the source of the rights of the coastal State, and not merely coastal length in itself. The Court added:

> "As has been explained in connection with the concept of natural prolongation, the coast of the territory of the State is the decisive factor for title to submarine areas adjacent to it".[3]

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[1] *I.C.J. Reports*, 1982, p. 45, para. 41.
[2] *Ibid.*, p. 61, para. 73. Emphasis supplied.
[3] *Ibid.*

The explanation given "in connection with the concept of natural prolongation" is precisely that – leaving aside broad-margin situations (which are not relevant here) –

> "... the distance from the baseline, measured on the surface of the sea, is the basis for the title of the coastal State... [and] it is only *the legal basis of title to continental shelf rights – the mere distance* from the coast – which can be taken into account as possibly having consequences for the claims of the Parties".[1]

"Therefore", the Court added,

> "the coast of each of the Parties ... constitutes the starting line from which one has to set out in order to ascertain how far the submarine areas appertaining to each of them extend in a seaward direction, as well as in relation to neighbouring States...".[2]

Here is a clear statement that continental shelf rights, whether extending without restraint into the open sea or limited by reference to a neighbouring State, are controlled by the concept of distance from the coasts.

86. Looking at the matter more closely, it will be observed that the distance of which the Court speaks is not measured from the very coast itself but is rather a "distance from the baseline". Article 76(1) of the 1982 Convention provides in the same way that the continental shelf of a coastal State extends "to a distance of 200 nautical miles *from the baselines* from which the breadth of the territorial sea is measured". A comparable form of words appears in relation to the breadth of the exclusive economic zone in Article 57 of the same convention. There is thus a striking identity between the points or lines from which the territorial sea, the continental shelf and the economic zone are all measured. In other words, we have here three areas of maritime rights which are defined by reference to the combination of coasts and distance. The explanation of this similarity is simple: the basepoints and baselines from which the territorial sea is measured – and likewise from which the continental shelf and the economic zone are measured – are not determined arbitrarily. They are used because, and to the extent that, they represent the coasts. The rules governing their determination have been the subject of extended customary and treaty consideration with a view to achieving exactly this representative quality.

(d) *The Equality of the Seaward Projection of Coasts*

87. But the combination of distance and coasts has another important consequence: where a constant distance is used to define the seaward extension of a coastal State, its maritime zone extends in every direction within the prescribed distance. No one direction is legally

[1] *Ibid.*, p. 48, para. 48.
[2] *Ibid.*, p. 61, para. 74.

more significant than any other. The maritime zone of a coastal State within this framework is not to be thought of as a platform in front of its coast, but as a broad belt of sea surrounding its territory in every direction. This equality of seaward projection of the coasts occurs every time that a maritime area is defined in terms of distance. This was the case with the territorial sea which the "cannon-shot rule" led jurists to consider from the 17th century onwards as "a belt of sea adjacent to the land".[1] The same is true for the exclusive economic zone. It was not so for the continental shelf so long as the latter was defined by reference to depth or exploitability. Now, however, that the continental shelf has come to be defined also by reference to distance from the coasts (at least in the most common case and in any event in the Pelagian Sea), the concept of equal radial projection applies also to it. In the case of a continental State the idea of radial projection can be implemented only from the coastal front, but it operates in all directions until it meets, according to the situation, the radial projection starting from the coastal front of another State. In the case of an island, which by definition is " an area of land, surrounded by water" (Article 121 of the 1982 Convention), the radial projection extends in all directions around the island, and the idea of a "belt" – the word used by the Court in relation to the territorial sea[2] – assumes its full meaning. This is why island States with a small area are capable of generating very large areas of maritime jurisdiction.

88. The radial jurisdiction which characterizes entitlement to maritime zones under the principle of the relationship between coasts and sea areas[3] is applied by the method of envelopes of arcs of circles adopted to define the outer limit of these zones.

89. This method was first established, as was natural, for the territorial sea. This was the method described by Whittmore Boggs,[4] by Fritz Münch,[5] and by Gilbert Gidel.[6] It was also the method put forward by the United States delegation to the League of Nations Conference on the Codification of International Law at The Hague in 1930. The Court described it in 1951 in the Judgment in the *Fisheries* case, though stating that "it is not obligatory in Law".[7] The Committee of Experts consulted by the International Law Commission defined this method as consisting in drawing

> "... a line, every point of which is at a distance of T miles (the breadth of the territorial sea) from the nearest point of the baseline.

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[1] O'Connell, *The International Law of the Sea*, Vol. I, Edited by J. A. Shearer, 1982, p. 127.

[2] *I.C.J. Reports*, 1959, p. 128.

[3] See para. 85 above.

[4] Delimitation of the Territorial Sea, *American Journal of International Law*, Vol. 24 (1930), p. 541.

[5] *Die Technichen Fragen des Küstenmeers*, Kiel, 1934.

[6] *Le droit International public de la mer, Vol. III* (1934), p. 503.

[7] *I.C.J. Reports* 1951, p. 129.

> It constitutes a continuous series of intersecting arcs of circle chain with a radius of T miles from all points on the baseline. The limit of the territorial sea is formed by the most seaward arcs".[1]

The International Law Commission recommended its adoption.[2] It became the legally compulsory method with the entry into force of Article 6 of the 1958 Convention on the Territorial Sea and Contiguous Zone, the terms of which reappear in Article 4 of the 1982 Convention on the Law of the Sea:

> "The outer limit of the territorial sea is the line every point of which is at a distance from the nearest point of the baseline equal to the breadth of the territorial sea".

90. Conceived by the technical experts in order to meet practical needs, the method of envelopes of arcs of circles thus became the appropriate legal rule for the territorial sea not later than 1958. However, it is capable of wider application and may be extended to the delimitation of all areas of maritime jurisdiction, entitlement to which rests on the spatial relationship between a maritime area and coasts, especially the exclusive economic zone. The 1982 Convention does not, it is true, contain any provision establishing the outer limit of the exclusive economic zone comparable to the one contained in Article 4 dealing with the limits of the territorial sea, but one may assume that the same technical method is applicable to both.[3] For the same reason this method naturally lends itself to use in drawing the outer limit of the continental shelf, except where the outer limit of a continental margin lies more than 200 nautical miles from the baseline.

91. The link between the method of the envelope of arcs of circles and the radial approach to all areas of maritime jurisdiction is evident. Judge Read shed light on the matter in his dissenting opinion in the *Fisheries* case in 1951:

> "In the earliest days, the cannon on the coast, when traversed, traced arcs by the splash of their shots. Later, the imaginary cannon traced imaginary arcs which intersected and marked out the limit based on cannon shot".[4]

Subsequently, Professor O'Connell stressed that this method

> "... is intrinsic in the cannon-shot theory, the assumption being that the sea is reduced to control within the intersection of the arcs of traverse of coastal guns. The range of the guns... would then provide a notional line of fall of shot which would not be a parallel trace of the coast, but an envelope of arcs of circles".[5]

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[1] *Yearbook of the International Law Commission, 1953*, Vol. II, p. 79.
[2] *Yearbook of the International Law Commission 1956*, Vol. II, p. 268.
[3] cf. Caflish in *Le nouveau droit international de la mer*. Paris, Pedone, 1983, p. 85.
[4] *I.C.J. Reports*, 1951, p. 192.
[5] Op. cit., p. 230.

92. The method of envelope of arcs of circles presents a number of special features which the authors just cited have emphasized.

93. The first is its geometrical and scientifically certain character. As Boggs wrote, "there is one and only one such line which can be drawn in front of any coast".[1]

94. Secondly, since it is the *envelope* of the arcs of circles drawn from all points on the baselines which is alone operative, those arcs of circles which lie landwards of this envelope have no influence on the construction of the outer limit, and the points from which these arcs were drawn are ultimately of no value in the determination of the line. They are in effect lost. This shows that it is not all the points of the base *line* which are in the end determinative, but only certain base *points* – in effect the salient points of the coast.[2] The number of basepoints relevant to the construction of the outer limit will vary according to the configuration of the coast, and each basepoint may vary from the others in the length of outer limit which it controls.

95. The features just mentioned have not, as we have seen, prevented the method of the envelope of arcs of circles from rising from the level of a convenient technical procedure to that of a method required by law. It was unanimously adopted by the International Law Commission in relation to the territorial sea. The 1958 Conference, and then the Third UN Conference on the Law of the Sea, had no difficulty in reaffirming it. Nor has the prospect of its applicability to the exclusive economic zone ever occasioned the least doubt. This consensus is significant. It is evident that neither States nor publicists have viewed the fact that only certain basepoints control the line of envelopes of arcs of circles as in any way weakening the propriety of recourse to the method. Certainly they have not felt that the only line acceptable for the outer limits of the territorial sea is one which must be totally parallel to the baseline and reflecting every part in it. The system of *basepoints* does not appear to have been regarded as jeopardizing the link between the outer limit of the maritime zones and the coastal configuration.

(e) *Entitlement is Measured from Basepoints and in all Directions.*

96. It can thus be seen how greatly in error Libya is when it criticizes Malta because it "substitutes basepoints ... for the coast as the basis of continental shelf entitlement"[3] and for resorting to "multiple use of a single basepoint ... to create the illusion of a long coast when in actuality only a short coast is involved".[4] In this connection the Libyan

[1] Op. cit., p. 545.

[2] Cf. Gidel, op. cit., p. 510; Boggs, Delimitation of Seaward Areas under National Jurisdiction, *American Journal of International Law*, Vol. 45 (1951), p. 240, at p. 250.

[3] Libyan Counter-Memorial, p. 84, para. 4.18.

[4] *Ibid.*, p. 159, para. 7.23.

Counter-Memorial says:

> "Legal entitlement arises not from 'basepoints' but from the natural prolongation of the land territory of the State and its *coastal extent into and under the sea*".[1]
>
> "Natural prolongation starts from the coasts of the Parties and not from baselines or basepoints".[2]

Libya forgets that the outer limit is always drawn from certain basepoints and not from all the points on the coast or on the baseline. The choice of these basepoints is in no way arbitrary. It is imposed by geography and every geographer would reach the same result in relation to any given coast. These basepoints are in truth representative of the coast, and the Libyan argument, which attempts to place "basepoints" in opposition to "coasts" as a source of legal entitlement to continental shelf rights, simply does not make sense.

97. The Libyan approach to the question of "coasts" may thus be seen as resting upon a complete misunderstanding of the basis of legal entitlement. Whatever their length, Malta's coasts generate equally a seaward extension in all directions, as much towards the east as any other direction, and these projections are to be determined according to the method of the envelopes of arcs of circles based on control points located on straight baselines. The number of these points matters little.[3] Nor does it matter much whether these points are used only once or more than once for a larger or smaller part of the envelope. Everything is determined by geography and law. There is nothing abnormal in a short coast generating an extensive maritime zone. That is the conjoint effect of the radial projection and of the method of envelopes of arcs of circles. This is what explains, it is necessary to repeat, why an island State can attract considerable maritime areas, even though it possesses only a modest length of coastline.

(f) *Malta's entitlement is delimited only by the equal entitlement of neighbouring States.*

98. The error committed by Libya on the plane of entitlement also has repercussions on the plane of delimitation. Malta's entitlement cannot open out freely in the limited space in which it is situate. Its continental shelf cannot extend to 200 miles from the baselines. The same is true for Libya. In 1969 the Court said that "delimitation is to be effected ... in such a way as to leave as much as possible to each Party all those parts of the continental shelf that constitute a natural pro-

[1] *Ibid.*, p. 37, para. 2.39.
[2] *Ibid.*, p. 42, para. 2.49.
[3] Libya has itself recognized this consideration in its comment on the delimitation between Norway and Denmark in respect of the Faroes: "... indeed the delimitation line in this instance is in all likelihood governed by a single point on the Norwegian coast." (Libyan Counter-Memorial p. 125, para. 5.66).

longation of its land territory into and under the sea, without encroachment on the natural prolongation of the land territory of the other".[1] This means, in today's legal context, that delimitation must leave to Malta as much as possible of its entitlement to a continental shelf of 200 miles from its baselines without encroachment on a similar right of equal validity possessed by Libya. The extent of Malta's continental shelf vis-à-vis Libya is thus determined by the conjunction of two considerations: first, the necessity to restrain the maritime extension to which it would be entitled if it were not situated in what Libya calls a "constricted setting" or a "confined area"[2]; second, the necessity to treat Malta on a footing of equality with Libya, in the sense that since the entitlement of each has the same validity as that of the other, the sacrifice which each must accept by reason of the geographical context must be the same as that of the other.

99. It is not because the coasts of Malta are shorter than those of Libya that the seaward extension from Maltese basepoints should be more restricted than the seaward extension from Libyan basepoints. It is not because Malta's coasts are shorter than those of Libya that the seaward extension from Maltese basepoints should stretch only in a frontal direction towards the Libyan coast between Ras Ajdir and Ras Zarrouq. This direction is no more suitable or appropriate than any other. The maritime extension of Malta from its basepoints stretches as much in a southwesterly and westerly and in a southeasterly and easterly direction, as in a southerly direction, until it meets an extension of equal validity from, as the case may be, Libyan, Tunisian or Italian basepoints. Libya's claim to terminate Malta's extension at a longitude of approximately 16° has no more justification from the point of view of seaward extensions from coasts generally than it has from that of the interruption of a geological and geomorphological natural prolongation. Nor can the fact that Malta's coasts are shorter than those of Libya justify the claim that the maritime boundary between the two countries should pass within some 15 nautical miles of Malta's coasts and more than 160 miles from those of Libya. Such a delimitation would be a strange way of respecting coastal geography.

[1] *I.C.J. Reports*, 1969, p. 53, para. 101.
[2] Libyan Counter-Memorial p. 28, para. 2.17 and p. 41, para. 2.47.

CHAPTER VI

THE EQUIDISTANCE METHOD

1. Imaginary Libyan Argument

100. The Libyan Counter-Memorial criticizes Malta for arguing that "the equidistance method is obligatory in the present case"; for its "attempt to confer on equidistance a compelling, mandatory character"; for maintaining that "between States with opposite coasts, the law requires a median line"; for adopting afresh the contention – rejected by the Court – of The Netherlands and Denmark; and for seeking to "reassert equidistance as a rule and to treat equidistance as synonymous with an equitable result".[1] Following this criticism, the Libyan Counter-Memorial makes a major effort to establish that "neither equidistance nor any other method has an obligatory character in continental shelf delimitation" and devotes a whole chapter to this attempt.[2]

101. Once again, Libya is here tilting at an imaginary Maltese argument. Malta has never argued that equidistance has a legally obligatory character, either in relation to opposite or adjacent States. Malta has not reasserted the fundamental and inherent character of this method. Malta has not denied that in certain situations the equidistance method might lead to an unreasonable and inequitable result, or that it is then necessary to have recourse to variants of the method, or even to an alternative method. What Malta has argued is that the legal basis of title to continental shelf rights requires that, as a starting point of the delimitation process, consideration must be given to a line based on equidistance, since the equidistance method reflects the coastal configuration and accords due spatial weight to the combination of coasts and distance. But it is only to the extent that this primary delimitation, resting on the legal basis of title, produces an equitable result by a balancing up of the relevant circumstances of the case that the boundary coincides with the equidistance line.[3]

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[1] Libyan Counter-Memorial, p. 102, para. 5.01; p. 103, para. 5.05; p. 104, para. 5.09; p. 107, para. 5.18; p. 112, para. 5.33.

[2] *Ibid.*, pp. 102–135, paras. 5.01–5.97.

[3] See in particular Maltese Counter-Memorial, pp. 77–78, paras. 163–164; pp. 81–82, para. 172.

2. The so-called "Trends Away From Equidistance".

102. The Libyan Counter-Memorial does not stop at a lengthy restatement that the equidistance method does not have a legally binding character – all this being no more than a statement of the obvious, which Malta does not dispute; it goes further and argues that international law is daily moving further away from equidistance. It repeats such phrases as "the trends away from equidistance",[1] and "the decline in the reliance on equidistance".[2]

103. In attempting to support this argument, Libya turns first to the case law.[3] But what are the facts? Although it is true that the Court in the *Anglo–French Continental Shelf* case observed that *in certain cases* the equidistance method could lead to an inequitable result, it is no less true that the Court also observed that *in certain cases* this method leads to an equitable result. Both this Court and the Court of Arbitration have pointed out the advantages of the equidistance method. The 1977 Decision stated several times that in more than one sector the United Kingdom and France were in agreement that the median line method was appropriate, and went on in some instances to express its agreement with the views of the two Governments.[4] Moreover, the line established by the Decision was one based on equidistance, as much in the Channel as in the Atlantic region. As for this Court, it also had recourse to a variant of equidistance in the outer segment of the line between Tunisia and Libya. Malta would hardly have thought it necessary to recall these episodes had not the Libyan Counter-Memorial appeared to be denying their existence.

104. In support of its argument that the equidistance method is in decline, Libya has referred, secondly, to State practice – and this as much in a general way as in a manner specifically related to island States.[5] The treatment of State practice in the Libyan Counter-Memorial is highly distorted – to such an extent that the present Reply will deal with this aspect of the matter specifically in a separate part[6] and in an Annex.[7] It will there be shown that State practice confirms the importance which Malta attaches to equidistance.

105. Thirdly, the Libyan-Counter Memorial suggests that support may be found for the alleged decline of equidistance in the proceedings of the Third United Nations Conference on the Law of the Sea.[8] This support, so Libya suggests, may be found in the fact that in Article 83

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[1] Libyan Counter-Memorial, p. 101, para. 4.52; p. 102, para. 5.02.
[2] *Ibid.*, p. 108, para. 5.19; cf. p. 110, para. 5.27 and p. 112, para. 5.33.
[3] *Ibid.*, pp. 102–104, paras. 5.03–5.09.
[4] See e.g. paras. 15, 27, 87, 103, 111, 120 and 146 of the Decision.
[5] Libyan Counter-Memorial, pp. 104–110, paras. 5.10 – 5.28; pp. 117–135, paras. 5.49–5.97.
[6] Part VI.
[7] Annex 4.
[8] Libyan Counter-Memorial, pp. 111–112, paras. 5.29–5.33.

of the 1982 Convention "the reference to the equidistance or median line disappeared entirely".[1] In his dissenting opinion in the *Tunisia/Libya* case,[2] Judge Oda has set out in detail the relevant developments on this matter. Two points appear clearly from his analysis. First, the equidistance method is the only one to have been considered worthy of mention in the successive negotiating texts. Secondly, while it is true that mention of this method does not appear in the final text, one must not forget that this compromise text, adopted *in extremis* on the last day of the Tenth Session, no more refers to "equitable principles" than it does to equidistance. Thus, as Judge Oda has emphasized, it gave satisfaction to the two "schools of thought" which had opposed each other for years throughout the Conference – a satisfaction "essentially of a negative kind, i.e. pleasure that the opposing school has not been expressly vindicated".[3] If the Libyan contention, according to which the silence of Article 83 on the question of equidistance evidences the "decline" of this method were correct, one might equally assert that the silence of the same article on "equitable principles" should be interpreted as evidencing the "decline" of this notion also. In truth, neither the one nor the other of these conclusions can properly be drawn from the compromise text that constitutes Article 83 in its final form.

106. In short, the thesis of the "decline" of equidistance and of the "trends away from equidistance" rests on nothing more substantial than Libya's wishful thinking.

3. Equidistance and Equity

107. Not satisfied with developing its contention regarding the decline of equidistance as a method of drawing continental shelf boundaries, Libya has developed a number of criticisms of this method, so far-reaching that they amount in effect to an assertion that equidistance can *never* lead to an equitable solution, indeed that its very nature precludes such a possibility. Libya thus falls into the grave mistake, already pointed out by Malta, of jumping from the fact that equidistance is *sometimes* inequitable – which is true – to the conclusion that it is necessarily *always* so – which is not true.[4]

108. Thus, according to Libya:

> "... the equidistance method by its very nature fails to take account of the physical factors and other relevant circumstances, and even ignores geographical factors such as coastal lengths". [5]

Equidistance, so Libya states,

> "cannot take account of other relevant factors such as geormo-

[1] *Ibid.*, p. 112, para. 5.32.
[2] *I.C.J. Reports*, 1982, pp. 234–247.
[3] *Ibid.*, p. 246.
[4] Cf. Maltese-Counter Memorial, p. 78, para. 164.
[5] Libyan-Counter Memorial, p. 23, para. 2.04; pp. 151–152, paras. 7.04–7.05.

> phology, geology, physical appurtenance of shelf to landmass, conduct of the Parties, effect of delimitations with third States or the element of proportionality".[1]

If this criticism were justified, equidistance could *never* be used, and it would be impossible to understand either why Governments have several times – indeed even often – used it in their boundary agreements (as the Court has itself noted in its 1982 judgment),[2] or why the cases have accorded it a place alongside other methods.

109. According to the Libyan Counter-Memorial, the equidistance method does not even have the merit of reflecting coastal geography.[3] In this assertion Libya really goes too far. If there is one advantage of the equidistance method which no one has hitherto contested, it is that it reflects the coastal configuration. As the Court has itself declared:

> "... it is the virtue – though it may also be the weakness – of the equidistance method to take full account of almost all variations in the relevant coastlines".[4]

There is no doubt that an equidistance line is controlled only by a number of basepoints. There is no doubt also that one or more basepoints may control the equidistance line over a significant part of its extension. But the equidistance method shares these characteristics with that of the envelope of arcs of circles. These features have not prevented the latter method from having been successfully used in practice before it was adopted as the rule for determining the outer limits of the territorial sea. It is difficult to understand how they are of such a nature as to render a delimitation based on equidistance *necessarily* inequitable.

110. In this perspective the criticism made by Libya of equidistance – that it does not take account of the respective lengths of the coasts and that it is in consequence necessarily inappropriate when the relevant coasts are not of comparable length[5] – appears to be beside the point. Delimitation must reflect coastal *geography*, and not, contrary to the Libyan view of the concept, the *lengths* of the coasts. But delimitation must also reflect the relationship between the maritime areas and the coasts as well as the geographical relationship between the coasts themselves. The use of basepoints to determine a line is justified precisely because it respects this double relationship. Depending on the coastal configuration, the line will be determined by a larger or smaller number of basepoints, variously spaced, and which may vary in number and spacing from one coast to another. The length, as such, of any particular coast has nothing to do with this question, since each

[1] *Ibid.*, p. 152, para. 7.04.
[2] *I.C.J. Reports*, 1982, p. 79, para. 109. See also Annex.
[3] Libyan Counter-Memorial, p. 152, para. 7.04.
[4] *I.C.J. Reports*, 1982, p. 88, para. 126.
[5] Libyan Counter-Memorial, pp. 160–161, paras. 7.24–7.27.

basepoint on each coast is a source of "radiation" in all directions.[1] The fact that equidistance has been used by States without reference to the length of coastlines[2] by itself serves to contradict the Libyan contention that equidistance necessarily produces an inequitable result in situations where the coasts of the Parties are of significantly different lengths. The weakness of the Libyan position is readily verifiable by looking at Libya's own Annex of Delimitation Agreements.

111. As will presently be developed more fully in Part IV, the difference in the length of the relevant coastlines and the equitableness of an equidistance line in a given situation are matters which lie on different planes. It is possible that in one or another given situation an equidistance line may be inequitable – but this would be for reasons other than the difference in the length of the coastlines. Conversely, the difference in the length of the coastlines is not a feature which of itself excludes equidistance when this is justified by the coastal configuration[3] and is equitable on the basis of other relevant circumstances and by reference to the test of proportionality. It is one thing to say that the comparative length of coasts may in certain situations constitute a supplementary factor supporting an equidistant solution; it is another to maintain that the presence of coasts of different lengths necessarily renders an equidistance solution inequitable. No rule of law exists to invalidate an equidistance delimitation, which is justified for other reasons, by reference to the sole consideration that the two coasts involved are not of comparable length. In short, equality of coastal lengths is not a necessary legal condition for recourse to equidistance.

112. It is not necessary to dwell longer on the Libyan argument of the necessarily inequitable character of the use of equidistance, for the problem here is an entirely different one. It is that of determining whether the equidistance method, the use of which is required as a first step by virtue of the legal basis of title to continental shelf rights, leads in the present case – having regard to all the relevant circumstances – to a reasonable and equitable result. The use of equidistance in the present case does not lead to "results that appear on the face of them to be extraordinary, unnatural or unreasonable", to adopt the words of the Court in 1969.[4] In particular, the distorting effect which may in

[1] In its Memorial in the *Tunisia/Libya* case, Libya wrote, very properly, that "it is the geographical features of the coastline of a State which provide basepoints employed in delimiting the outer limits of the territorial sea and ... of the continental shelf as well" (Pleadings, Vol. I, p. 38, para. 92). This observation is equally valid for delimitations between opposite and adjacent States.

[2] See *Annex 4 of this Reply*.

[3] In the Memorial in the *Libya/Tunisia* case, Libya stated: "... the geographical configuration of a coast – whether concave or convex, whether primarily regular or highly irregular, containing gulfs, promontories or offshore islands or islets – may determine decisively whether, in particular circumstances, the equidistance method is equitable" (*ibid.*, para. 94). The Libyan statement of the relationship between coastal geography and equidistance was there stated more precisely than it is to-day; it was not tied to the *length of the coastline*.

[4] *I.C.J. Reports*, 1969, p. 23, para. 24.

certain circumstances be produced by a minor geographical feature on a lateral equidistance line, and which increases as the line moves towards the open sea, does not arise in the present case. The coasts of Malta and of Libya are obviously opposite each other, and not the slightest element of adjacency exists. We are not in the present case confronted by a minor coastal feature which "makes the equidistance line swing out laterally across [one State's] coastal front, cutting it off from areas situated directly before that front.[1] Indeed, quite the reverse; it is the Libyan line which manifestly produces such an effect by seeking to move the boundary so close towards Malta as to cut it off from areas which can properly be regarded as lying directly in front of its coasts.

[1] *Ibid.*, pp. 31–32, para. 44.

PART III

REBUTTAL OF LIBYAN ARGUMENTS TENDING TO DISTORT THE GEOGRAPHICAL AND LEGAL FRAMEWORK OF THE PRESENT CASE

CHAPTER VII

RECOGNITION AND APPRECIATION OF GEOGRAPHICAL FACTORS

1. The Allegation of Malta's Neglect of Geographical Factors

113. It is a constant theme of the Libyan Counter-Memorial[1] that Malta's Memorial shows a "neglect" of geographical factors. However, when the particulars of the Libyan complaint of "neglect" are set forth it becomes immediately apparent that it is the interpretation and legal appreciation of the geographical factors which is the real source of contention. Thus the Libyan pleading in practice spends many pages examining Malta's arguments relating to geographical factors; but much of the substance of the Libyan Memorial is devoted to an attack upon the legal appreciation of the geography, geomorphology and geology of the case presented in Malta's Counter-Memorial.

114. The difference between the two Parties concerns the *nature and appreciation* of geographical facts and factors for purposes of continental shelf delimitation within a legal framework. Take for example, the concept of "coast". In the Libyan conception of proportionality, the only means by which Libyan coasts can be given legal significance and appropriate credit is to allow a delimitation which would give Libya a virtual monopoly of the seabed of the Pelagian Block and would deny Malta any appreciable seaward reach of jurisdiction. In accordance with this methodology Malta's coasts are given little or no weight for legal purposes. In Malta's view the argument relying upon proportionality (based upon the ratio of the lengths of coasts) is not a standard, objective, and obvious "geographical fact" or "factor". In the history of the law of the sea, and during the long evolution of the territorial sea as a concept, it was not once suggested that long coasts could produce proportionately broad belts of territorial sea as against opposite "short coast" States.

115. There is no warrant for assuming that for purposes of delimitation "geographical facts" involve only matters of detail and the measurement of incontrovertible data.

[1] Libyan Counter-Memorial, pp. 22–42; 112–117 and 151–164.

2. The Geographical Framework of this Case: The Appropriate Legal Perspective

116. In the Maltese Counter-Memorial it was stated that the geographical framework of the delimitation to be effected is uncomplicated by the presence of Maltese islands near Libya or the existence of peninsulas.[1] The position was summed up in the following passages:

> "Two coastal States thus face one another in a very simple setting, in the absence of narrow seas or other special *circumstances*".[2]

> "There is in legal terms a complete absence of abnormal geographical features in the present case. There is nothing unusual in the existence of an island State; and the Mediterranean and Caribbean Seas and the Indian and Pacific Oceans encompass a good number of island States. Nor is there anything unusual about the Libyan coastline, which is obviously free from abnormalities. Moreover, the *relationship* of the Maltese and Libyan coastlines is quite unremarkable. As a matter of principle, only unusual features, which involve serious departures from the primary elements in the geographical framework, can be subjected to the process of abatement on equitable grounds. To resort to adjustments where nothing in the geographical situation justifies it would be to refashion geography and would involve a crude process of apportionment".[3]

117. These straightforward descriptions appear to have prompted Libya to respond by a series of repetitious counter-assertions.[4] Malta is content to reaffirm the characterisations quoted in the previous paragraph and to make certain observations on matters of principle.

118. Libya asserts that "the difference in size – and in particular in the lengths of relevant coastlines – is ... a key relevant circumstance in the present case".[5] This proposition is, of course, not a reference to geographical facts but a statement of a legal conclusion. Malta does not deny the difference in size and therefore the complaint of the Libyan Counter-Memorial is that Malta's views *of the law* differ from its own. In so far as States do differ in size, in terms of lengths of coasts or otherwise, such variations are not regarded as abnormal but rather the reverse. The juxtaposition of island States and mainland States, or large States and small States, is a familiar and normal aspect of geography and of international relations, and in this respect the relation of Malta and Libya is in no way exceptional.

119. The thinness of the reasoning in the Libyan Counter-Memorial

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[1] Maltese Memorial, p. 36, para. 114.
[2] *Ibid.*
[3] *Ibid.*, p. 128, para. 263.
[4] Libyan Counter-Memorial, pp. 22–42.
[5] Libyan Counter-Memorial, p. 25, para. 2.10.

is emphasised by the appearance of the assertion that "normality does not exist in geographical settings".[1] This is no more than a reference to the obvious fact that all situations are to some degree individual. But variations and different permutations will still encompass certain elements which are recognized as regularities, as normal combinations of circumstances. The existence of an island State opposite a long coast or mainland State is a normal situation, and there are examples in many regions of the world.[2] There is, however, a more substantial point to be considered. The question of geographical normality is not to be weighed in the abstract. The real question is: what is normal, or unusual, for purposes of the law relating to continental shelf delimitation? The jurisprudence available suggests that in the case of opposite States the presence of promontories or intervening islands constitutes a complication of the kind which calls for some modest adjustment of the delimitation which would otherwise be based upon equidistance. In the same way, the practice of States, which is reviewed elsewhere,[3] gives a strong indication that relative size, and differences in coastal lengths, do not constitute relevant factors for purposes of continental shelf delimitation. Such considerations are generally ignored in the practice of States.

3. The Continuing Significance of the Distinction Between Opposite and Adjacent States.

120. In its Memorial[4] Malta stated that "the principle that where the coasts of two States are opposite to one another the median line will normally bring about an equitable result has been explicitly recognised in all three delimitation cases so far decided by international tribunals". Moreover, this view was confirmed by a substantial body of the practice of States in situations which are legally comparable with the coastal relationships of Malta and Libya.[5]

121. In the same connection Malta pointed out that the factor of proportionality as expressed in terms of coastal ratios is inapplicable in the case of opposite States as a matter of principle,[6] and the opinion of Professor Bowett was invoked in the following passage:

> "The relevance of the proportionality factor is more difficult to assess. Clearly, it is entirely subservient to the primary criterion of

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[1] *Ibid.*, p. 27, para. 2.13. See also para. 2.14: "The word normal has no place in any geographical-geomorphological setting".

[2] Maltese Memorial, pp. 61–96. See also Maltese Counter-Memorial pp. 111–123, 145–146.

[3] Part VI of this Reply; see also para. 79 above and Annex 4.

[4] Pp. 59–60, paras. 181–183.

[5] Maltese Memorial, pp. 61–96. See also Maltese Counter-Memorial pp. 111–123; 145–146.

[6] Maltese Memorial, p. 125, para. 258.

'natural prolongation', so there can be no justification for ignoring the geological evidence and simply dividing the shelf according to coastal ratios. Nor, indeed, are such ratios to be calculated on actual coastal length, for the Court envisaged a 'coastal front', a line of general direction to the coast rather than a line following its sinuousities (so that islands may count for this purpose, as part of such a 'front'). Indeed, it would seem that the proportionality factor might only be applied, or be meaningful, in the case of adjacent States (not 'opposite') where the existence of a markedly concave or convex coastline will produce a cut-off effect if the equidistance principle is applied: that is to say, will allocate to one State shelf areas which in fact lie in front of, and are a prolongation of, the land territory of another".[1]

122. In its Counter-Memorial[2] the Libyan Government adopts a number of arguments with the object of contradicting the contention just described. The Libyan position can be summarised as follows:-

(a) In the first place, a number of propositions are rehearsed as though the Maltese Memorial had attacked them and rehabilitation was called for.

(b) There is a false assumption that, because there is no sharp legal dichotomy between the "opposite" and "adjacent" situations (a "practical" but not a "legal" difference), the difference has *no* legal consequences.

(c) The reader is not expected to notice that the "opposite" or "adjacent" issue, however it was formulated, occupied the substantial attention of the Courts concerned in all three of the relevant cases decided by international tribunals.

(d) The effect of the reasoning of the Court of Arbitration in the *Anglo-French Arbitration* is misreported.

(e) It is assumed that if the distinction between "opposite" and "adjacent" States is reduced in significance, this will adversely affect the equidistance method as a means of achieving an equitable solution.

These matters will now be examined one by one.

(a) *Attacks upon a non-existent Maltese Thesis*

123. In a series of paragraphs[3] the Libyan Counter-Memorial explains that the "legal principle" is the same both in the case of "opposite" and "adjacent" coasts[4]; that "in terms of geometry the exercise [is] the same";[5] that "there [is] a practical difference but no

[1] *The Regime of Islands in International Law* (1978), p. 164.
[2] Pp. 102, 112–117.
[3] Libyan Counter-Memorial, pp. 112–117, paras. 5.34–5.48.
[4] *Ibid.*, para. 5.34.
[5] *Ibid.*

legal difference";[1] and that "there is no sharp dichotomy between opposite and adjacent coasts".[2] These assertions form part of an attack on a "Maltese thesis" which does not exist. It can be agreed that in a certain sense, and particularly in a geometrical sense, the "legal principle" is the same in both cases and the difference is "practical"; but this is really changing categories without changing the substance of the matter. The statement that in fact certain situations are hybrid, and that there is no "sharp dichotomy" between "opposite" and "adjacent" coasts, is not a statement that there is *no* difference.

(b) *The Consequence of the Dichotomy Between "Opposite" and "Adjacent" Situations*

124. In the context of delimitation in accordance with equitable principles, the difference in geographical circumstances is crucial and this remains so whether a particular variation is described as "legal" or "practical". The Libyan argument becomes a caricature of itself in the concluding paragraph.[3] There it is stated that "there has never been any legal difference between opposite or adjacent coasts ... except in the purely practical sense that Courts acknowledged the increased risk of distortion with a lateral line and therefore accepted the need to offset any such distortion by a careful balancing of all the equitable considerations". Here, "the purely practical sense" involves *legal* consequences – the offsetting "of any such distortion" in the case of a "lateral line". The logic of the Libyan whole pleading collapses utterly at this point, since there can be no question of "distortion" unless there is a concept of a primary boundary indicated by the major aspects of the coastal geography. In the case of a median line between "opposite" coasts there is no cause of distortion, apart from the incidence of "islets, rocks and minor coastal projections".[4] The reference to "a lateral line" in the quotation above assumes both a primary boundary which reflects coastal geography and a critical difference between "opposite" and "adjacent" coasts.

(c) *The Rôle of the Distinction Between "Opposite" and "Adjacent" States in Cases Decided by International Tribunals.*

125. The insistence of the Libyan Counter-Memorial on "the progressive disappearance of *any distinction*[5] between 'opposite' and 'adjacent' States[6]" involves a bold dismissal of the undeniable: in the three cases decided so far by international tribunals, the Courts involved

[1] *Ibid.*, paras. 5.39, 5.41.
[2] *Ibid.*, para. 5.44.
[3] Libyan Counter-Memorial, p. 117, para. 5.48.
[4] *North Sea Continental Shelf* cases, *I.C.J. Reports*, 1969, p. 36, para. 57.
[5] Emphasis supplied.
[6] Libyan Counter-Memorial, pp. 102, para. 5.02, 112 (heading).

were much concerned with the identification of geographical situations in terms of "opposite" or "adjacent" States. The significance of the distinction as a matter of principle was given clear recognition in the following passage in the Judgment of the Court in the *Tunisia-Libya Continental Shelf* case:–

> "While, as the Court has already explained (paragraphs 109–110), there is no mandatory rule of customary international law requiring delimitation to be on an equidistance basis, it should be recognised that it is the virtue – though it may also be the weakness – of the equidistance method to take full account of almost all variations in the relevant coast-lines. Furthermore, the Court in its 1969 Judgment recognised that there was much less difficulty entailed in a general application of the equidistance method in the case of coasts opposite to one another, when the equidistance line becomes a median line, than in the case of adjacent States (*I.C.J. Reports, 1969*, pp. 36–37, para. 57). *The major change in direction undergone by the coast of Tunisia seems to the Court to go some way, though not the whole way, towards transforming the relationship of Libya and Tunisia from that of adjacent States to that of opposite States, and thus to produce a situation in which the position of an equidistance line becomes a factor to be given more weight in the balancing of equitable considerations than would otherwise be the case.*"[1]

So much for the so-called "progressive disappearance" of the distinction between "opposite" and "adjacent" States.

(d) *The Reasoning of the Court in the Anglo-French Continental Shelf Arbitration.*

126. In its treatment of the views expressed by the Court of Arbitration in the *Anglo-French Continental Shelf Arbitration*, the Libyan Counter-Memorial[2] fails to convey the nature of the exercise. The Court of Arbitration was applying the provisions of Article 6 of the Continental Shelf Convention to the Atlantic region. In so doing it was concerned to make two points:-

(a) "Whether the Atlantic region is considered, legally, to be a case of 'opposite' States governed by paragraph 1 or a case of 'adjacent' States governed by paragraph 2 of Article 6, appreciation of the effects of any special geographical features on the equidistance line has to take account of these two geographical facts: the lateral relation of the two coasts and the great distance which the continental shelf extends seawards from those coasts".[3]

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[1] *I.C.J. Reports*, 1982, p. 88, para. 126. See further the Judgment at p. 61, para. 74. Emphasis supplied.

[2] Pp. 114–116, paras. 5.41–5.43.

[3] *Decision* of 30 June 1977, para. 241; and see also para. 242 *in fine*.

(b) "In so far as the point may be thought to have importance, the Court is inclined to the opinion that the Atlantic region falls within the terms of paragraph 1 rather than paragraph 2 of Article 6. As the United Kingdom emphasises, there are a number of precedents in which equidistance boundaries between 'opposite' States are prolonged seawards beyond the point where their coasts are geographically 'opposite' each other; and the assumption seems to be that these are prolongations of median lines".[1]

127. The Libyan Counter-Memorial contends that the Court of Arbitration is *eliminating* the distinction between "opposite" or "adjacent" coasts. This is evidently not so. The Court is indicating that the dichotomy presented in Article 6 of the Convention is subject to account being taken of the particular geographical facts of the Atlantic region. Moreover, this reference to the geographical facts is necessary as a part of the "appreciation of the effects of any special geographical features on the equidistance line".[2]

(c) *The Relation Between the Equidistance Method and the Distinction Between "Opposite" and "Adjacent" States.*

128. A remarkable feature of the reasoning offered by Libya (in developing the thesis that the distinction between "opposite" or "adjacent" States has "disappeared") is the assumption that, if certain geographical situations are not characterised in terms of "opposite" coasts, or are seen to be hybrid in nature, such possibilities exist at the expense of the rôle and significance of the equidistance method. This assumption is completely without foundation. Thus, for example, the Court of Arbitration in the *Anglo-French Arbitration* clearly did not consider that, if the situation in the Atlantic region were to be classified as one of "adjacent" States (under paragraph 1 of Article 6 of the Continental Shelf Convention), this would involve setting aside a solution based upon equidistance.[3] In fact, the Court proceeded to apply the equidistance method, taking account of the presence of the Scilly Islands.[4]

[1] *Ibid.*, para. 242.

[2] *Ibid.*, para. 241. Also with reference to the Atlantic region the Court had this to say: "Whereas in the case of 'opposite' States a median line will normally effect a broadly equitable delimitation, a lateral equidistance line extending outwards from the coasts of adjacent States for long distances may not infrequently result in an inequitable delimitation by reason of the distorting effect of individual geographical features. In short, it is the combined effect of the side-by-side relationship of the two States and the prolongation of the lateral boundary for great distances to seawards which may be productive of inequity and is the essence of the distinction between 'adjacent' and 'opposite' coasts situations".

[3] *Ibid.*, para. 242.

[4] *Ibid.*, paras. 243-252.

The result was a modification of the equidistance method but the *modus operandi* remained that of equidistance.[1]

129. Both the jurisprudence available and the essential nature of the process of delimitation in accordance with equitable principles confirm the continuing significance of the distinction between opposite and adjacent States. The Libyan views on this question lack any foundation and have a tactical purpose which has no relation to doctrinal discussion. The object of the Libyan thesis attacking the distinction would appear to be to distract attention from the relationship of the real coasts of the Parties, which is clearly opposite and lacks any hybrid elements. In view of the evidence indicating that equidistance is the correct method of delimitation in the case of opposite States, the tactical needs of Libya in the matter are easily understood.

[1] In the words of the Court of Arbitration (Para. 249):

"The Court notes that in a large proportion of the delimitations known to it, where a particular geographical feature has influenced the course of a continental shelf boundary, the method of delimitation adopted has been some modification or variant of the equidistance principle rather than its total rejection. In the present instance, the problem also arises precisely from the distorting effect of a geographical feature in circumstances in which the line equidistant from the coasts of the two States would otherwise constitute the appropriate boundary. Consequently, it seems to the Court to be in accord not only with the legal rules governing the continental shelf but also with State practice to seek the solution in a method modifying or varying the equidistance method rather than to have recourse to a wholly different criterion of delimitation. The appropriate method, in the opinion of the Court, is to take account of the Scilly Isles as part of the coastline of the United Kingdom but to give them less than their full effect in applying the equidistance method. Just as it is not the function of equity in the delimitation of the continental shelf completely to refashion geography, so it is also not the function of equity to create a situation of complete equity where nature and geography have established an inequity. Equity does not, therefore, call for coasts, the relation of which to the continental shelf is not equal, to be treated as having completely equal effects. What equity calls for is an appropriate abatement of the disproportionate effects of a considerable projection onto the Atlantic continental shelf of a somewhat attenuated portion of the coast of the United Kingdom".

CHAPTER VIII

THE RÔLE OF GEOGRAPHICAL CONSIDERATIONS IN ACHIEVING AN EQUITABLE RESULT

1. The Misconceptions of the Libyan Counter-Memorial Concerning Geographical Considerations

130. Reference has already been made to the Libyan contention that Malta has neglected the geographical factors relevant to the issue of delimitation in the present case. In the previous chapter the substance of this charge has been rebutted but the question of the apppropriate rôle of geographical considerations has certain facets which call for examination. Such examination is the more justified in the light of the approach to geographical factors to be discovered in the Libyan Counter-Memorial.

131. The approach apparent in the Libyan arguments involves two related elements. In the first place there is a more or less exclusive focus upon "the physical factors of geography, geomorphology and geology".[1] It is true that in a passage of the Libyan Counter-Memorial, appearing near the end of that pleading, it is accepted that "there are other factors which in a given case may also be relevant – or even determinate – in reaching an equitable result".[2] The other factors referred to are the conduct of the parties, security consideration, navigation channels, and historic rights. However, virtually the entire substance of the Libyan Counter-Memorial is devoted in practice to geographical and geomorphological considerations, and this impression is confirmed by a perusal of the Libyan Submissions.[3]

132. This focus upon the "physical factors" is accompanied by a second element, namely, the highly abstract and academic fashion in which these factors are presented. This legally inappropriate approach to the "physical factors" will be analysed in the following paragraphs.

2. The Relation Between Legal Principles and Geography

133. The fact is that, since the earliest days of the evolution of the law relating to the continental shelf, the elements of geography and geomorphology have appeared not in a pure and abstract form, but

[1] Libyan Counter-Memorial, pp. 22–23, 139–142, 151–162.
[2] *Ibid.*, pp. 141–142, paras. 6.07–6.08.
[3] *Ibid.*, pp. 171–172.

within a legal framework and within the particular context of delimitation according to law. The very term "continental shelf" can no longer be classified as a physical value: it has become a legal term of art. Similarly, the physical concept of "natural prolongation" has undergone a process of legal refinement. Thus in the *Anglo–French Continental Shelf Arbitration* the Court of Arbitration made the following highly pertinent statement on an important point of principle:

> "The continental shelf of the Channel Islands and of the mainlands of France and of the United Kingdom, in law, appertains to each of them as being the natural prolongation of its land territory under the sea. The physical continuity of the continental shelf of the English Channel means that geographically it may be said to be a natural prolongation of each one of the territories which abut upon it. The question for the Court to decide, however, is what areas of continental shelf are to be considered as *legally* the natural prolongation of the Channel Islands rather than of the mainland of France. In international law, as the United Kingdom emphasised in the pleadings, the concept of the continental shelf is a juridical concept which connotes the natural prolongation under the sea not of a continent or geographical landmass but of the land territory of each State. And the very fact that in international law the continental shelf is a juridical concept means that its scope and the conditions for its application are not determined exclusively by the physical facts of geography but also by legal rules. Moreover, it is clear both from the insertion of the 'special circumstances' provision in Article 6 and from the emphasis on 'equitable principles' in customary law that the force of the cardinal principle of 'natural prolongation of territory' is not absolute, but may be subject to qualification in particular situations".[1]

134. The legal connotation of the concept of natural prolongation was explained clearly and decisively in the Judgment of the Court in the *Tunisia-Libya Continental Shelf* case. The following passages are of particular interest:[2]

> "43. It was the Court itself in its 1969 Judgment which gave currency to the expression 'natural prolongation' as part of the vocabularly of the international law of the sea. It should, however, first be recalled that the geographical and other physical circumstances of that case were different from those of the present case. In particular the whole relevant area of the North Sea consisted of continental shelf at a depth of less than 200 metres. Secondly, it should be borne in mind that, as the Court itself made clear in that Judgment, it was engaged in an analysis of the concepts and

[1] Decision of 30 June 1977, para. 191.
[2] *I.C.J. Reports*, 1982, pp. 46–47.

principles which in its view underlay the actual practice of States which is expressive, or creative, of customary rules. The concept of natural prolongation thus was and remains a concept to be examined within the context of customary law and State practice. While the term 'natural prolongation' may have been novel in 1969, the idea to which it gave expression was already a part of existing customary law as the basis of the title of the coastal State. The Court also attributed to that concept a certain role in the delimitation of shelf areas, in cases in which the geographical situation made it appropriate to do so. But while the idea of the natural prolongation of the land territory defined, in general terms, the physical object or location of the rights of the coastal State, it would not necessarily be sufficient, or even appropriate, in itself to determine the precise extent of the rights of one State in relation to those of a neighbouring State.

44. ... The Court in 1969 did not regard an equitable delimitation and a determination of the limits of 'natural prolongation' as synonymous, since in the operative clause of its Judgment, just quoted, it referred only to the delimitation being effected in such a way as to leave 'as much as possible' to each Party the shelf areas constituting its natural prolongation. The Court also clearly distinguished between a principle which affords the justification for the appurtenance of an area to a State and a rule for determining the extent and limits of such area: 'the appurtenance of a given area, considered as an entity, in no way governs the precise delimitation of its boundaries' (*I.C.J. Reports, 1969*, p. 32, para. 46). The Court is therefore unable to accept the contention of Libya that 'once the natural prolongation of a State is determined, delimitation becomes a simple matter of complying with the dictates of nature'".

135. From these examples certain conclusions can be drawn. In the first place the intellectual foundations of the Libyan Counter-Memorial are unsound and involve major misconceptions of law. The law concerning continental shelf delimitation does not rest upon "physical factors" in a direct and simplistic way. Secondly, the Libyan reasoning displays a self-serving over-simplification when "geography" and other "physical factors" are applied with notably subjective results. This is especially apparent in relation to the Libyan argument based upon proportionality.

3. Physical Factors and Geopolitical Results in the Libyan Case: The Example of Proportionality

136. The reasoning in the Libyan Memorial and Counter-Memorial employs arguments based upon "physical factors" which are not applied within a legal framework. This approach not only involves major departures from legal principle but results in the use of arguments which rest upon a highly subjective notion of "geographical con-

siderations", used as a flag of convenience for claims which cannot be related to the applicable principles and rules of international law.

137. The question of proportionality will be dealt with subsequently in Part V of this Reply and the present reference is confined to the purpose of illustrating the real nature of the Libyan reliance upon "physical factors" in the present case.

138. By way of preface it may be recalled that one-third of the Libyan Submissions[1] relate to the thesis that equitable principles call for the application of a certain concept of proportionality according to which the delimitation should reflect the ratio of "the lengths of the relevant parts" of the coasts of the Parties. In what sense can such an approach to delimitation be said to reflect "physical factors"? Certain it is that this "proportionality" argument refers to coasts, but for the rest it relies upon matters of assumption and policy which have no connection with "physical factors". The introduced factors of a non-geographical character are the following:

(a) the concept of "relevant" coasts;[2]

(b) the assumption that the result will be in accordance with equitable principles;[3]

(c) the assumption that the length of Libya's coasts, or any part of them, should determine the seaward reach of Malta's appurtenant areas of continental shelf.[4]

139. The delimitation contended for by Libya involves an alignment which, in its several versions, would involve a virtual monopoly of the seabed areas lying between Malta and Libya.[5] The Libyan argument rests upon political suppositions which have no normative value in law. The Libyan version of proportionality does not reflect "physical factors" or the geographical situation in the present case. Instead the Libyan claim based on proportionality represents a geopolitical special theory. This theory has two elements. The first is the selection of a *single* physical factor – the length of coasts, or of "relevant coasts" – to the exclusion of other factors, geographical or otherwise. The second is the imposition of a *single* principle – proportionality – in a specialised and inappropriate form – the ratio of coastal lengths. The outcome has nothing in common either with geographical considerations or with equitable principles. The Libyan attachment to the "physical factors" of geography and so forth is hollow and does not reflect legal principle.

[1] Libyan Counter-Memorial, pp. 171–172.

[2] *Ibid.*, Submissions, para. 7.

[3] *Ibid.*, paras. 5, 6 and 7.

[4] *Ibid.*, paras. 6 and 7.

(5) [5] See the Libyan Memorial, Map 9; and see Maltese Counter-Memorial, Map No. 4.

CHAPTER IX

THE EQUAL STATUS OF ISLAND STATES WITHIN THE FRAMEWORK OF EQUITABLE PRINCIPLES

1. Refutation of the Allegation that Malta Argues for a Privileged Status for Island States

140. The Libyan Counter-Memorial claims that Malta has asserted that island States have a privileged status, "a privileged position in continental shelf delimitation".[1] This is a misrepresentation of Malta's position. Moreover, when the Libyan Counter-Memorial defines the "privileged status" in more specific terms, it is seen to be in substance simply a reference to Malta's general case on the principles of delimitation. Indeed, the burden of Libya's complaint appears to be that Malta, as a coastal State, does not accept a legal disability. As the Libyan Counter-Memorial puts the matter:

> "The inescapable conclusion that is derived from the Maltese Memorial is that Malta claims that, as an island State, its continental shelf should extend *as far as the continental shelf of any other coastal state*, irrespective of its small size and its restricted coastline, and that any considerations that might affect the case of dependent islands do not apply to an Island State".[2]

141. The essence of the problem certainly lies in the fact that the significance of coasts, as a matter of legal principle, is in issue between Malta and Libya. This question of principle will be pursued further in Part IV of this Reply, and the relevance of the size – the landmass – of the coastal State has been examined in Part II. For present purposes only certain specific allegations of the Libyan Counter-Memorial will be reviewed.

142. The Libyan Counter-Memorial makes the statement set forth in paragraph 140 above, and then complains that "this allegation does not find support in the jurisprudence referred to by Malta, nor does it accord with the treatment of this issue in the United Nations Sea-bed Committee and at the Third Conference on the Law of the Sea".[3] In

[1] Libyan Counter-Memorial, pp. 92–98, and see, in particular, p. 98, para. 4.45.
[2] *Ibid.*, p. 92, para. 4.34. Emphasis supplied.
[3] Libyan Counter-Memorial, p. 92, para. 4.34.

one sense this complaint is spurious, since the formulation represents a question which, if Malta's view of the law be correct, *ex hypothesi* could not arise. If island States were not regarded – from the point of view which Malta upholds – as exceptional when the Sea-bed Committee and the Third United Nations Conference were at work, then no reference to the "special case" of island States can be expected. Indeed, the Libyan reasoning from silence points in all directions, if consistency is to be observed. The various debates and records make no reference to "long coast" States or "large" coastal States either: and therefore it follows that these sources cannot be adduced to support Libyan positions.

143. In so far as the debates in the Law of the Sea Conference relate to the entitlement of islands to continental shelf and exclusive economic zone, the outcome confirms Malta's view that island States are not subject to any legal disability in the contexts of entitlement and delimitation. The materials set forth in the Libyan Counter-Memorial[1] which refer to the provenance of Article 121 of the Law of the Sea Convention (on the Régime of Islands) merely confirm the view of the matter to be found in Malta's Memorial.[2]

144. The Libyan Counter-Memorial contends[3] that Malta's view as to the significance of islands in maritime delimitation is not supported by the Decision of the Court in the *Anglo-French Continental Shelf Arbitration*. The reasoning of the relevant passage in the Libyan pleading is quite unpersuasive. Thus it is said that the Court of Arbitration only dealt with certain arguments concerning the status of islands because the Parties in that case presented them. So the Parties did, and in dealing with those arguments the Court of Arbitration took clear positions and expressed views on matters of law. *It did not dismiss the arguments as irrelevant*. Moreover, the political status of the Channel Islands occupied a substantial section of the part of the Decision relating to the "Channel Islands region".[4] The Court expressed its conclusion as follows:

> "It follows that, as between the United Kingdom and the French Republic, the Court must treat the Channel Islands only as islands of the United Kingdom, not as semi-independent States entitled in their own right to their own continental shelf *vis-à-vis* the French Republic".[5]

2. Libyan Recognition of the Correct Principle

145. Strange to relate, whilst setting up a false target – the alleged Maltese thesis of a privileged status of island States – the Libyan Counter-Memorial, apparently by way of a concession, produces a

[1] Pp. 95–97, paras. 4.41–4.43.
[2] Pp. 54–55, paras. 168–169.
[3] Pp. 92–93, para. 4.35.
[4] Decision of 30 June 1977, paras. 183–186.
[5] *Ibid.*, para. 186.

correct statement of the legal position as contended for by Malta. The relevant passage is as follows:

> "It is certainly conceivable that the overall geographical relationship between two States might influence the treatment of their respective islands in delimitation agreements aimed at reaching an equitable result; and that such considerations might not apply in a case where – in consequence of the fact that the island involved is an independent island State – the delimitation would necessarily be restricted to the relationship of that island alone to the opposite continental coast. However, this does not imply a privileged position for such an island because of its independent political status but, rather, results from the effect of the overall geographical relationship between the respective States".[1]

This formulation is very close to Malta's position which maintains the equality of island States and other coastal States within the framework of equitable principles.

3. Libya's Claim to Privileged Status

146. Malta's arguments in the present case observe, as they are bound to do, two forms of discipline. First, they are closely related to the legal framework of equitable principles governing continental shelf delimitation. Secondly, they avoid reliance upon a plea of exceptional circumstances: in the words of the Libyan Counter-Memorial, "Malta claims that ... its continental shelf should extend as far as the continental shelf of any other coastal State".[2]

147. In contrast, the Libyan argument in substance lies outside the legal framework, for example, in promoting proportionality to the status of a controlling principle, and calls, quite openly, for a privileged status to be accorded not only to States with long coasts but also to States with "an extensive continental landmass".[3] The Libyan use of proportionality in an eccentric way, together with a version of natural prolongation which does not accord with legal principle, produces a claim to a monopoly of the seabed between Malta and Libya. That is obtaining a privileged status indeed.

148. The true character of the Libyan position as a claim to *privilege* – literally a special advantage, a *lex privata* – can be tested by reference to the practice of States. The large number of delimitation agreements – relating to various regions of the world – constitutes important evidence of the views of States on the question of what is an equitable result in the context of continental shelf delimitation. This evidence is set forth in Malta's Memorial[4] and Counter-Memorial;[5] and the evi-

[1] Libyan Counter-Memorial, p. 93, para. 4.35.
[2] P. 92, para. 4.34.
[3] Libyan Counter-Memorial, p. 41, para. 2.47; p. 42, para. 2.50.
[4] Pp. 61–96.
[5] Pp. 111–123, 145–146.

dential weight of such material is affirmed in Part VI of the present Reply. The practice of States provides a massive contradiction of the appropriateness and legitimacy of Libya's claim to a privilege both as a "long coast" State and as a State with "an extensive continental landmass".[1]

[1] See also Annex 4 of this Reply.

PART IV

THE LEGAL SIGNIFICANCE OF COASTS IN CONTINENTAL SHELF DELIMITATION

CHAPTER X

THE UNDERLYING PRINCIPLES

1. The Importance of the Relationship of Coasts to other Geographical Features

149. Both Parties agree that the fundamental rule, which lies behind the equitable principles governing delimitation, is that the appropriateness of any method is a reflection of the geographical and other relevant circumstances of the particular case.[1] Within this conception the coastal configurations of the Parties have a major rôle, and this rôle was emphasised by the Court in its Judgment in the *Tunisia–Libya* case.[2] However, the Libyan argument, as presented in the Counter-Memorial,[3] focuses upon coasts (and lengths of coasts) in a highly abstract way and divorces coasts from the overall geographical circumstances. This produces a serious departure from legal principle. As the Court has made clear in its Judgment of 1982, it is the *relationship* of the coast to the submarine areas adjacent to it, and the *relationship* of the coast to the coasts of opposite or adjacent States, which have to be considered when the process of delimitation is undertaken.[4]

2. The Need to Identify the Area of Shelf Relevant to the Decision of the Dispute

150. The Court in the *Tunisia–Libya* case pointed out that the practical aspect of assessing the relationship of the coasts of the Parties was the identification of the area "relevant to the decision of the dispute". This area consists of the areas which can be considered to lie off the coasts of either the one Party or the other. The area "relevant to the decision of the dispute" may be defined in various ways. In the *Anglo–French* case the Court of Arbitration identified the "Atlantic region" in relation to two coastlines abutting on the continental shelf which were "comparatively short".[5] Moreover, the shelf in issue in the Atlantic region "extended to seawards of the coasts of the two countries for great distances".[6]

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[1] Maltese-Memorial, p. 35, para. 110; Libyan Counter-Memorial, p. 22, para. 2.01.
[2] *I.C.J. Reports*, 1982, p. 61, paras. 73–74.
[3] Pp. 32–42, 151–162.
[4] *I.C.J. Reports*, 1982, p. 61, paras. 73–75.
[5] Decision of 30 June 1977, para. 233.
[6] *Ibid.*

151. In both the Memorial and Counter-Memorial Malta has employed a simple figure, which takes the form of a trapezium, to illustrate the concept of *relationship* of the coasts of Malta and Libya. This figure applies to the facts of the present case, *mutatis mutandis*, the approach applied to different sets of circumstances in previous cases. The trapezium is an exercise which seeks to identify the area of shelf "relevant to the decision of the dispute". It involves no novelty whatsoever and the reaction it has engendered in the Libyan Counter-Memorial is surprising.

152. It is the geography which must determine the general dimensions of the area "relevant" to the delimitation. The area identified for this purpose may be extensive, as it was in the *Tunisia–Libya* case, and this can be seen on a map when the distance is taken between Ras Kaboudia and Ras Tajoura. Thus in the present case the trapezium directly reflects the geography and coastal relationships which characterise the dispute.

153. In identifying the areas which may be said to lie *either* off the Maltese *or* Libyan coasts[1] not much difficulty is involved. So far as the Libyan coast is concerned, it seems very arbitrary to take, as Libya does, a certain sector which has an eastern terminus at Ras Zarrouq.[2] The Libyan pleadings take little or no trouble to justify this position in legal terms. In the case of Malta the relevant coasts are those which may be said to face any part of the coast of Libya, whether or not they also face certain other States. It is quite obvious by reference to the task of the Court as defined in the Special Agreement that it is unnecessary to identify with great exactitude the aspects of the coasts of Malta which may be said to face or be opposite to the coasts of Libya. The Libyan concern[3] with coastal detail is irrelevant if not obsessional.

3. The Coasts in Relation to the Basis of Entitlement to Submarine Areas

154. In its Judgment in the *Tunisia–Libya* case the Court gave a strong indication of the significance of coasts as the basis of title to shelf rights. The key passage in this respect is as follows[4]:

> "It should first be recalled that exclusive rights over submarine areas belong to the coastal State. The geographic correlation between coast and submerged areas off the coast is the basis of the coastal State's legal title. As the Court explained in the *North Sea Continental Shelf* cases the continental shelf is a legal concept in which 'the principle is applied that the land dominates the sea' (*I.C.J. Reports 1969*, p. 51, para. 96). In the *Aegean Sea Continental Shelf* case the Court emphasised that

[1] Judgment in the *Tunisia–Libya* case, *I.C.J. Reports*, 1982, p. 61, para. 74.
[2] Libyan Memorial, p. 156, para. 10.09; Libyan Counter-Memorial, p. 39, para. 2.44.
[3] See the Libyan Counter-Memorial, pp. 32–35.
[4] *I.C.J. Reports*, 1982, p. 61, para. 73.

> 'it is solely by virtue of the coastal State's sovereignty over the land that rights of exploration and exploitation in the continental shelf can attach to it, *ipso jure*, under international law. In short, continental shelf rights are legally both an emanation from and an automatic adjunct of the territorial sovereignty of the coastal State'. (*I.C.J. Reports 1978*, p. 36, para. 86).
>
> As has been explained in connection with the concept of natural prolongation, the coast of the territory of the State is the decisive factor for title to submarine areas adjacent to it. Adjacency of the sea-bed to the territory of the coastal State has been the paramount criterion for determining the legal status of the submerged areas, as distinct from their delimitation, without regard to the various elements which have become significant for the extension of these areas in the process of the legal evolution of the rules of international law".

155. As Malta has already had occasion to point out,[1] the nature of the legal basis of title must have a certain bearing on the criteria and methods of delimitation. The highly ambitious Libyan claim to submarine areas within a short distance of the coasts of Malta is incompatible with the principles stated by the Court in the passage above. By no stretch of the imagination can the Libyan claim to a very high proportion of the sea-bed dividing the two States be said to satisfy the "paramount criterion" of adjacency as formulated by the Court.

156. In the Judgment of the Court in 1982 the concept of the continental shelf "as understood in international law" is related to the principles applicable to delimitation,[2] and careful note is taken of the significance of the rôle of distance from the coast as "the legal basis of the title to continental shelf rights".[3] The positions underlying the arguments presented in the Libyan Counter-Memorial[4] continue to be out of line with such contemporary thinking concerning title to shelf rights and its relation to delimitation.

157. The concepts of adjacency and distance reflect the political and security aspects of the interest of the coastal State and the "protective" element in maritime jurisdiction. The distance principle, together with the political and security interests of the coastal State, has the clear implication that there be no major discrepancies in the seaward reach of jurisdiction attributed to coastal States abutting on the same submarine areas.

158. The considerations of principle set forth above receive strong confirmation from the practice of States. This practice gives no support for the view that "mainland" or "long coast" States should receive more than half the sea-bed areas dividing them from opposite "short coast" States. The map of delimitations existing in the Gulf (attached to *Limits*

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[1] Maltese Counter-Memorial, pp. 54–57, paras. 96–102.
[2] *I.C.J. Reports*, 1982, p. 43, para. 36.
[3] *Ibid.*, p. 48, para. 48.
[4] In particular, at pp. 80–87, paras. 4.10–4.24.

in the Sea No. 94[1]) is a sample of practice in an area containing important mineral resources. Iran, as the "long coast" State in the Gulf, has been involved in delimitation agreements with no less than five opposite States. The resulting boundaries stand in clear contradiction of the conceptions advanced by Libya in the present proceedings.

[1] United States Department of State, Office of the Geographer, Bureau of Intelligence and Research, September 11, 1981, reproduced in this Reply as Map No 2 on page opposite.

CHAPTER XI

THE SIGNIFICANCE OF LENGTHS OF COASTS

1. Libya's Case Rests upon Basic Errors of Principle

159. The Libyan approach to the legal significance of the length of coasts is deeply flawed by conceptual error and as a consequence the Libyan pleadings fail to grapple with the real issues of principle and policy. As always, it is necessary to find the right question to ask, before seeking answers. The right question in the present context would seem to be: What is the legal significance of *coasts*, since the matter of length cannot be considered in a purely abstract form. In the present Chapter Malta will seek to elucidate the significance of coasts, and, in that setting, of coastal lengths, for purposes of shelf delimitation.

2. Coasts have a Similar Legal Significance in Terms of Seaward Reach

160. By way of introduction it may be said that, in the exposition which follows, an attempt will be made to avoid a detailed cross-reference to the views expressed in the Libyan Counter-Memorial. The general refutation will necessarily envelop the particular errors and distortions to be found in that pleading. However, a major misrepresentation calls for immediate notice. The Libyan Counter-Memorial states:

> "From this, Malta draws the conclusion that the length of the coastline has *no relevance* to the extent of the continental shelf area appurtenant to that coast and, consequently, *no relevance* for the purpose of delimitation of this area vis-à-vis another State."[1]

No such conclusion is drawn in the passages cited by Libya[2] and no such view is expressed elsewhere in Malta's Memorial. The trapezium figure, and Malta's discussion of coastal relationships in connection with that figure,[3] stand witness to this misrepresentation of Malta's position.

161. The substance of the problem can now be addressed. In the

[1] P. 84, para. 4.18. Emphasis supplied.
[2] Maltese Memorial, paras. 128–129, 246.
[3] *Ibid.*, pp. 118–122, paras. 240–247.

examination of coastal relationships within a context of legal principle, two assumptions must be made. In the first place, the principle of natural prolongation is a juridical concept to be examined within the context of customary law and the general application of the equitable principles applicable to delimitation.[1] As a "physical factor" natural prolongation has no relevance to the facts of the present dispute, since as has been shown,[2] it is not legally relevant and, in any case, the seabed dividing Malta and Libya is a geological continuum. Secondly, Malta considers reference to "the landmass behind the coastline"[3] to be contrary to legal principle, and Libya's "large State" thesis has already been examined in Part II.[4]

162. The key question of substance clearly is: What is the legal significance of coasts in the context of continental shelf delimitation? Libya sees the question – at least at one level – exclusively in terms of the *lengths* of coastlines.[5] However, in the application of the Libyan arguments the political and geographical reality of coastlines as land territory, bearing a legal and geographic correlation to adjacent submarine areas, is left aside. The Libyan Submissions (2, 3 and 4) based upon natural prolongation which conclude the Counter-Memorial do not refer to coastal configurations in any form, but to the so-called Rift Zone. The Libyan argument based upon proportionality similarly moves well away from the actual coastal relationships. The formula of the ratio of the difference in the lengths of coasts – or "relevant" coasts – simply uses lengths as an arithmetical element in a crude process of apportionment, the result of which bears no relation to coasts as such.

163. The legal significance of coasts must be drawn from the objective political geography of appurtenance and adjacency, since "the geographic correlation between coast and submerged areas off the coast is the basis of the coastal State's legal title".[6] There can be no reference to geography – to coasts as geographical features – in the abstract. The reference is in the legal context of delimitation in accordance with equitable principles; and in consequence the *relation* of the coast to other features is of paramount importance. The relations which are significant are, first of all, the relation *between the coast and the areas of seabed*: in legal thinking this is usually described positively as adjacency, and negatively in terms of the principle of non-encroachment. The second significant relation is that *between the coasts* of "neighbouring States situated either in an adjacent or opposite position".[7]

164. The length of the coasts is naturally an *aspect* of these relations.

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[1] See above, para. 63.
[2] In Part II above.
[3] Libyan Counter-Memorial, p. 84, para. 4.19.
[4] See paras. 72–82 above.
[5] Libyan Counter-Memorial, pp. 38–42, paras. 2.43–2.51, pp. 83–92, paras. 4.17–4.33; pp. 151–162 (Chapter 7).
[6] *I.C.J. Reports*, 1982, p. 61, para. 73.
[7] *Ibid.*, para. 74.

But for present purposes length is not a "piece of string" so many miles long. *In the context of real coasts, length is simply an aspect of the overall relationship between the coasts of neighbouring States and between coasts and the seabed areas relevant to the delimitation.*

165. For purposes of delimitation, it is the relation of coasts to adjacent submerged areas which is of primary interest, and this can only be expressed in terms of a distance principle, that is to say, a presumed *equality of seaward reach of jurisdiction* from the land territory of the respective coastal States. In the practice of international tribunals the logical outcome has been the reference to the overall "geographical and legal framework" of a case for the purpose of determining the "primary boundary", which, subject to the removal of distortions caused by particular features, produces "a generally equitable delimitation as between the Parties".[1]

166. In seeking a primary boundary which gives a "generally equitable delimitation", certain general lines of policy are applicable. In the first place, there is no room for a radical policy of equality of States in the form of a reformation – a refashioning – of geography.[2] The function of the concept of equality is related to the actual geography of the region. Within that actual geographical framework, the delimitation process involves seeking an approximate *equality of relationship* between the respective coasts and the areas of continental shelf dividing the coasts.[3]

167. This "approximate equality"[4] or "balance of geographical circumstances"[5] has no connection with proportionality as a distinct factor, and is merely a reflection of the broad geographical framework. In the *Anglo–French Continental Shelf Arbitration* this balance took different forms. In the case of the English Channel, leaving aside the Channel Islands region, the balance resulted from the relationship of opposite coasts,[6] the unity and continuity of the region,[7] and the equality of the coastlines in relation to the continental shelf.[8] In the case of the Atlantic region, the Court found sufficient elements of balance in the lateral relation of the two attenuated maritime frontages in spite of the existence of certain differences.[9]

168. There is no indication that the Court of Arbitration considered that the equality of lengths of coastlines was a necessary condition in all cases for the existence of "a balance of geographical circumstances",

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[1] *Anglo–French Arbitration*, Decision of 30 June 1977, paras. 101–113. See further *ibid.*, paras. 181–183, 196, 199–201.
[2] *Ibid.*, paras. 101; 195.
[3] *Ibid.*, para. 181–182, 196.
[4] *Ibid.*, para. 181.
[5] *Ibid.*, para. 183.
[6] *Ibid.*, paras. 103, 181–182.
[7] *Ibid.*, para. 181.
[8] *Ibid.*, paras. 182–183, 196, 201.
[9] *Ibid.*, paras. 232–248.

and there is no justification for the inference to this effect in the Libyan Counter-Memorial.[1]

169. It is clear that the balance of geographical circumstances which produces a median line as a "generally equitable" delimitation will often consist of situations in which the opposite States have coasts which are not equal in length. In the *Anglo–French Arbitration* the abutting coasts which were the basis of delimitation in the Atlantic region were both relatively limited in extent. Moreover, their actual extent was far from equal relative to each other – the Cornish Peninsula is very attenuated, and the Scilly Islands even more so[2]: yet the primary delimitation between the English and French coasts was still an equidistance line. Furthermore, it is recorded in the Decision that as between the Channel Islands and the French coast the Parties had agreed upon a median line as the boundary.[3]

170. In the present case, the balance of geographical circumstances must lead to the equality of seaward reach of the opposite coasts of the Parties. In the Libyan argument this equality of seaward reach is rejected absolutely.

3. The Link between Attribution of Shelf Areas and Delimitation

171. The Libyan claims in the present case, whether based upon natural prolongation or the ratio of the difference between coastal lengths, would produce a result which would reduce Malta's appurtenant shelf area to a very modest enclave.[4] It is illuminating to consider the link between the rules of entitlement and the policy of delimitation as between opposite or adjacent States: *and in making such an inquiry the extreme form of the Libyan claims is to be borne in mind.*

172. If an island State exists in mid-ocean or in any other situation which does not involve issues of delimitation of shelf areas with neighbouring States, the question of appurtenance or entitlement is obviously regulated by reference to the principles to be found in the Law of the Sea Convention. In consequence, the coastal State would have exclusive rights over submarine areas stretching not less than 200 miles, in accordance with the distance principle.

173. In the case of an island State which abuts upon the same continental shelf as a "long coast" State, the normal outcome, well evidenced by State practice, is a median line. The median line may be modified to avoid distortions caused by local irregularities but there is, as a matter of principle, no weighting in favour of the "long coast" State. This is the outcome when the island State presents a long coast to the mainland State, as in the case of the United Kingdom and France. It is equally the outcome when the island State does not have a

[1] P. 89, para. 4.28; pp. 153–155, paras. 7.10–7.12.
[2] See Map No 3 on page 88.
[3] Decision of 30 June 1977, para. 22.
[4] See Map 9 of the Libyan Memorial.

long coast, as in the case of Bahrain and Saudi Arabia.[1] The same result also appears in delimitations between "long coast" States and peninsula States, as in the case of Qatar–Iran[2] and Oman–Iran.[3]

174. In the case of an island State (or a peninsula State) abutting on the same continental shelf as a "long coast" State, there is no reason why the normal solution should be excluded when the seabed dividing the two opposite States is extensive – of the order of 100 miles (Bahrain–Iran),[4] or 180 miles (Malta–Libya) or 400 miles (India–Maldives).[5] There is no evidence from the practice of States and no consideration of principle which would suggest that the "long coast" State in such delimitations should be given a boundary line weighted in its favour.

175. The fact is that the question of entitlement and the issue of delimitation are connected, and this is logical as the business of delimitation is related to the legal basis of title. An island State near a long coast State in a semi-enclosed sea area, such as the Gulf, is not placed under a legal disability as a consequence.

176. In conclusion it is to be recalled that, when islands are to some extent discounted for delimitation purposes, such discounting is not based on consideration of the length of coasts. The principal reasons for discounting islands recognised in the jurisprudence are two:

(a) that they are wholly detached from the mainland of the State of which they form part and thus lie on the wrong side of the primary boundary indicated by the geographical framework;[6]

(b) that the islands, though geographically constituting an extension of the mainland of the State of which they are part, have a location which deflects the primary boundary further than would the baseline of the mainland.[7]

177. It is noteworthy that *even in the case of dependent islands located close to the mainland of another State*, the delimitation which results does not involve the kind of discounting for which Libya argues. The delimitation agreed in principle between France and the Channel Islands is a median line.[8] Similarly, delimitations between Norway and the United Kingdom (Shetland Islands), India and Indonesia, India (Nicobar Islands) and Thailand, and Australia and France (New Caledonia), did not reduce the weighting given to groups of dependent islands.[9]

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[1] Libyan Counter-Memorial, Annex of Delimitation Agreements, Annex 5.

[2] *Ibid.*, Annex 21.

[3] *Ibid.*, Annex 40.

[4] Maltese Memorial, Reduced Map 2 at p. 63. See also Map 1 of this Reply.

[5] *Ibid.*, p. 65.

[6] *Anglo–French Arbitration*, Decision of 30 June 1977, paras. 192, 196–201.

[7] *Ibid.*, paras. 243–254. See also the Judgment in the *Tunisia–Libya* case, *I.C.J. Reports*, 1982, p. 63, para. 79; pp. 88–89, paras. 126–129; p. 91, para. 131.

[8] *Anglo–French Arbitration*, Decision, para. 22.

[9] Maltese Memorial, Annexes 50, 51, 53 and 54 and relative Reduced Maps at pp. 81, 82, 85 and 87 respectively.

4. The Scale of Equitable Adjustment

178. The considerable weight of experience in matters of delimitation, both in terms of jurisprudence and the practice of States, indicates that in principle all coasts count more or less equally in terms of seaward extension of jurisdiction. This is true of the *North Sea* cases, the *Anglo–French Continental Shelf Arbitration* and the *Tunisia–Libya* case. Such an assessment is not necessarily related to a particular method of delimitation. It reflects the essence of continental shelf law: the coasts of the State generate rights over submarine areas and, at least as a presumption, this process has a more or less uniform effect. The political and security aspects of coastlines are not of variable significance in legal terms.

179. It follows from these premises that the primary boundary selected in accordance with equitable principles always aims, however approximately, at an equal attribution of shelf areas to coastal States. It follows also that any modification or adjustment of the primary boundary on account of local irregularaties would be limited in scale and would not be radical in result. The process of adjustment can only apply on the margins of the basically equal relationship of the coastal States. The scale of the modification of the primary boundary as determined by the major geographical features is always limited, and this is evidenced by the existing jurisprudence.

180. The Libyan position as expounded both in the Memorial and the Counter-Memorial thus suffers from an all-pervading weakness, since the Libyan claims totally ignore the concept of equal entitlement in terms of seaward reach. Both the Libyan theses – the one based upon physical natural prolongation, the other based upon the ratio of the lengths of coastlines – call for a delimitation marked by radical inequality and an arbitrary notion of apportionment.

5. The Ratio of Coastal Lengths: Proportionality Advanced as an Independent Source of Rights

181. As Malta has already had occasion to point out,[1] the Libyan pleadings employ proportionality as a primary source of title and as an independent source of rights. This application is contrary to legal principle and, if it were to be given any currency, it would transform the legal and political significance of coastal geography. The settlement of disputes concerning maritime delimitation normally involves negotiation. On the Libyan view of the law, the variables in any negotiation would be so greatly increased that the settlement of disputes by negotiation would be made much more difficult to achieve.

[1] Maltese Counter-Memorial, p. 153, para. 321.

6. The Significance of the Distinction between Opposite and Adjacent States

182. In the light of the considerations set forth above, it is now possible to appreciate the real significance of the distinction between opposite and adjacent States. The distinction is not always applicable in a neat way and some geographical situations may be more or less mixed. None the less the distinction forms an important aspect of any practical exercise in seeking an equitable result; and this is true whether or not the equidistance method of delimitation is in issue.

183. The distinction between opposite and adjacent States forms a part of the procedure by which a tribunal discovers a basis of "approximate equality"[1] and a "balance of geographical circumstances."[2] Such a balance does not involve distributive justice but should reflect the *relationships* of the principal sectors of abutting coasts. It is not concerned with spatial distribution according to a dogmatic formula such as the ratio of the lengths of coastlines.

184. The "balance of geographical circumstances" should satisfy three conditions set by the legal framework:

(*a*) As a principle of appurtenance, or entitlement, all mainlands are to be given full effect in terms of a presumed equality of seaward reach of sovereign rights from the land territory over adjacent submarine areas.

(*b*) In the process of delimitation, actually abutting coasts of mainlands are to be given full effect.

(*c*) The principle of non-encroachment is to be observed.

185. The normal case of opposite-related abutting coasts will produce a balance of geographical circumstances based upon the concept of equidistance: since a median line is the equitable result of this balance in appropriate circumstances and not an independent or "obligatory" rule. In the case of "adjacent" States the maintenance of a geographical balance cannot depend on the unqualified use of an equidistance line, precisely because the principle of non-encroachment and the concept of equality of seaward reach of rights over adjacent submarine areas would be placed in jeopardy. This is, of course, familiar to the Court, but it provides a useful preface to observations on the Libyan reasoning in this case. The Libyan position is that Malta's reliance upon equidistance is dogmatic and that Malta ignores actual coastal geography.[3] This is the reverse of the truth. Malta relies upon the relationships of *real coasts* – not abstract calculations based on ratios of lengths – and on the balance of actual geographical circumstances.

186. The principle of balance and the principle of non-encroachment call for different techniques of adjustment in different geographical

[1] *Anglo–French Arbitration*, para. 181.
[2] *Ibid.*, para. 183.
[3] Libyan Counter-Memorial, Chapter 7.

situations. In the case of opposite States some modification of the primary equitable delimitation may be necessitated by the presence of islets or coastal irregularities. In the case of adjacent States similar modification, *mutatis mutandis*, may be called for. *But in both situations it is the approximate equality of seaward reach of sovereign rights which is being maintained.*

187. In consequence, even when the technique of modification in the case of adjacent States involves some form of proportionality calculation, this exercise still rests upon the basic premises of non-encroachment and equality of seaward extension; indeed, these values are the very *raison d'être* of the modification. Moreover, because what is involved is *modification in order to maintain a balance of geographical circumstances and an "approximate equality"*, the result cannot constitute an apportionment which attributes little or no seaward extension of sovereign rights to the land territory of one of the Parties. In the present case Libya insists (wrongly in principle) that a certain form of proportionality should be applied in a case of opposite States. Not only that, but Libya also insists on an extreme form of proportionality claim which falls outside the criteria of modification *even if the present case were one of adjacent coasts.*

188. The result of the *Tunisia–Libya* case is in full accord with the view of the matter set forth above. The Judgment (and especially Part B of the *Dispositif*)[1] makes clear that the delimitation envisaged was to reflect "the general configuration of the coasts of the Parties". This basic principle dominated the approach in both sectors of the delimitation carried out by the Court. In spite of the strong elements of adjacency in the coastal relationships, the Court indicated a delimitation which allowed a *generally equal* seaward extension to both coasts, and it may be noted that this giving of full faith and credit to coastal geography was not in fact related to the application of the equidistance method.

189. In the circumstances of laterally related coasts of adjacent States, where the coasts have a point of departure at the terminus of a land boundary, the reference to the lengths of coastal fronts as part of the application of the factor of proportionality[2] is necessary *precisely in order to produce a balance in the seaward extension of rights over submarine areas.* However, the application of such a method to opposite coasts has the effect, not of producing an approximate equality but of causing a severe imbalance: and this is because in a simple case of opposite coasts the length of the respective coastlines cannot play a rôle in avoiding convergence and undue encroachment. Allowing for the difference in geographical circumstances, the use of a calculation based on the ratio of lengths of coastlines produces a qualitatively different and totally inequitable result in the present case, whereas in the *Tunisia–Libya* case the delimitation adduced by the Court was very sen-

[1] *I.C.J. Reports*, 1982, p. 93.
[2] *Ibid.*, p. 91, para. 131.

sitive to the question of non-encroachment and was thus concerned not to give "excessive weight" to the Kerkennahs.[1]

7. Delimitation must Relate to the Coasts Actually Abutting on the Continental Shelf

190. The basis of title – as the Libyan Counter-Memorial recognises[2] – is "the geographic correlation between coast and submerged areas off the coast". This relationship reflects both the principle of distance and the concept of adjacency. Unless there are special circumstances justifying some technique of abatement, the normal legal implication of a coast is an equality of seaward reach, both as between different sectors of the same coast and as between the coasts of opposite and adjacent States abutting upon the same continental shelf.

191. Unless geography – the actual coasts abutting on the shelf areas dividing the Parties – is to be ignored, delimitation involves the use of appropriate basepoints. The use of basepoints is the simple procedure by which the generation of shelf rights is reflected by use of normal survey and hydrographic techniques. When a method of delimitation other than equidistance is to be used, other techniques with a similar objective may be employed, including the construction of coastal fronts. The use of such techniques always involves the reflection of geographical facts for legal purposes, a very familiar aspect of the law of the sea.

192. As a matter of logic and on the basis of the jurisprudence, it is necessary to determine (a) which are the actually abutting coasts in a given case; and (b) which count as *mainland* coasts. The rôles of the Cornish peninsula and the Isles of Scilly in the *Anglo–French Continental Shelf Arbitration* are of relevance in this context. Cornwall and the Scilly Isles were coasts "actually abutting on the continental shelf" of the region,[3] and the latter counted as an extension of the landmass – the mainland – of the United Kingdom.[4]

193. Malta is an island State with a political status equal to that of other coastal States and is therefore in legal terms a mainland. Its coasts in their southerly aspects, abut upon the shelf areas which divide the Parties. By reason of their shape and location – which are not unusual as a matter of the law of delimitation – the Maltese group generates a normal seaward reach or radial projection of sovereign rights over adjacent submarine areas. Since it is coasts "in place", so to speak, and not abstract *lengths* of coasts, which generate such rights, it is clear that, even if Malta had a much longer coast, this would have little or no effect on the general outcome so far as generation of shelf
(16) rights is concerned. This is shown very well by Diagram A contained in the Libyan Counter-Memorial.[5]

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[1] *Ibid*, pp. 88–89, para. 128; and see the Dispositif, p. 93, B(2) and (3).
[2] P. 157, para. 7.18.
[3] Decision, para. 248.
[4] *Ibid*., paras. 248–251. See also Map No. 3 at page 88.
[5] Opposite p. 160 and reproduced in this Reply at page 94.

(16) 194. The Libyan Counter-Memorial[1] considers that its Diagram A proves that equidistance has a "distorting effect". In fact the diagram simply shows the way geography works, unless it is to be refashioned. It is geography, coasts in relation to other features, including location and distance, and not length of coasts *as such*, which is decisive. The significance of coasts and coastal lengths must be measured relative to something else; and in the case of opposite coasts length as the factor of measurement is less significant than it is in other geographical circumstances.

195. These considerations can be weighed at the level of practical experience by a perusal of boundaries in the Gulf as indicated in *Limits in the Seas.*[2] The delimitations involving Bahrain – Saudi Arabia, Bahrain – Iran, Qatar – Iran, and Oman – Iran, all contradict the Libyan view on lengths of coasts. Indeed, the whole pattern of maritime boundaries illustrates the equality of seaward extension of jurisdiction which is the legal reflection of real coasts. This type of equality falls within the tradition of territorial sea and other maritime extensions as zones of uniform breadth appurtenant to the coasts of States. In the Gulf the position of Bahrain illustrates the equality of seaward reach which accords with the framework of the law and equity in continental shelf delimitation. The areas appurtenant to Bahrain as it faces Iran are not of the same extent as those appurtenant to Bahrain as it faces Saudi Arabia: *but within the opposite relationships Iran–Bahrain and Saudi Arabia–Bahrain there is a marked equality of seaward reach.*

8. Coastal Relationships and Delimitation in Semi-Enclosed Seas: the Results of the Libyan Approach

196. The drawbacks to the Libyan position on the significance of coastal lengths can be illustrated by a hypothetical situation as in (31) Figure A.[3] A number of short coast States abut upon the same shelf as a long coast State. According to Libyan reasoning, the length of the coast of State I would operate *in each case* against States II*n* opposite State I, and the result would be a "proportionality" line of obvious inequity. Libyan logic about the length of coasts as such – the "piece of string" approach – does not allow for common sense, and contains no qualifications.

197. If it be accepted that in the situation shown in Figure A the equitable solution, reflecting the balance of geographical circumstances, is a delimitation based upon a median line, can it be said that a *single* (31) short coast State II (as in Figure B)[4] opposite State I should accept less than equidistance? First of all, it may be asked what does State I "lose"

[1] Pp. 160–161, paras. 7.24–7.26.

[2] United States Department of State, Office of the Geographer, Bureau of Intelligence and Research, *Limits in the Seas*, No. 94, "Continental Shelf Boundaries: The Persian Gulf"; also reproduced in this Reply as Map No 2 at page 82.

[3] At p. 96.

[4] *Ibid.*

by the change of circumstances? The answer must be little or nothing. As a consequence of the equidistance method (as illustrated by (16) Diagram A in the Libyan Counter-Memorial) State I "keeps" all the sector below the median line. State II "gains" the shaded areas above the median line *but not at the expense of State I*. The balance of geographical circumstances has not changed sufficiently to depart from the median line as the equitable solution.

198. This exercise provides the "length of coastlines" argument with a decent burial and relates the issue of delimitation to the political realities of coastal State relationships in semi-enclosed seas. The existing patterns of boundary settlement in the Baltic Sea and the Gulf are (31) related to Figure B and not to the Libyan approach the result of which is depicted in Figure A.

9. Significance of Lengths of Coasts: Summary

199. The Libyan contentions in the present case present a major paradox. This consists in the fact that the superficial insistence upon the importance of lengths of coasts is accompanied by Submissions and arguments claiming large areas of seabed adjacent to Malta on the basis of legal theses – physical natural prolongation and the proportionality doctrine based upon a formula (the ratio of lengths of coasts) – which have no connection with the actual coasts of Malta and Libya.

200. The Libyan version of the significance of coastal lengths is substantially inconsistent with the following important principles:

(a) The relation of coasts to other features is of paramount importance, and especially the relation to adjacent areas of seabed and the relation between the coasts of opposite or adjacent neighbouring States.

(b) The distance principle, and adjacency of seabed to the territory of the coastal State as the basis of legal title to shelf areas, indicate a presumed equality of seaward extension of jurisdiction.

(c) Coasts form part of the broad framework within which a Court must seek a balance of geographical circumstances, but equality of the lengths of coastlines is not a necessary condition for the existence of a "balance of geographical circumstances".

(d) The rules of entitlement to continental shelf areas of islands and island States are logically connected with the principles of delimitation as between neighbouring States: and whether an island State is located in mid-Ocean, or is placed in a semi-enclosed sea with opposite or adjacent States abutting on the same shelf area, there is no evidence of a legal disability in the context of delimitation as against 'long coast' States.

(e) Even when islands (not island States) are to be discounted to some degree, such discounting is not based on consideration of the length of coasts.

(f) The distinction between opposite and adjacent coasts forms a part of the discovery of a "balance of geographical circumstances" as a

part of the process of delimitation; and in the normal case of opposite coasts a median line is the equitable result of this balance.

(g) The principle of non-encroachment which may call for modification of the primary equitable delimitation is compatible with the approximate equality of seaward extension of sovereign rights which is in effect being maintained by means of such modification: the *raison d'être* of the modification is to avoid tendencies to enclaving and encroachment.

(h) The Libyan invocation of proportionality on the basis of the ratio of the lengths of coasts in the wrong geographical context produces the very type of encroachment and geographical imbalance which equitable principles are designed to avoid.

(i) The Libyan claims are unrelated to existing patterns of the practice of States and ignore the political realities of coastal relationships in semi-enclosed seas such as the Baltic, the Mediterranean and the Gulf.

(j) The geographical circumstances which produce the framework within which delimitation takes place consist of the arrangement of real coasts. The location and shape of such coasts, as they actually abut upon the areas of shelf in dispute, are significant in generating shelf rights, and "length" of coasts is only relevant *in so far as it is only one element in the number of elements which constitute the configuration of the Parties' coasts.* As a consequence, even if Malta had a larger extent and a longer coastline, the result in terms of seaward extension of jurisdiction over the shelf areas in dispute would remain unaffected.

PART V

THE RÔLE OF PROPORTIONALITY: LIBYAN MISREPRESENTATIONS CORRECTED

CHAPTER XII

LIBYA'S MISREPRESENTATION OF MALTA'S POSITION CONCERNING THE RÔLE OF PROPORTIONALITY

201. The treatment of the issue of proportionality in the Libyan Counter-Memorial is characterised by persistent failure accurately to represent Malta's position concerning the rôle of proportionality. Thus the assertion is made that "the rejection of proportionality is crucial to the Maltese case",[1] and it is suggested that Malta has attempted "to discredit" proportionality.[2] These statements are incorrect and Malta's views on the subject are given clear expression in its Counter-Memorial.[3] The Maltese view is that proportionality *in the particular mode of the use of the ratio of the lengths of coastlines* is inapplicable in the circumstances of the present case. On the other hand, proportionality remains as a criterion for evaluating the equities of certain geographical situations. Certainly it has no *a priori* rôle in delimitation cases and the nature of its rôle must depend on the circumstances of each case.[4]

202. A further stage of Libyan misrepresentation of Malta's views takes the form of assertions that Malta's use of a trapezium figure as a method of expounding the relationships of the coasts of the Parties is "another form of proportionality test".[5] Such assertions have no basis. It is certainly true that the trapezium figure may assist in assessing the equitable nature of a delimitation based upon equidistance but it cannot be said that any means of assessing the appropriateness of a method of delimitation is *ex hypothesi* a form of "proportionality test".

203. In Malta's Counter-Memorial[6] the trapezium figure is used again to show that the median line satisfies the general test of equity in the present case. After all is said and done the figure is a simple representation of coastal relationships and the function of distance. It shows how the effect of the equidistance method is always to reflect the *equal* seaward reach of jurisdiction from the coasts of the two opposite States, whatever the distance between them.

[1] Libyan Counter-Memorial, p. 142, para. 6.10.
[2] *Ibid.*, pp. 142–146, *passim*.
[3] Part III, Chapter IV, pp. 98–123.
[4] *Ibid.*, pp. 105–107, paras. 237–242.
[5] Libyan Counter-Memorial, pp. 149–150, paras. 6.33–6.37; pp. 162–164, paras. 7.33–7.39.
[6] Pp. 107–108, paras. 244-245 (and Figure 5 at p. 109).

204. Yet another misrepresentation of Malta's views occurs in the Libyan Counter-Memorial, when it is suggested that Malta considers that coastal length is irrelevant *tout court*.[1] This suggestion is very surprising, since the trapezium figure shows exactly how the equidistance line relates both to seaward or distance relationships and to the west to east extension of coasts.

205. In general the Libyan Counter-Memorial makes very heavy weather of the trapezium. Essentially the figure shows geographical relationships. Its sides consist of lines drawn so as to encompass those submarine areas *lying off one or other of the coasts of two opposite States*, one with a short and one with a long coast. An equidistance line is included and the result of this simple demonstration was given a name for reference purposes. The trapezium reflects geographical realities in the most straightforward fashion.

206. In seeking to attack the trapezium figure, the Libyan Counter-Memorial adopts a variety of tactics which are based upon irrelevance and illogicality. These tactics are examplified by the assertion that, within the trapezium, Malta's share of the shelf is "determined by the length of the Libyan coast, not Malta's own coast".[2] This is, of course, nonsensical. The length of the median line is governed by the lengths of *both* coasts and also by the distance between them. The diagram (21) (Figure 5) provided in the Maltese Counter-Memorial[3] illustrates the interaction of the various factors. Indeed, the proposition that Malta's share is determined by one coast – the Libyan – is contradicted elsewhere in the Libyan Counter-Memorial,[4] where it is stated that "under most normal circumstances the length of any median line is directly dependent on the length of the two coasts controlling it".

207. Another Libyan criticism of the trapezium is that "the exercise has nothing to do with the actual coastlines of the Parties".[5] This assertion is not logically compelling, for the trapezium is based, in two of its three critical elements, precisely upon the coasts of the opposite States. It simply will not do to say that the short coast of Malta is "largely irrelevant to the exercise".[6] Nor is there justification for the complaint that "as to the long, Libyan coast, no explanation is offered by Malta to show why this enormous length of coast is relevant to this delimitation".[7] There is a certain difficulty in explaining what may seem obvious. The coasts included were those which were in legal and geographical terms "opposite". In the language of the Judgment of the Court in the *Tunisia–Libya* case "the area in dispute, where one claim

[1] Libyan Counter-Memorial, pp. 142–143, paras. 6.10–6.15.
[2] *Ibid.*, p. 163, para. 7.37; and see also para. 7.38.
[3] At p. 109.
[4] Libyan Counter-Memorial, p. 143, para. 6.15.
[5] *Ibid.*, p. 163, para. 7.39.
[6] *Ibid.*
[7] *Ibid.*, (at p. 164).

encroaches on the other, is that part of this whole area which can be considered as lying both off the Libyan coast and off the Tunisian coast".[1] There is no mystery to be explained in this respect.

[1] *I.C.J. Reports*, 1982, p. 61, para. 74. See also the *Anglo–French Arbitration*, Decision of 30 June 1977, para. 100.

CHAPTER XIII

THE LEGAL FRAMEWORK

1. A Libyan Position Based on Fundamental Error

208. The Libyan use of the factor of proportionality as disclosed in the Counter-Memorial continues to be deeply flawed and incompatible with legal principle. Libya relies upon a particular version of proportionality as the dogmatic basis for what is in effect a delimitation. This delimitation stems directly from proportionality and thus, contrary to legal principle, this factor is invoked to provide an independent source of rights to areas of continental shelf, rather than "as a criterion or factor relevant in evaluating the equities of certain geographical situations".[1]

209. In the second place the Libyan use of proportionality disregards that part of the legal framework of delimitation which consists of the principles which determine the basis of the entitlement of the coastal State to adjacent submarine areas. The Libyan claim to submarine areas as close as fifteen miles to the coasts of Malta contradicts the legal basis of title to continental shelf as explained in the jurisprudence of the Court.[2]

2. The Length of Coasts Treated as an Abstraction

210. The focus upon the *length* of coasts as an abstract value or factor in the Libyan argument is deeply flawed by conceptual error. In Part IV, Chapter XI of this Reply, Malta has examined the significance of lengths of coasts in a careful perspective of law and policy. In Libyan methodology the issue of coastal relationships – in other words, the geographical circumstances of the case – is reduced to the question of lengths of coasts, and the issue of what is an equitable result is reduced to a single operation involving a certain type of proportionality test. In this way the question of what is equitable is transposed to the formula based on the differences of lengths of coasts. The real geographical framework of the case is disregarded, and the factor of proportionality is not properly related to, but takes precedence over, the application of the ensemble of equitable principles and relevant circumstances.

[1] *Anglo–French Arbitration*, Decision of 30 June 1977, para. 101.
[2] See para. 154–158 above.

3. Proportionality in the Libyan Mode Causes Inequity

211. In Part IV of the Reply, Malta has already had occasion to point out that the principal basis for seeking an equitable solution is the actual geographical framework and, within this framework, the "balance of geographical circumstances".[1] This balance has no connection with proportionality as an independent factor, but is a reflection of the geographical framework. The idea behind the concept of balance is an approximate equality and not an exercise in geopolitical "distributive justice". What is aimed at is the avoidance of a monopoly or a preponderance in relation to the area in dispute as causes of inequity. At the same time, States are presumed to have a dominant interest in *adjacent* submarine areas and an equality of seaward reach of jurisdiction.

212. In the circumstances of the present case the Libyan claim would establish a very marked preponderance in favour of one State in submarine areas adjacent to the coasts of the other State. The Libyan approach involves the use of a proportionality argument not in order to avoid but in order to produce preponderance and inequity. The absurd result, which is out of line with the practice of States in comparable situations in the Gulf and elsewhere, is a consequence in part of using a proportionality principle as an independent source of rights and in part of using a form of "proportionality test" which is inappropriate to the case of opposite coasts.

4. The Importance of the Relationship of Coasts

213. In the evaluation of the balance of geographical circumstances, the length of the respective coasts is but one of the various geographical circumstances relevant to the delimitation and it is the *relationship* of coasts which is all-important. There is no evidence to support the view that as a matter of principle an island State opposite a long coast State in a semi-enclosed sea is placed under a legal disability in the context of delimitation of shelf areas: and there is no evidence that the existence of such a disability is contingent upon the presence or absence of an equality of length of coastlines. These issues have been examined more fully in Part IV, Chapter XI of this Reply, where, *inter alia*, it is shown that the Libyan position is strongly rebutted by the practice of States.

5. The Libyan Version of Proportionality is Inapplicable Even in Cases of Adjacent Coasts

214. The essence of the Libyan argument as presented in the Counter-Memorial consists of the following elements: –

(a) The test of proportionality appropriate in all cases is based upon the ratio of the difference between coastal lengths.

[1] See paras. 167-170 above.

(b) There is no difference between "opposite" and "adjacent" States in this connection.[1]

(c) Consequently, even if the "opposite" relationship of coasts in the present case is to be accepted, the "ratio of coastal lengths" approach is applicable as between Malta and Libya.

(d) Proportionality is a direct source of rights and a direct method of delimitation, and not merely a corrective to be applied after other conditions are fulfilled.

215. The unsoundness of these positions has been demonstrated already in this Reply and the present purpose is to point out that, even in situations of "adjacent" coasts, the test of proportionality is not applicable *in the form which Libya has adopted in the present case.* The following examples of cases of "adjacency" are fairly representative of the type of problem which occurs in practice.

(32) (i) *Adjacent States on a Regular Coast* (Diagram A)

216. The balance of geographical circumstances in such a case is obvious and the equitable result must consist either of an equidistance line or of a perpendicular. There is no room for referring to the ratio of lengths of coasts.

(ii) *Converging Coasts in a Gulf With a Land Boundary Terminus at*
(32) *the Apex* (Diagram B)

217. The permutation of geographical circumstances presented in this context is best described as involving adjacent coasts within the vicinity of the terminus of the land boundary which become predominantly opposite away from the apex of the gulf. There can be no question about the appropriateness of equidistance in such circumstances as the normal basis for a delimitation which reflects the balance of geographical circumstances. The practice of States establishes the recognition of equidistance as the equitable result in such cases.[2] There is no basis for invoking a "proportionality" test based upon the ratio of lengths of coasts.

(iii) *Laterally Related Coasts Abutting on a Shelf Extending Seawards*
(33) *from the Coasts* (Diagram C)

218. In the *Anglo–French Continental Shelf Arbitration* the Court of Arbitration took some care in examining the relationship of the coasts of the United Kingdom and France in the Atlantic region.[3] Whilst the Court stressed that the fixing of the "precise legal classification of the

[1] See, in particular, the Libyan Counter-Memorial, pp. 144–145, paras. 6.17–6.24.

[2] See the following examples: Argentina–Uruguay, *Limits in the Seas*, No. 64; Finland-Sweden, *ibid.*, Nos. 16 and 56.

[3] Decision of 30 June 1977, paras. 233, 241–242.

Atlantic region" appeared to be "of little importance", emphasis was placed upon the particular characteristics of the relationship. Thus the Court accepted that "beyond the point where the coasts are geographically opposite each other, the legal situation changes to one analogous to that of adjacent States". In its conclusion on the question the Court observed:

> "What is important is that, in appreciating the appropriateness of the equidistance method as a means of effecting a 'just' or 'equitable' delimitation in the Atlantic region, the Court must have regard both to the lateral relation of the two coasts as they abut upon the continental shelf of the region and to the great extent seawards that this shelf extends from those coasts".[1]

219. In the Atlantic region the Court applied the equidistance method as the basis of an equitable solution which reflected the balance of the geographical features of the region. The question of the effect to be given to Ushant and the Scilly Isles was seen in terms of the *modification* of the equidistance method rather than its "total rejection".[2] The framework of the process of delimitation was thus the equidistant line between the laterally related coasts. The Court stated the issue within this framework:

> "The problem therefore is, without disregarding Ushant and the Scillies, to find a method of remedying in an appropriate measure the distorting effect on the course of the boundary of the more westerly position of the Scillies and the disproportion which it produces in the areas of continental shelf accruing to the French Republic and the United Kingdom".[3]

220. What is striking about the Court's whole approach to the issue of "distortion" is that the object of the exercise was *to maintain the appropriate seaward extension of both the United Kingdom and French coasts.* The problem had *no relation to the lengths of coasts.* Thus, when the Court adverts to "the element of 'proportionality'",[4] this was considered within the context of the abatement of the "distorting effects" of the Scillies *on the equidistance line.*[5] The equidistance line represented equity as between the mainlands of France and the United Kingdom: and therefore the issue of distortion was one of maintaining the normal seaward reach of the mainlands as far as possible. The issue of "distortion" was equated to the element of proportionality.[6]

221. In describing the rôle of equity the Court of Arbitration observed:

> "The appropriate method, in the opinion of the Court, is to take

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[1] *Ibid.*, para. 242.
[2] *Ibid.*, para. 249; and see also para. 251.
[3] *Ibid.*, para. 248.
[4] *Ibid.*, para. 250.
[5] *Ibid.*, paras. 249–251 *passim.*
[6] *Ibid.*, paras. 248–250 *passim.*

account of the Scilly Isles as part of the coastline of the United Kingdom but to give them less than their full effect in applying the equidistance method. Just as it is not the function of equity in the delimitation of the continental shelf completely to refashion geography, so it is also not the function of equity to create a situation of complete equity where nature and geography have established an inequity. Equity does not, therefore, call for coasts, the relation of which to the continental shelf is not equal, to be treated as having completely equal effects. What equity calls for is an appropriate abatement of the disproportionate effects of a considerable projection on to the Atlantic continental shelf of a somewhat attenuated portion of the coast of the United Kingdom."

"250. The abatement of these disproportionate effects, as previously indicated in paragraph 27, does not entail any nice calculations of proportionality in regard to the total areas of continental shelf accruing to the Parties in the Atlantic region. This is because, as pointed out in paragraphs 99–101, the element of 'proportionality' in the delimitation of the continental shelf does not relate to the total partition of the area of shelf among the coastal States concerned, its rôle being rather that of a criterion to assess the distorting effects of particular geographical features and the extent of the resulting inequity".[1]

222. In the *Anglo–French Continental Shelf Arbitration* the Court applied the factor of proportionality in a manner which completely contradicts the *modus operandi* now sponsored by Libya. As already pointed out the approach of the Court is based on a concept of "distortion" which involves adjustment *with the precise object of maintaining an equality of seaward reach of the mainlands of the two States.* The abatement which was called for and effected took place within a legal framework which excluded a "total partition" of the area of shelf. The lengths of coastlines were not relevant, and proportionality was invoked in a form which maintained a balance between the coasts concerned. In the present case Libya is seeking to use proportionality as a means of establishing a preponderance of seaward control over the submarine areas which divide the Parties.

(34) (iv) *Three Adjacent States on a Concave Coast* (Diagram D)

223. The facts of the *North Sea Continental Shelf* cases involved a situation in which three States were adjacent on a concave coast, and where, but for the concavity of the German coast, the three States have been given broadly equal treatment by nature.[2] The Court set aside the equidistance method precisely because, in the circumstances of the cases with which the Court was concerned, equidistance would produce an

[1] *Ibid.*, paras. 249–250.
[2] *I.C.J. Reports*, 1969, p. 49, para. 91.

encroachment by the natural prolongation of the territory of one State upon that of the territory of another State.[1]

224. It is well-known that the Judgment in its *Dispositif* includes in the "factors" which are to be taken into account:

> "the element of a reasonable degree of proportionality, which a delimitation carried out in accordance with equitable principles ought to bring about between the extent of the continental shelf areas appertaining to the coastal State and the length of its coast measured in the general direction of the coastline, account being taken for this purpose of the effects, actual or prospective, of any other continental shelf delimitations between adjacent States in the same region".[2]

225. The *North Sea* cases are of considerable interest, for here was a geographical situation in which the Court invoked proportionality in a form apparently similar to the version invoked by Libya in the present case, and yet there are considerable points of distinction to be noted. In the first place, the geographical situations are totally different. Secondly, the Libyan mode of proportionality is different in substance. In the *North Sea* cases proportionality had a low normative status as a "factor to be taken into account" and was not classified in the *Dispositif* as one of the "principles and rules" applicable to the delimitation. In the present case Libya invokes proportionality as an independent and primary source of rights.

226. The major point of interest for present purposes lies in the fact that the reasons which moved the Court to set aside equidistance in the *North Sea* cases are fundamentally incompatible with the arguments advanced by Libya in the present dispute. The Court was using the legal idiom of natural prolongation to express a certain practical view. The principle of non-encroachment – which appears in the *Dispositif* as the primary "rule or principle" – involved recognition of the equality of seaward reach of coastal States and is based upon the concept of natural prolongation as the basis of title to adjacent shelf areas. The reasoning of the Court favours maintaining in substance the equal significance of coasts and the reference to proportionality in the Judgment is to be understood in this context.

227. The reasoning and philosophy of the Judgment in the *North Sea* cases is therefore inimical to the Libyan claim in the present case. The Court explains with great care that the intention was not to refashion nature but to reduce inequity "in a theoretical situation of equality within the same order". No major reordering of shares of shelf was envisaged.[3]

228. The Judgment in the *North Sea* cases contradicts the Libyan argument based upon proportionality precisely because it prefers

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[1] *Ibid.*, p. 31, para. 44; p. 46, para. 84; p. 49, para. 91. See also the *Anglo–French Arbitration*, Decision of 30 June 1977, para. 99.

[2] *I.C.J. Reports*, 1969, p. 54, D(3).

[3] *Ibid.*, p. 49, para. 91.

equity, whilst the Libyan position seeks to establish inequality and a preponderance of legal influence for the coasts of one State. The justification for this view of the reasoning in the *North Sea* cases can be found in the subsequent practice of the Parties to those cases. The delimitations which were negotiated by the German Federal Republic[1] on the basis of the principles laid down by the Court indicate that *even in a situation of adjacent States on a concave coast* the effect of the element of proportionality was marginal rather than radical: and this was the result even "in a theoretical situation of equality within the same order". In the geographical circumstances of the present case no such equality within the same order can be said to exist.

(v) *Adjacent States with Converging Coasts in an Asymmetrical Gulf with a Land Boundary Terminus Located at one Side of the Gulf* (Diagram E)

(35)

229. The geographical circumstances envisaged here are of the type presented in the *Tunisia–Libya* case. It will be recalled that in this case the Court applied "the test of proportionality as an aspect of equity".[2] However, the approach of the Court was very different from the Libyan *modus operandi* presented in the pleadings in this case. In the *Tunisia–Libya* case the geographical circumstances were quite unlike those of the present dispute, and this difference is so marked that caution is called for in making reference to that decision. Nonetheless the general approach of the Court to the "test" of proportionality can be safely compared to that of Libya in the present case, and such a comparison discloses a critical difference. The Court used proportionality as a "test" in relation to a delimitation which had already been constituted in accordance with various relevant circumstances and, in particular, "the general configuration of the coasts of the parties", "the marked change in direction of the Tunisian coastline between Ras Ajdir and Ras Kaboudia", "the existence and position of the Kerkennah Islands", "the land frontier, and the conduct of the parties".[3]

230. A further difference in approach consists in the fact that the Court did not employ proportionality as an independent source of rights, as Libya now seeks to do. The Court stated emphatically that "the coast of the territory of the State is the decisive factor for title to submarine areas adjacent to it".[4] The primary objects of the Court's approach to delimitation were to avoid any undue encroachment in respect of shelf areas adjacent to the Libyan coast as a result of changes in the configuration of the Tunisian coast,[5] and to give proper weight to the conduct of the parties and the *de facto* maritime limit. In

[1] See the U.S. Department of State, Bureau of Intelligence and Research, *Limits in the Seas*, No. 10 (Revised), at pp. 16–22.

[2] *I.C.J. Reports*, 1982, p. 91, paras. 130–131; p. 93, B(5).

[3] *Ibid.*, pp. 82–89, paras. 114–129; p. 93, B(1), (2), (3) and (4).

[4] *Ibid.*, p. 61, para. 73.

[5] *Ibid.*, pp. 86–89, paras. 122–129.

contrast, the Libyan position in the present case involves using proportionality not as a test of inequity of a primary delimitation which has been designed on grounds other than proportionality in order to avoid encroachment, but as the primary basis for a delimitation which is characterised by a major inequality of seaward extension and a massive encroachment on submarine areas adjacent to the coasts of Malta.

6. MALTA'S POSITION IS COMPATIBLE WITH THE FRAMEWORK OF LEGAL PRINCIPLE

231. The factor of proportionality is applicable within a framework of legal principle of which the key elements are as follows:

(*a*) The delimitation to be effected must reflect the legal basis of title, which is the coast of the territory of the State and the geographic correlation between coast and submerged areas off the coast.
(*b*) In consequence, the concepts of adjacency and distance, which are correlatives of the legal basis of title, justify an equality of seaward extension of sovereign rights in respect of coasts abutting upon the submarine areas in dispute.
(*c*) The criterion or factor of proportionality is a general test of the equity of a delimitation effected on other bases and is not an independent source of rights.
(*d*) The geographical circumstances as a whole form the primary guide to an equitable result.
(*e*) The actual relationship of coasts and not coastal lengths in the abstract are to be taken into account.
(*f*) In the case of opposite coasts the presumption of the equality of seaward extension of sovereign rights is at least as strong as in other geographical situations.
(*g*) Even when some adjustment or modification of the primary boundary indicated by the balance of geographical circumstances is justified in principle, such adjustment cannot be so radical in result as to create a preponderance of influence for the coasts of one State in the area in dispute.

232. The Libyan arguments relating to proportionality are based on fundamental misconceptions of principle and thus disregard the elements of the legal framework set forth above. The eccentricity of the Libyan position is demonstrated by reference to the practice of States which reveals that (in terms of seaward reach) short coast States suffer no legal disability as against long coast States in the context of delimitation.[1] A clear illustration of this is provided by the delimitation between India and the Maldives established by agreement in 1976. According to The Geographer of the United States Department of State,

[1] For the practice of States generally see the Maltese Memorial, Chapter VII, sections 3–5; and Counter-Memorial, pp. 111–123, paras. 252–257. See also Annex 4 of this Reply.

"the boundary closely approximates an equidistant line".[1] This alignment thus gives equal weight to the continental landmass of southern India and the northern aspect of an elongated chain of atolls. The delimitation involves a "maritime boundary" which delimits "sovereign rights and exclusive jurisdiction over the continental shelf and the exclusive economic zone".[2] Similarly, the pattern of delimitation in the Gulf, involving Iran and States opposite, gives no support whatsoever to the Libyan thesis of the preponderant effects of long coasts.

233. In contrast to the arbitrary and extravagant claim of Libya, which is based directly upon proportionality, though not upon the legal conception of this factor, the position of Malta is entirely compatible with the key elements of the framework of legal principle set forth above. This compatibility with the legal framework is amply confirmed by the practice of States in comparable situations, and the importance of this confirmation is no doubt the reason for Libya's abhorrence of the relevant practice of States. The legal significance of this practice will be examined in Part VI of this Reply.

[1] *Limits in the Seas*, No. 78, p. 7; Maltese Memorial, pp. 62, 65–66.
[2] *Ibid.*, p. 3; Article IV.

PART VI

STATE PRACTICE: ITS RÔLE IN CONFIRMING THE VALIDITY OF MALTA'S POSITION

CHAPTER XIV

CRITICISM OF THE *MODUS OPERANDI* OF THE LIBYAN COUNTER-MEMORIAL

INTRODUCTION

234. In its written pleadings Malta has made appropriate reference to State practice. The substantial evidence thus submitted will, it is believed, be of assistance to the Court, more especially since the application of legal principles should be assessed in terms of available experience. The Libyan Memorial, it may be recalled, avoided any reference to State practice.[1] The Libyan Counter-Memorial has belatedly turned to the materials of State practice in seeking to refute Malta's arguments. The outcome is contradictory, since the Libyan Government at one and the same time asserts the irrelevance of practice *tout court* and contends that the practice does not support Malta's views on delimitation in the present case.

235. The *modus operandi* adopted in the Libyan Counter-Memorial combines several procedures. The first consists of misreporting the argument of Malta; the second takes the form of a generalized attempt to discount State practice; and the third procedure involves a substantial misinterpretation of the various delimitation agreements which form a part of the evidence of State practice. These procedures will be examined *seriatim* in this Chapter and the next. The Libyan misinterpretation of various delimitation agreements is also the subject of an expert opinion prepared by a leading authority on maritime boundary, Dr. J. R. V. Prescott. The opinion is submitted as Annex 4 of this Reply.

1. LIBYAN MISSTATEMENT OF MALTA'S ARGUMENTS

236. In the context of reference to State practice Libya once again insists that Malta contends that the "application of the equidistance method is a principle or rule of customary international law in the delimitation of the continental shelf".[2] This is not Malta's position. Malta considers that State practice "gives the strongest possible in-

[1] However, somewhat inconsistently the Libyan Memorial departs from this policy on three reasons. (See Maltese Counter-Memorial pp. 33–35).

[2] Libyan Counter-Memorial, p. 117, para. 5.49.

dication of the appropriateness – the equitable nature – of the method of equidistance in delimitation of the areas of continental shelf which appertain to Malta and Libya respectively";[1] and that this is Malta's view is acknowledged in the text of the Libyan Counter-Memorial.[2] The statement that in certain types of geographical situations the equidistance method constitutes an equitable solution is not equivalent to the statement that the method "is a principle or rule of customary international law".

237. In this and other contexts the Libyan argument assumes an artificial aspect. The fact that equidistance is not "obligatory" or "a rule of law" does not have the consequence that resort to the method of equidistance is *in no circumstances* equitable and legally appropriate. Malta does not seek to offer inflexible axioms which have no place in the contemporary law but to examine all the material which is relevant to the issue of what is an equitable solution in the present case. Of the material available State practice appears to be perhaps the most relevant.

2. The Libyan Attempt to Discount State Practice *tout court*

238. The written pleadings of Malta have, quite naturally, made reference to State practice relating to analogous geographical situations as a part of the evidence of the practical application of equitable principles in negotiated delimitation agreements concerning areas of continental shelf and exclusive economic zones. In contrast, the Libyan pleadings not only neglect the pertinent State practice, but also insist, in an artificial and doctrinaire way, that reference to State practice is inadmissible for a variety of reasons.

239. The Libyan fear of State practice involves no less than eight assertions which, both individually and by their number, demonstrate the existence of a tactical need to keep all practice out of the picture.

(i) *The Assertion that no Situations are Analogous*

240. In the first place there is the complaint that the situations offered as comparable in geographical terms by Malta are somehow not "analogous"[3] and therefore, in the Libyan view, not comparable. At the same time Libya is quite prepared to offer an examination of certain instances of State practice with the purpose of establishing that certain agreements have "key aspects" which are "unfavourable to Malta's case".[4] By so acting Libya clearly shows that even in situations which are not analogous a comparison is not only perfectly possible but also justified.

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[1] Maltese Memorial, para. 195; and see also paras. 109, 272.
[2] Libyan Counter-Memorial, pp. 118–119, paras. 5.50–5.52.
[3] *Ibid.*, p. 4, para. 9.
[4] *Ibid.*, p. 126, para. 5.68.

(ii) *The Assertion that Every Situation is "Geographically Unique"*

241. The Libyan Counter-Memorial goes as far as to assert that "if State practice demonstrates anything therefore, it is that each case has its own unique setting and own peculiar facts".[1] Whilst geographical circumstances are infinitely varied, this dogmatic denial of comparability is contradicted by the fact that States involved in disputes relating to maritime boundaries habitually invoke comparable situations in preparing their written and oral arguments for presentation to international tribunals. Such a denial of comparability ignores the dictates of common sense. If individual geographical situations can be assessed by tribunals for the purpose of achieving an equitable solution, then no doubt it must be possible to make comparisons in terms of the equity of different delimitations.

(iii) *The Assertion that State Practice Rarely Specifies All the Factors Taken into Consideration*

242. The Libyan Counter-Memorial states that State practice "must be viewed with some caution" because "State practice and particularly delimitation agreements, rarely specify all the factors considered by the parties in reaching the ultimate solution".[2] This observation is undeniable as a general observation but it lacks point. The transactions of states may be accompanied by a variety of motives, some of which will be political and some of which will relate to collateral benefits having no direct relation to the subject-matter. But to say so is banal. The legal significance of State practice cannot be discounted on such a basis. Provided there is an actual or presumed reference to legal criteria, the practice concerned will have evidential significance.

243. Whilst the Libyan assertion quoted above may be true of State practice in a general way (whether it concerns continental shelf delimitation or any other topic of general international law), it is contradicted by some recent examples of practice relating precisely to the continental shelf. Thus a number of agreements, such as the convention between Spain and Italy on 19 February 1974[3] and the agreement between Italy and Greece, signed on 24 May 1977,[4] expressly state that the criterion of equidistance is the basis of the delimitation. Moreover, the recent agreements between France and Mauritius,[5] and France and St. Lucia,[6] expressly state in their preambles that the application of the equidistance method constitutes an equitable system of delimitation.

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[1] *Ibid.*, pp. 134-135, para. 5.96; and see also p. 119, para. 5.52; and p. 124, para. 5.63.
[2] *Ibid.*, p. 120, para. 5.54.
[3] See Maltese Memorial, Annex 63.
[4] *Ibid.*, Annex 64.
[5] *Ibid.*, Annex 57.
[6] *Ibid.*, Annex 60.

(iv) *The Assertion that the Court in the North Sea Cases Ruled out the Use of State Practice*

244. The Libyan Counter-Memorial[1] invokes the Judgment of the Court in the *North Sea*[2] cases to the effect that a rule of customary law can only emerge on the basis of a "settled practice" accompanied by a sense of legal obligation. These statements of general principle relating to the formation of new rules of customary law are as such, of course, uncontroversial; and in the *North Sea* cases the Court was addressing itself to the specific argument whether the equidistance/special circumstances rule was *obligatory* in the context of general international law. No such proposition has been offered in the present case. Thus the assertion of the Libyan Counter-Memorial[3] that the evidence does not support the view that equidistance is "obligatory" or "automatic", involves nothing more than an assault on a target invented by Libya for its own forensic purposes.

(v) *The Assertion that State Practice is Inadmissible if it is "Unilateral"*

245. The Libyan view is that "unilaterally enacted legislation" does not count as State practice.[4] This assertion is surprising, since much State practice is by definition "unilateral". It is generally accepted that the evidence of the practice of States includes legislation: hence the value of the *United Nations Legislative Series*. Obviously the legislation by States is, inevitably, enacted "unilaterally"

(vi) *The Assertion that not Enough State Practice is Available*

246. The Libyan Counter-Memorial offers the further argument that the State practice is unreliable because "many delimitations remain to be established throughout the world".[5] The fact remains that a significant number of delimitation agreements have already been concluded with reference to situations which are geographically comparable, and these agreements, together with the pertinent national legislation, constitute a respectable body of evidence relating to the nature of an equitable result in the present case.[6]

(vii) *The Assertion that the Number of "Unresolved Shelf Boundaries is Eloquent Testimony against ... Equidistance"*[7]

247. This statement reveals a lack of understanding of the problems affecting boundary negotiations. In fact, it can be said with confidence

[1] Pp. 120–122, paras. 5.55–5.58.
[2] *I.C.J. Reports*, 1969, pp. 43–45, paras. 76–78.
[3] P. 121, paras. 5.56–5.58.
[4] Libyan Counter-Memorial, p. 123, para. 5.62.
[5] *Ibid.*, p. 135, para. 5.97.
[6] See also, in this respect, Annex 4.
[7] Libyan Counter-Memorial, p. 110, para. 5.28.

that whatever the number of unsettled boundaries this is no criticism of the validity of the equity of equidistance. There can be a variety of reasons why a boundary remains unresolved and Malta will here suggest only the most obvious ones.

First of all equidistance can only be applied when the basepoints to be used and their location have been agreed. This is a matter which is often the cause of lengthy discussions and delays.

Secondly, many boundaries remain undefined for reasons which have nothing to do with equidistance. For example:

(a) some countries, such as Australia and New Zealand, do not negotiate their common maritime boundaries because they do not consider it a matter of urgency; (b) other countries, especially those which have recently become independent have more pressing problems, domestic or otherwise, that take precedence; (c) some countries cannot at present enter into negotiations with a neighbour for political reasons, such as non-recognition or a difference in ideologies; (d) there are very few maritime boundaries around the African continent (except in the Mediterranean) that urge an early settlement, partly because most of these African countries either do not have important fishing grounds or important fishing fleets, and few have a realistic prospect of finding petroleum or natural gas on their very narrow continental shelves.

Thirdly there are, in several cases, disagreements on matters other than the method of delimitation which prevent the boundaries from being delimited. Such are for example: (a) disagreements over ownership of territory, whether islands or sections of mainland; and (b) disagreements as to the interpretation of boundary agreements concluded prior to independence. The former disagreements explain unsettled boundaries between Venezuela and Guyana, Argentina and Chile, France and Vanuatu and in certain areas of the South China Sea. Problems of the second kind face Canada and the U.S.A.; U.S.A. and the Soviet Union; the Philippines and Indonesia; China and Vietnam, to mention but a few.

(viii) *The Assertion that Malta has Relied on "Selective" State Practice*

248. The Libyan Counter-Memorial accuses Malta of relying on State practice of a "selective nature"[1] and refers to some agreements which "Malta has elected to ignore."[2] Malta's first reply to this criticism is that Libya conveniently forgets here its previous contention[3] that no two situations are analogous, and consequently none are comparable. Malta of course does not consider that *all* situations are analogous and, therefore, in invoking delimitations to support its submissions it must choose agreements in comparable situations. In other words it *necessarily* has to be selective. At the same time Malta is

[1] *Ibid.*, p. 132, para. 5.87.
[2] *Ibid.*, p. 132, para. 5.88.
[3] See para. 239 above.

confident that it has produced evidence, both in its Memorial[1] and in its Counter-Memorial[2], which demonstrates that, as a general and persistent pattern, State practice in *analogous situations* indicates that the equidistance method gives an equitable solution.

249. As to Malta's "omissions", Malta does not deny that there may be a small minority of agreements which do not coincide with its views of equity in the present case. What is difficult to understand is why it is thought by Libya that the existence of this small minority subverts the general pattern of delimitations invoked by Malta. On this aspect of Libya's argument Malta would make one final observation. The delimitations introduced by Libya as examples supposedly "ignored" by Malta *give no support to Libya's position in the present case.*[3]

3. Conclusion: The Extraordinary Character of the Libyan Attack on State Practice

250. The Libyan position is that State practice is inadmissible *tout court*, as evidence on the issue of what would constitute an equitable solution in the present case and, consequently, in respect of all issues concerning delimitation of areas of continental shelf. Apparently State practice is admissible only for the negative purpose of establishing the proposition that:

> "If State practice demonstrates anything therefore, it is that each case has its own unique setting and its own peculiar facts. As the former Geographer to the United States Department of State has observed, 'every maritime boundary situation is geographically unique'. Consequently, States have resorted to a wide variety of solutions to ensure that they reach a satisfactory result in each particular case."[4]

251. This conclusion to the pertinent chapter of the Libyan Counter-Memorial is exceptional to a degree. The law relating to the continental shelf has its roots in customary law and, in the law of treaty interpretation, the subsequent practice of the parties has a significant role. Moreover, in various parts of international law bilateral agreements are commonly recognized as evidence of the mode of application of the relevant international standard, for example, in relation to the use of international rivers or to the treatment of aliens and their property. According to Libya, the law relating to delimitation of continental shelf areas forms an enclave, an area of juridical eccentricity, in these matters.

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[1] Pp. 61–96, paras. 185–194.
[2] Pp. 111–123, paras. 252–256; pp. 133–134; paras. 274–275.
[3] See also Annex 4.
[4] Libyan Counter-Memorial, pp. 134–135, para. 5.96.

CHAPTER XV

THE SO-CALLED "TRENDS AWAY FROM EQUIDISTANCE" AND STATE PRACTICE

1. The Libyan Contention

252. The Libyan Counter-Memorial misstates the position of Malta when it asserts that Malta presents the equidistance method as "a principle or rule of law"; and this failure to state Malta's arguments accurately has already been the subject of comment in previous Chapters of this Reply. The failure to reflect Malta's argument concerning equidistance is closely related to two other tactics adopted in the Libyan Counter-Memorial. The first is the insistence on "the progressive disappearance of any distinction between 'opposite' and 'adjacent' States". Malta has subjected this thesis to critical analysis and has affirmed the continuing significance of the distinction.[1] The second tactic takes the form of a thesis that since 1969 there have been "clear trends away from equidistance manifested in the jurisprudence, in delimitation agreements between States, and in the deliberations of the Third Conference on the Law of the Sea."[2] Malta has already rejected this thesis with particular reference to the jurisprudence and to the Third Conference on the Law of the Sea.[3]

253. In the present Chapter it remains to examine the evidence offered by Libya for the view that the State practice in the form of delimitation agreements supports the thesis of the "trends away from equidistance."[4] It may be observed in passing that the Libyan argument does not hesitate to invoke State practice when it is supposed to give substance to a view espoused by Libya.[5]

2. The Errors in the Libyan Assessment of State Practice

254. The errors in the Libyan assessment of State practice will be examined here broadly in terms of types or categories. A more systematic commentary upon the Libyan assessment of individual de-

[1] See paras. 120–122 above.
[2] Libyan Counter-Memorial, pp. 102–112, paras. 5.01–5.33.
[3] See above Chapter VI, Part II, paras. 102–106.
[4] Libyan Counter-Memorial, pp. 104–110, paras. 5.10–5.28.
[5] See fn. 1 to para. 234 above.

limitation agreements, with particular reference to the "Comments" contained in the Annex of Delimitation Agreements appended to the Libyan Counter-Memorial, will be found in the expert opinion of Dr. J. R. V. Prescott annexed to this Reply.[1]

(a) *Irrelevant Statements*

255. In the first place the treatment of State practice in the Libyan Counter-Memorial involves a number of completely irrelevant statements. Two examples may be given. Thus the Truman Proclamation of 1945 is invoked to show that it "made no reference to equidistance as the basis for delimitation with neighbouring States."[2] This observation cannot carry much weight, since it is well known that the law relating to the continental shelf was just emerging in 1945. In any case it cannot be assumed that the reference to resort to agreement in accordance with "equitable principles" in the Truman Proclamation is inimical to the role of equidistance. So much so that the United States have agreed to several maritime boundaries on the basis of equidistance.[3] Secondly, the Libyan argument invokes the Judgment in the *North Sea* cases to support the proposition that "there was no rule of customary international law requiring the use of equidistance."[4] As so often in the Libyan pleading the assertion is beside the point. Malta has not contended that equidistance is a mandatory rule; moreover, in point of fact, the Judgment in the *North Sea* cases allowed a significant role to the equidistance method.

(b) *The Statement that Many Agreements do not Specify the Method upon which Delimitation was Based*

256. The Introduction to the Annex of Delimitation Agreements which accompanies the Libyan Counter-Memorial places emphasis upon the fact that "textually, a large number of agreements do not specify the precise method upon which the delimitation was based."[5] To the limited extent that this may be true, there is no reason to believe that an agreement is thus deprived of evidential significance. There are a number of uncomplicated ways in which the elements of equidistance can be detected in a delimitation[6] and it is not the practice of commentators to exclude the evidence of agreements on the basis that they contain no express declaration of the method of delimitation adopted. Not even the Libyan Counter-Memorial observes this "pro-

[1] Annex 4
[2] Libyan Counter-Memorial, p. 105, para. 5.12.
[3] See e.g., U.S.A.–Mexico, U.S.A.–Cuba, U.S.A.–Venezuela and U.S.A.–New Zealand Agreements.
[4] *Ibid.*, pp. 105–106, para. 5.14.
[5] P. 2, para. 8.
[6] See Annex 4.

hibition" when it finds it convenient to invoke agreements in support of a Libyan argument. A perusal of the series published by The Geographer of the United States Department of State, *Limits in the Seas*, reveals that successive holders of that appointment have found no difficulty in analysing the basis of delimitations with the assistance of normal techniques.

(c) *Persistent Under-Estimation of the Incidence of the Equidistance Method in Delimitation Agreements*

257. On a significant number of occasions the Libyan Counter-Memorial, both in the principal text and in the Annex of Delimitation Agreements, produces a considerable under-estimate of the incidence of the equidistance method in such delimitation agreements. This is a persistent feature of the Libyan pleading, and the examples of this under-estimate of equidistance are chronicled systematically in Dr. J. R. V. Prescott's opinion.[1]

258. The under-estimation generally takes the form of pointing out that certain segments of a delimitation are not based on equidistance, even though in fact the line is substantially the result of applying the equidistance method. This approach is to be seen – for example – in the comments on the delimitations between Bahrain and Saudi Arabia and between Iran and Oman.[2] A further tactic is to refer to adjustments due to the presence of islands as though such adjustments involve a legally significant divergence from equidistance when in fact they do not: see, for example, the treatment of the delimitations between Italy and Yugoslavia, between Iran and Saudi Arabia, and between Cuba and the United States.[3]

259. It would be tedious to explore every fault in the parts of the Libyan Counter-Memorial dealing with State practice, and one further example will suffice. Malta is taken to task for having invoked the delimitation between the Maldives and India and for having ignored "key aspects" of the agreement "which are unfavourable to Malta's case."[4] The substance of the Libyan complaint is that "most of the delimitation line was governed on the Indian side not by its mainland coast, but by the tiny island of Minicoy lying well out to sea." The fact remains that *that part of the delimitation which is governed by the Indian mainland clearly gives equal effect to the Maldives and to the Indian mainland.* The reference to the sector governed "by the tiny island of Minicoy" can hardly support Libya's case. In the first place, the island of Minicoy, so far from the Indian mainland, is clearly accepted as the controlling coast and not the mainland. Secondly, if Minicoy is given equal weight *as against the Maldives*, how does this support the Libyan position?

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[1] Annex 4.
[2] Libyan Counter-Memorial, Annex of Delimitation Agreements Annexes 5 and 40.
[3] *Ibid.*, Annexes 14, 17 and 53.
[4] Libyan Counter-Memorial, p. 126, para. 5.68.

(d) *An Unwarranted Emphasis on the Fact that an Alignment was "Negotiated"*

260. Both in the Introduction to the Annex of Delimitation Agreements[1] and in comments on specific delimitations, the Libyan Counter-Memorial places emphasis on the fact that a line was "negotiated", apparently on the supposition that this obvious truth weakens the significance of reliance upon the equidistance method in the particular agreement. This supposition flies in the face of ordinary logic. The element of equidistance, with or without adjustment on the basis of considerations of legal principle or political bargain, will be evident and legally significant *if it was the result of the negotiation*, as it clearly was in a considerable number of instances.

261. Two examples of this attempt by Libya to diminish the significance of a delimitation on the ground that it was "negotiated" will suffice to indicate the air of unreality which surrounds this tactic. The agreement between Mexico and the United States is undoubtedly based upon equidistance, and this in both sectors, and yet the "Comments" in the Libyan Annex describe the alignment as "a negotiated boundary".[2] Similarly, the delimitation between Cuba and the United States is described in the Annex simply as "a boundary every turning point of which has been established by negotiation."[3] In fact, the establishment of the boundary involved the use of a median line and this fact is attested in an article published by an official of the Office of the Geographer of the United States Department of State.[4]

(e) *The Fact that States Sometimes Use other Methods of Delimitation*

262. A further tactic adopted in the Libyan Counter-Memorial is to stress the fact that "there is no one method of delimitation that States have felt compelled to use in every situation."[5] This is another variant of the persistent assertion that Malta has advanced equidistance as a "mandatory" or "obligatory" rule. This is not Malta's position and it goes without saying that in certain circumstances the equidistance method will not produce an equitable solution, and, in consequence, some other method of delimitation will be employed. The fact, however, remains that what State practice shows is that these cases are few in number and in the large majority of cases the delimitation was based on equidistance.

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[1] *Ibid.*, Vol. II, p. 2, para. 9.

[2] *Ibid.*, Annex 23.

[3] *Ibid.*, Annex 53.

[4] R. W. Smith, 1981, Maritime Boundaries of the United States *Geographical Review*, Vol. 17, p. 402. See also Annex 4.

[5] Annex of Delimitation Agreements, Introduction, p. 3, para. 12. See also the Libyan Counter-Memorial, pp. 104–110, paras. 5.10–5.27, *passim*.

(f) *Conclusion: The Libyan Thesis of the "Trends Away From Equidistance" is False*

263. The errors in the Libyan assessment of the State practice for the purpose of establishing the thesis of the "trends away from equidistance" are so persistent and so egregious that the results of the assessment are evidently unreliable.

264. The Libyan assessment is also incorrect, and the principal indicator of the falsity of the Libyan thesis is, quite simply, the general pattern of agreements relating to the delimitation of continental shelf areas. In the Annex which accompanies Malta's Reply[1] delimitation practice is subjected to careful analysis and the incidence of the equidistance method, especially in the case of opposite States, is seen to be very marked. Thus out of fifty agreements involving opposite States, only six were not based either in whole or in part on the equidistance method. Moreover, in respect of all delimitation agreements concluded after 1969, only nine, out of a total of fifty four delimitations were not based either in whole or in part on the equidistance method.[2]

[1] Annex 4.
[2] See Annex 4.

CHAPTER XVI

THE LEGAL SIGNIFICANCE OF STATE PRACTICE IN CONFIRMING THE EQUITY OF THE EQUIDISTANCE METHOD

1. General Recognition of the Significance of State Practice

265. What may be described quite properly, as the Libyan fear of State practice, has resulted in the adoption of a position which contradicts normal practice in the handling of the materials of international law. Libya is presumably well aware of the general tendency for State practice to be referred to, more or less extensively, in the written pleadings presented to international tribunals in the recent past.[1] It is piquant to notice that in the *Tunisia–Libya Case* the Libyan Memorial did not hesitate to invoke State practice,[2] and indeed, in the present proceedings the Libyan Memorial has relied upon State practice in three separate contexts.[3] Recent contributions to the literature routinely examine the relevant practice on questions of continental shelf delimitation.[4] The substantial study entitled "Maritime Boundary" presented by Dr. Jagota, in a course of lectures delivered at The Hague Academy in 1981,[5] is largely founded on an extensive reference to State practice.

266. In the present stage of the evolution of the law relating to maritime delimitation, the evidence of State practice has particular value. In combination with the developing jurisprudence of international tribunals the growing stock of delimitation agreements constitutes an objectively very powerful indication of what is deemed to be equitable in a variety of geographical situations. It goes without saying that such application of equitable principles must be "examined within the context of customary law and State practice" as in the case of other concepts and principles.[6]

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[1] See the *Anglo–French Arbitration* Decision of 30 June 1977 pp. 79–80, para. 156; pp. 84–85, para. 170; pp. 94–95, paras. 199–200.

[2] p. 43, the whole of Chapter IV.

[3] For the details see Maltese Counter-Memorial, pp. 33–35, paras. 64–67.

[4] See the works of Professor Bowett, *The Regime of Islands in International Law*, 1982, pp. 169–183, 271–277; and the late Professor O'Connell, *The International Law of the Sea*, Vol. I, 1982, Vol. II, 1983.

[5] *Recueil des Cours*, Vol. 171 (1981, II), p. 83.

[6] See the Judgment of the Court in the *Tunisia–Libya* case, *I.C.J. Reports* 1982, p. 46, para. 43.

2. Certain Admissions by Libya Concerning the Seaward Reach of Coasts

267. The section of Chapter 5 of the Libyan Counter-Memorial which is devoted to "State Practice Relating to Continental Shelf Delimitation" includes passages criticising the use by Malta of certain delimitation agreements in support of its argument.[1] These passages, however, also contain important admissions of the validity of some key elements in Malta's position.

268. Thus in its Memorial[2] Malta invoked the Agreement which established a delimitation between the Norwegian coasts and Denmark (in respect of the Faroes). The Libyan Counter-Memorial makes two points:[3]

(i) The first is that the delimitation is affected by delimitations between neighbouring States. That may be so. However, it does not in any way limit the relevance of the agreement for present purposes, since both the Faroes and the mainland of Norway were accorded an equal potential in terms of seaward reach. The Libyan Counter-Memorial does not contradict this element in Malta's exposition.

(ii) The second point made is that the "relevant stretch" of the Norwegian coast is short: and that "the delimitation line in this instance is in all likelihood governed by a single point on the Norwegian coast".[4] This "criticism" involves an acceptance of the point developed in Maltese Memorial,[5] namely, that short abutting coasts may play a significant role in delimitation.

In conclusion the points made by Libya leave intact, and indeed confirm, the significance of the delimitation: that the Faroes are given a seaward extension equal to that of the mainland of Norway in the relations of the two opposite coastal States, Denmark and Norway.

269. The Libyan Counter-Memorial next refers to the delimitation between Bahrain and Iran.[6] Again the equality of seaward extension of the coasts of the two opposite States is not denied. Instead, three obfuscations are produced. Two are irrelevant matters: thus it is stated that there are third State delimitations in "the immediate vicinity" and that "the delimitation line is only 54 kilometres long". The third is the assertion that the delimitation "is not based exclusively on equidistance". The fact is that it is based substantially on equidistance.[7] Moreover, this and other delimitations like it, not only do not even begin to justify a division of shelf areas of the type proposed by Libya in the present case but contradict it.

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[1] Pp. 125–128, paras. 5.65–5.75.
[2] P. 39, para. 125.
[3] P. 125, paras. 5.65–5.66.
[4] Para. 5.66.
[5] Pp. 37–39, paras. 121–126.
[6] Pp. 125–126, para. 5.67.
[7] Maltese Memorial, p. 62, para. 185 (a). See also Annex 4.

3. The Significance of State Practice in the Present Case Reaffirmed

270. The legal significance of State practice in the present case is reaffirmed by Malta. That significance has several facets and these will now be summarised.

(*a*) State practice confirms the entitlement of island States to appurtenant shelf areas on a basis of equality with other coastal States.[1]
(*b*) State practice likewise provides clear indications that in comparable geographical situations, the equidistance method was considered by the parties as producing an equitable result.[2]
(*c*) State practice effectively contradicts the Libyan thesis based upon the ratio of coastal lengths and the use of proportionality as a primary source of continental shelf rights.[3]
(*d*) State practice likewise effectively contradicts the Libyan thesis of the significance of "the land mass behind the coast" and the consequent "greater intensity" of the natural prolongation.[4]
(*e*) Finally State practice effectively contradicts the Libyan thesis that geological and geomorphological features control the delimitation of continental shelf boundaries.[5]

[1] Maltese Memorial, pp. 48–51, paras. 154–157; p. 54, para. 165.
[2] *Ibid.*, pp. 61–96, paras. 184–195.
[3] Maltese Counter-Memorial, pp. 111–123, paras. 252–257.
[4] See para. 79 above; See also Annex 4.
[5] See above, paras. 70–71; see also Annex 4.

SUBMISSIONS

271. Malta, respectfully requesting the Court to reject Libyan submissions to the contrary, repeats and confirms the submissions which it has made in its Memorial and Counter-Memorial.

.....

Edgar Mizzi
Agent of the Republic
of Malta.

ANNEXES TO THE REPLY OF MALTA

Annex 1

EXTRACT FROM NOTES ON TALKS OF 10 APRIL 1974

"Mr Ben Amer reiterated that Libya could not accept the principle of equidistance just as Malta could not accept the principle of proportionality. Because of this Mr Ben Amer came with a concrete proposal namely that both sides would forget their stands and would reach a compromise agreement.

The Prime Minister stated that this proposal had already been made before through Mr Ben Amer and that he had informed Mr Ben Amer himself and later also the President that this was not acceptable."

Annex 2

LETTER FROM EXXON DATED 25 JUNE 1975
TO MR. C. V. VELLA, CHARGÉ D'AFFAIRES,
PERMANENT MISSION OF MALTA TO THE UNITED NATIONS

June 25, 1975.

Dear Mr Vella:

This letter will acknowledge receipt of your letter dated June 23, 1975, addressed to Mr J. K. Jamieson, wherein you advise of your understanding that Exxon Corporation is conducting certain oil exploration activities within an offshore area over which you state that the Republic of Malta maintains full sovereignty rights. On behalf of the Republic of Malta, you request a categoric assurance from our company that no such exploration or drilling activities are being or will be carried out in any part of the described area.

During 1974, Esso Standard Libya Inc. (Esso Libya), an affiliate of Exxon Corporation, entered into an Agreement with the National Oil Corporation, a Libyan corporation, and owned by the Libyan Government, under which Esso Libya is authorized to conduct exploration and production operations, including seismic, within a certain defined Area offshore the Libyan Arab Republic. A comparison of the offshore coordinates contained in Esso Libya's Agreement with the coordinates set out in your letter indicates an area in conflict.

We are informed that the Libyan Government is aware of Malta's position as to the demarcation of its offshore boundary: however, the Libyan Government recently advised Esso Libya that it exercises sovereign rights over all of the offshore Area covered by the 1974 Agreement. At the present time, Esso Libya's contractor is conducting seismic operations offshore Libya. However, Esso Libya advises that no seismic operations have been conducted within the area claimed by Malta, nor has Esso Libya conducted any drilling operations within such area.

It is in the interests of all concerned that both of the involved Governments seek an early resolution of this question so that offshore development can proceed in an orderly manner. It is our earnest desire that this matter be resolved at an early date.

Very truly yours,

Charles J. Hedlund

Annex 3

NOTES OF MEETING OF 23 APRIL 1980

On his visit to Tripoli on April 23, 1980, and at the various meetings, the Prime Minister was accompanied by Edgar Mizzi, Karm Vella and Martin Zammit, who travelled with him, and Maurice Lubrano who joined the delegation in Tripoli. Mr Shweidi and Mr Sweidan also travelled with the Prime Minister and Mr Shahati and Mr Al Atrex, from the Libyan side were also present at the various meetings.

The Prime Minister had three meetings: the first was with Mr Shahati, the Secretary in charge of Popular Committees abroad, Mr At-Talhi, the Secretary of the General People's Committee and Major Jalloud.

....

Meeting with Major Jalloud

The Prime Minister said the People of Malta would understand that Libya could not continue to supply Malta with oil at current prices forever. What the Maltese people could not understand – and the Prime Minister could not explain to them – was the continued refusal by Libya to reach some agreement on the dividing line. The Prime Minister added that he attached such importance to this question that he preferred to go back to Malta without any agreement on oil but with an acceptable agreement on the dividing line.

Jalloud recalled the suggestion he had made at the meeting of October 1979; but the Prime Minister pointed out that two proposals had been made at that meeting, one by Malta and the other by Libya, and both had failed to obtain an agreement. There had also been a further meeting of experts but this too had been inconclusive because the Libyans had never seriously wanted to reach an agreement with Malta but had continuously used delaying tactics to prevent Malta from drilling for oil. This had now to stop; and as he had given warning at the other meeting, the Libyan Government has since been formally notified that the Maltese Government intended to drill on its continental shelf leaving out only, and for the time being, a band 15 miles wide.

At this Major Jalloud showed surprise, and added that he knew nothing about this decision. He also said that Libya would protest against and resist such an action.

The Prime Minister retorted that Malta would not be deterred, and that Libyan–Maltese relations would be seriously affected if Libya tried to prevent Malta from enforcing her rights.

Jalloud said he was assured that no company would drill for Malta, not even if another Government were involved.

The Prime Minister said that events would show how correct that statement was. In this context Jalloud asked why Malta had given AMOCO a concession which encroached on Libya's claims. The Prime Minister answered all the current concessions – including AMOCO's – dated as far back as 1974/75. They were given at a time when an agreement to go to the International Court of Justice appeared imminent. In fact an agreement was reached, and it was signed in the presence of Col. Ghaddafi himself in Malta in 1976. But Libya had then repudiated it.

The failure by Libya to ratify that Agreement was the most damaging act Libya had ever done to Malta and to the Malta Labour Party. For four years Libya had, so to speak, used that stick with which to beat the Maltese Labour Party.

On its part the Maltese Government had doggedly tried to reach an agreement and avoid confrontation. It had failed, and now had no option but to enforce its rights and drill. Speaking in English, Jalloud at this point said: "We will go to the Court in June". In reply to the Prime Minister's query as to how this could take place, Jalloud said: "The Agreement which was signed (i.e. the 1976 Agreement) will be ratified by the Congresses in June, and we will then go to the Court."

Annex 4

EXPERT OPINION ON STATE PRACTICE: AN OPINION

by DR. J. R. V. PRESCOTT

OPINION

On certain aspects of the submissions concerning the delimitation of maritime boundaries contained in the Counter-Memorial of the Socialist People's Libyan Arab Jamahiriya filed on 26 October 1983.

by

J. R. V. PRESCOTT

Reader in Geography
University of Melbourne

INTRODUCTION

1. This opinion examines the Counter-Memorial submitted by the Socialist People's Libyan Arab Jamahiriya on 26 October 1983 in their Continental Shelf case with the Republic of Malta pending before the International Court of Justice. The examination has been made with particular reference to the Annex of Delimitation Agreements submitted by Libya and has the purpose of assessing the validity and accuracy of certain assertions made, or conclusions reached, with respect to the delimitation of maritime boundaries and the role, for that purpose, of the method of equidistance.

2. This opinion considers, in particular, the following matters:

1. The Identification of Maritime Boundaries which involve the Method of Equidistance.
2. The Libyan Analysis of Specific Boundary Agreements.
3. The Rôle of Equidistance in Maritime Boundary Agreements since 1969.
4. The Rôle of Physical Features and of Different Coastal Lengths in Maritime Boundary Agreements.

1. The Identification of Maritime Boundaries Which Involve the Method of Equidistance

3. Only some of the agreements which involve the use of equidistance announce this fact in the preamble. The analyses of agreements in the Libyan Counter-Memorial usefully identify those cases where such an announcement is made. Where the use of equidistance is present without having been specifically declared, it is necessary to consider how it can be detected.

4. The first step is to mark any straight baselines proclaimed by the Parties on the chart with the largest most convenient scale. In short boundaries it will be possible to use scales of say 1:500,000. On such charts 1 centimetre would represent 500 metres, which is 0.27 nautical miles. Since it is often inconvenient to work on more than one chart, the chart used to illustrate longer boundaries would have to be at smaller scales, of say 1:1,000,000 or even 1:2,000,000. Even at these scales it might be necessary to use more than one chart. At a scale of 1:2,000,000, 1 centimetre would represent 2 kilometres or 1.08 nautical miles.

5. Once the straight baselines have been marked on the charts, the location of the boundary's turning points and termini can be added, and joined by a fine line. Since the finest line which most analysts would draw would have a width of 0.1 millimetre, that line would represent a zone 200 metres wide on a chart at a scale of 1:2,000,000. Once this work has been completed, it is then necessary to test each turning point and terminus with a pair of dividers to discover their relationships to the nearest point on both coasts.

6. In making such comparisons it is important to bear in mind that on charts drawn on Mercator projection the scale on any chart will vary, and will increase towards the poles. The changes in scale will be least on large scale charts near the equator and greatest on small scale charts near the poles. Most charts are drawn on Mercator's projection because constant courses on the sea appear as straight lines on the chart. Thus, when using medium scale charts on Mercator's projection, it is essential to ensure that the correct scale is used when measuring the distance from the boundary to the opposite shore. Quite often the scale will be different when measuring from a turning point on the boundary to the nearest points on the baselines, when these nearest points are not on the same parallel.

7. If after taking these steps with due care it is found that the turning points are equidistant, then the boundary is established as a median line.

8. However, even if the points are not found to be on a median line, it would be presumptuous to assume that equidistance played no role in their location, without considering the following problems.

9. First, it is quite possible that the boundaries were defined on very large scale charts, constructed specifically for that purpose. Such charts would not normally be available except to the two countries concerned. In addition they would have all the important points on the baselines marked according to the most recent surveys, verified by both countries. Such charts would certainly be more accurate than charts available to analysts which, in some parts of the world, are based on surveys made at least decades ago. The cost of bringing such charts to a better standard of accuracy has generally prevented any updating, particularly with respect to those coasts to which vessels give a wide berth, such as the West and South coast of Western Australia. Consequently an analyst must consider the possibility that the available charts do not have all the correct information about reefs, rocks and islets marked, or where such information is shown, it might be in the wrong position.

10. It is, however, fairly safe to assume that, if turning points and termini are identified by co-ordinates which include degrees, minutes and seconds, large scale accurate charts have been used, since 1 second represents about 30 metres. To produce such precise locations detailed surveys must be available.

11. Second, it is possible that a plotted boundary may appear to follow a course other than the equidistance line in some sections because the Parties have agreed to disregard some of the points on the baseline. Conversely, the Parties may have agreed to allow the use of a feature which would not normally be considered part of the baseline. For example, when the agreement between Australia and France was published, after being signed on 4 January 1982, it was easy to establish that the boundary was based on equidistance, except in one sector between points 18 and 19.[1] The solution to the problem concerning this sector was supplied during a lecture by an official of Australia's Foreign Affairs Department on 11 September 1983. He explained what had happened in the following terms:

> "One interesting aspect of the negotiations was that the French accepted the use of Middleton Reef as a relevant feature, even though this reef was only exposed at low tide. If Middleton Reef had not been taken into account a median line delimitation would lie further southwards. The French also accepted an Australian proposal that the median line be 'straightened' to improve the boundary from both practical and presentational viewpoints."[2]

This explanation shows that the role of equidistance in negotiating this sector of boundary was concealed first by using an unusual basepoint, not envisaged by any conventions on the law of the sea, and second by modifying the median line which this unusual basepoint has established.

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[1] See Annex of Delimitation Agreements No. 71.

[2] P. G. Bassett, 1983, "Delimitation of Australia's Maritime Boundaries", unpublished paper delivered at the Australian National University from 8 to 11 September 1983.

12. The role of equidistance may also be concealed when one or both States use unpublicised baselines. In analysing the continental shelf boundary between Indonesia and Malaysia, The Geographer of the United States Department of State referred to Malaysia's straight baselines, which were shown on a map. In fact Malaysia has never proclaimed any straight baselines, and the existence of these lines was only confirmed when Malaysia published a map of its territorial seas. The map was published in two sheets at a scale of 1:1,500,000.[1] On it the outer edge of Malaysia's territorial waters appeared as straight lines. Such limits could only have been derived from straight baselines, and these were found by drawing parallel lines 12 nautical miles landward of the edge of the territorial seas. The existence of such baselines was disguised by not showing any internal waters. This omission means that in some areas Malaysia is claiming territorial seas 59 nautical miles wide.

13. A third situation in which the role of equidistance may be difficult to detect is when some feature on the baseline has been given only a partial effect. The problem is more difficult when the States are in an adjacent coasts situation than when they are opposite one another. Though proportional discounting normally takes the form of giving only half-effect to some features, there is no reason why the proportion should not be one quarter or one third.

14. Another way in which the role of equidistance may be disguised is when some of the boundary points are equidistant from a third State. This situation occurs in the boundaries agreed between the United Kingdom and West Germany, between the United States and Venezuela, and between the Dominican Republic and Venezuela. In the first agreement the boundary is equidistant between the United Kingdom and Denmark and The Netherlands; in the other two agreements points on the line are equidistant between the United States and the Dominican Republic on the one hand, and The Netherlands Antilles on the other.

15. This analysis makes it clear that if a boundary agreement does not explain how the boundary was drawn, and if it proves impossible to elicit this information from the countries concerned, it is necessary to undertake detailed research to discover the part played by equidistance; but the difficulty is more often than not overcome.

[1] Malaysia, Director of National Mapping 1979, *Map showing Territorial Waters and Continental Shelf Boundaries of Malaysia*, 2 sheets at a scale of 1:1,500,000.

2. THE LIBYAN ANALYSIS OF SPECIFIC BOUNDARY AGREEMENTS.

16. A careful examination has been carried out of the 71 maritime agreements analysed by Libya in its Annex of Delimitation Agreements submitted with its Counter-Memorial. Although it is claimed that the analysis is "detailed and factual,"[1] the examination carried out has shown that the Libyan analysis contain a number of errors, and that the cumulative effect of these errors is to seriously understate the significance of the use of equidistance in maritime boundary agreements.

17. The agreements were the analysis in the Libyan Counter-Memorial and its Annexes appear to be faulty will now be considered in detail, and in the order – i.e. the chronological order – listed and analysed by Libya. It remains only to be premised that Libya has omitted three delimitations; two concern France and Fiji and the third is between Indonesia and Papua New Guinea.

18. The faulty analysis refer to the following agreements:–

(i) *Iran–Saudi Arabia, Agreement No. 17.*

19. In referring to the boundary between Iran and Saudi Arabia, the following statement appears in the *Comments* on the agreement:

> "The boundary itself, however, has not otherwise been based on equidistance although in parts it does approximate the boundary that would result from a median line".

The analysis of The Geographer states that the eastern segment which measures 45 nautical miles "... is essentially an equidistant line between two mainlands".[2] This opinion can be confirmed by measurements of the distances involved.

(2) *Iran-Qatar, Agreement No. 21.*

20. The analysis of the boundary contained in Libya's *Comments* on the agreement states that the "turning points ... suggest that the boundary is more or less equidistant". The analysis by The Geographer[3] shows that the boundary is *exactly* equidistant.

[1] Libyan Counter-Memorial, p. 124, para. 5.63.
[2] *Limits in the Seas*, No. 24, p. 4.
[3] *Ibid.*, No. 25.

(3) *Mexico–U.S.A., Agreement No. 23.*

21. In commenting on the boundary agreement between the United States and Mexico, Libya cites from the U.S. Senate, Executive Report, No. 96–49, 5 August 1980, p. 24. According to this report the boundaries in the Gulf of Mexico and the Pacific Ocean can be characterized best "as a negotiated boundary reflecting the assessment of the treaty partners of their best interests". The Libyan *Comments* on the agreement also contain a quotation from the same report which refers to "tradeoffs" in the two areas whereby "a substantial area in the Pacific Ocean ... went to the United States and a somewhat small area in the deep waters of the East central Gulf of Mexico ... went to Mexico".

22. An uninformed reading of this analysis by Libya could lead to the conclusion that equidistance was unimportant in this agreement. In fact the reverse is true as the following quotation from a paper by Dr R. W. Smith (who is cited as an expert source by Libya[1]) demonstrates:

> "Mexico and the United States front on two common water bodies, the Pacific Ocean and the Gulf of Mexico. Technical experts from the two countries held informal consultations in New York City during April, 1976, prior to the enforcement of extended maritime zones by either country. At that time an informal agreement was reached to make recommendations to their respective Governments on numerous technical issues. The boundary would be based on and reference made to the 1927 North American Datum because it was the basis for working charts of both countries. *Equidistance was an appropriate method of delimitation in each of the boundary regions.* For practical purposes an attempt would be made to simplify the equidistant lines. Between April and November, 1976, the two countries carried out a technical exercise. Minor discrepancies that appeared in the calculations for the Gulf of Mexico were easily resolved by reference to large-scale coastal charts. On November 24, 1976, an exchange of notes in Mexico City effected an agreement on a provisional line".[2]

Smith goes on to explain that all the terminal points of the boundary in the Pacific Ocean and the two segments in the Gulf of Mexico are 200 nautical miles from the nearest land of both countries.

23. Inspection of the boundaries on medium scale charts clearly shows that the "tradeoffs" referred to earlier concern baseline points. The United States secured full effect for San Clemente Island in the Pacific Ocean, while Mexico secured full effect for the Whale Rock on the Alacran Reef in the Gulf of Mexico. There was no question of the two countries swopping areas which Mexico could claim in the Pacific Ocean and which the United States could claim in the Gulf of Mexico. Both boundaries in this agreement are very slight modifications of equidistance lines.

[1] Annex of *Delimitation Agreement, Introduction*, p. 3, para. 1.

[2] R. W. Smith, 1981, "The Maritime Boundaries of the United States" *Geographical Review*, Vol. 71, p. 402. Emphasis supplied.

(4) *Bahrain–Iran, Agreement No. 25.*

24. The *Comments* on this agreement by Libya run as follows:

> "The analysis of The Geographer of the U.S. State Department states that two of the four turning points on the line 'were determined by existing continental shelf boundary agreements'. Thus the delimitation between Iran and Bahrain took place within a restricted geographic area with correspondingly short stretches of the coast on either side of the Gulf resulting in a relatively short overall delimitation line (approximately the same length as the relevant coasts of Bahrain and Iran)".

It appears that the author of this comment has been guilty of selective quoting, or a remarkable oversight. The full paragraph in the analysis by The Geographer reads as follows:

> "The Bahrain–Iran continental shelf boundary is not based solely on the equidistance principle. Points 1 and 4 were determined by existing continental shelf boundary agreements; the remaining two points are nearly the same distance from Bahrain and Iran, so the assumption can be made that Points 2 and 3 are in fact equidistant points. The continental shelf boundary agreement does not specify that the principle of equidistance was utilized, but rather that the boundary divides the shelf in a 'just, equitable and precise manner'".[1]

The same points are made in similar language in the Summary contained in the analysis by The Geographer.[2]

(5) *United Kingdom–West Germany, Agreement No. 27.*

25. The Libyan *Comments* on this agreement state that:

> "Although the basis on which the delimitation is established is not specified in the Agreement, the boundary line is not equidistant between the nearest points on the territories of the two parties. The three turning points fall some 20 nautical miles closer to Britain than to Germany".

That statement is true, but the situation could not be otherwise after this agreement became necessary following the 1969 judgment of the Court in the *North Sea* cases. However an objective analysis would surely point out that all three points which define this boundary lie on one of the equidistant boundaries which the United Kingdom negotiated with The Netherlands in October 1965, and with Denmark in March, 1966. Indeed, Point 2 on the Anglo-German boundary occupies the same position as Point 19 on the original Anglo-Dutch boundary.

[1] *Limits in the Seas*, No. 58, p. 3.
[2] *Ibid*, p. 5.

(6) *India-Sri Lanka, Agreement No. 38.*

26. The Libyan *Comments* on this agreement also seem to underplay the role of equidistance, as may be seen from a comparison between those *Comments* and the analysis by The Geographer.

27. The Libyan *Comments* contain the following passages:

> "The initial boundary line appears to divide the maritime areas within the Palk Bay in more or less equal portions. Since the relevant coasts of the parties are comparable in length, the delimitation appears to have resulted in a boundary proportionate to the length of the coasts involved ... .
>
> The second agreement makes no reference to equidistance or any other method employed to establish the maritime boundary. It appears, however, that the line approximates an equidistant line, a fact which is not surprising given the similar lengths and configurations of the coasts of the two States in the delimitation area and the absence of any marked geomorphological relief in between".

In comparison, one cannot fail to note the objectivity of The Geographer's comments:

> "The (first) delimitation reflects a selective, i.e. modified, application of the principle of equidistance".[1]
>
> "The information in Table 1 (this table records the distance of turning points from the nearest coasts) indicates that the States apparently have agreed (in their second agreement) to a modified equidistant line and/or to one created by a selective choice of relevant base points".[2]

This last quotation deals with the segment of boundary in the Gulf of Manaar. The second agreement also extended the boundary drawn originally in Palk Bay, into the Bay of Bengal. About this sector The Geographer made the following comment:

> "The two countries have apparently agreed upon a modified equidistant line similar to the Gulf of Manaar delimitation".[3]

In passing it might be noted that in this analysis The Geographer refers to another technical issue which sometimes makes it difficult to detect whether a point is equidistant:[4]

> "The terminal point 6 is calculated to be 197.86 miles from India and 198.95 miles from Sri Lanka. The intent was to continue the boundary to 200 miles from each coast; the discrepancy may be partially explained by use of different spheroids in the distance calculations".

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[1] *Limits in the Seas*, No. 66, p. 6.
[2] *Ibid.*, No. 77, p. 7.
[3] *Ibid.*, p. 8.
[4] *Ibid.*

(7) *Iran-Oman, Agreement No. 40.*

28. The Libyan *Comments* on this agreement contain the following statement:

> "The Agreement does not indicate the method of delimitation, although the Preamble indicates the parties' desire to reach an 'equitable' boundary. The final 5 or 6 points on the line may be seen to deviate sharply from equidistance".

Measurements show that the maximum deviation from a median position for any of the final six points is 0.3 nautical miles, or 555 metres. The Libyan comment just quoted is a curious way of admitting that the first sixteen points occupy equidistant positions.

(8) *Cuba-Haiti, Agreement No. 52.*

29. The Libyan *Comments* on this agreement report that the agreement made reference to equidistance and equity in the Preamble, that the delimitation took place in a confined area and that the boundary is about the same length as the coasts which face each other.

30. Suspicions about the nature of this boundary should have been aroused by the fact that fifty-one points are used to define a boundary 150 nautical miles long, and that the coordinates are measured to two decimal places of seconds. These two facts point to very careful surveys and the use of equidistant points. When the points are plotted on a chart they are found to be equidistant, and the termini lie within 2 nautical miles of the trijunctions that are equidistant from the Bahamas in the North and Jamaica in the South.

31. It is interesting to note – in view of Libyan comments about the limited promontory of Norway's coasts which is involved in delimiting the boundary with the Faroes, that only small sections of Haiti's coast, around Cap du Mole St Nicolas and Cap Dame Marie, are involved in fixing the median line with the much longer coast of Cuba.

(9) *Cuba–U.S.A., Agreement No. 53.*

32. In the *Comments* on this agreement, Libya quotes the American Deputy Legal Adviser as saying that though "the line established by the treaty *[is] close to being an equidistance line giving full effect to islands* – [it] is in fact a boundary every point of which has been established by negotiation".

33. A fuller explanation, giving a clearer view of the importance given to equidistance, has been given by Dr R. W. Smith (who has already been quoted in this Opinion). After explaining that the United States objected to some sections of Cuba's straight baselines, Smith describes the procedure followed in order to solve the problem:

> "During the technical discussions, comparable artificial construction lines were drawn along the southern Florida coastline. An

equidistant line was then calculated by the use of the Cuban straight baselines and the artificial construction lines of the United States. Another equidistant line was calculated by the use of the relevant basepoints on the low-water line of the coasts of the two countries. A third line was then created between those two lines, which was not an equidistant line, but which divided equally the area between them".[1]

(10) *U.S.A.–Venezuela, Agreement No. 56.*

34. The *Comments* by Libya on this agreement do not even mention the word "equidistance". The closest the commentary comes to admitting that this is a boundary primarily based on equidistance is a quotation from an article by M. S. Fieldman and D. Colson that Aves Island, belonging to Venezuela, was given full effect. Of course, if an island is given full effect it must produce an equidistant line, and Aves Island is the only fragment of Venezuelan territory involved in determining the boundary between Points 1 and 11. Point 11 is equidistant from Aves Island and El Roque, which belong to Venezuela, and Muertes Island, which belongs to the United States. From Point 11 the boundary follows a westward course and Point 22 is very close to the trijunction which is equidistant from Mona Island, which belongs to the United States, Isla Saona, belonging to the Dominican Republic, and Bonaire, belonging to The Netherlands.

(11) *The Netherlands–Venezuela, Agreement No. 57.*

35. The *Comments* by Libya on the boundaries settled by this agreement merely indicate that the sector separating Aruba, Curacao and Bonaire from the Venezuelan mainland is an equidistant line. The shorter boundary between Saba and San Eustaquio, belonging to The Netherlands and Aves Island, belonging to Venezuela, is, however, also a median line. Furthermore, Points 1 and 13, which are the termini of the boundary limiting the Dutch claims from Aruba, Curacao, and Bonaire, are equidistant between the Dominican Republic and those islands of the Netherland Antilles. This is a case where Venezuela has apparently benefited by being allowed to use the territory of a third state (the Dominican Republic) as basepoints.

(12) *India–Thailand, Agreement No. 59.*

36. The *Comments* on this boundary agreement in the Andaman Sea contain the following assertion:

"The line is not, however, based on equidistance since in places it falls some 25–30 nautical miles closer to Indian territory than to Thai".

[1] *Op. Cit.*, Vol. 71, p. 402.

This assertion is contradicted by the fact that Points 4, 5, 6 and 7 are either equidistant or so close to being equidistant that only careful survey or the use of very large scale charts could establish the matter with absolute certainty. The Geographer only refers to points on the line connecting Points 4, 5 and 6 as being "nearly equidistant to the respective baselines".[1] But it is evident that the distances from Point 7 have not been accurately measured on the chart provided. Point 7 in Table 2 in the report by The Geographer, is shown to be 126.8 nautical miles from India and 121 nautical miles from Thailand. One of these figures, and probably the second, must be a misprint since measurements on the chart which accompanies the report shows the two distances to be identical. This segment of equidistance line totals 63.3 nautical miles. The divergence of 28.6 nautical miles from the median position occurs at the trijunction with Indonesia. It is incorrect to dismiss any role for equidistance on the basis of three out of seven points, especially when the four equidistant points define more than two thirds of the boundary.

(13) *Australia-Papua New Guinea, Agreement No. 60.*

37. The Libyan *Comments* on the agreement between Australia and Papua New Guinea in Torres Strait are simply that there is no mention of equidistance in the agreement and that the presence of islands makes it difficult to determine what effect they had on delimitation.

38. When turning points near the termini are examined on large scale charts it is evident that they are based on equidistance. Point (a), which is identical with Point A3 on the boundary agreed between Australia and Indonesia on 18 May 1971, is equidistant between the coasts of Indonesia and Australia. This is another case where a State, in this case Papua New Guinea, benefits from a basepoint on the coast of a third State, in this case Indonesia. Points (b) and (c) of the agreement between Australia and Papua New Guinea are equidistant between the two mainlands; islands are discounted. It is true, however, that once Torres Strait is approached – but only then – it becomes impossible, because of the multitude of islands, to guess which basepoints might have been used.

(14) *Dominican Republic-Venezuela, Agreement No. 61.*

39. On this agreement the Libyan *Comments* have this to say:

> "The Dominican Republic-Venezuela Agreement specifically states that delimitation has been based on equitable principles. No mention is made of equidistance. The eastern sector (sector A) of the boundary line appears to fall closer to the Dominican Republic than to Venezuela".

[1] *Limits in the Seas*, No. 93, p. 5.

Reference to the map produced by Libya which follows this comment makes it clear that Sector A is the western, not the eastern sector. But apart from this evident oversight, there is an explanation why parts of the western sector and all the eastern sector are closer to the Dominican Republic than Venezuela, and this is the presence of The Netherlands Antilles off the coast of Venezuela. In fact most of the turning points on the Dominican Republic–Venezuela boundary are equidistant between Punta Beata, or Alta Vela, or Isla Saona belonging to the Dominican Republic and the islands of The Netherlands Antilles. The only Venezuelan territory which is involved in producing this boundary line of equidistance is the northern tip of Los Monjes Archipelago. Points 5 and 6 are equidistant from this feature and Alta Vela.

(15) *Costa Rica–Panama, Agreement No. 64.*

40. On this agreement, the *Comments* by Libya note, quite correctly, that although the agreement states that the Parties employed the median line "... strict equidistance was not adhered to". The Libyan *Comments*, however, also acknowledge that both boundaries (in the Caribbean Sea and in the Pacific Ocean) may be considered to be lines perpendicular to the coast. This is a perfectly, proper application of equidistance. It is a simple technique by which States achieve a boundary which is simple to define and administer, by agreeing on a set of artificial basepoints.

41. One other point should be made. As Libya itself pointed out in respect of the boundary between Venezuela and the United States[1] "... it is not always apparent from an agreement itself what considerations have gone into the negotiation of a boundary line". In the case under review one notes that in Article III of the agreement Costa Rica recognizes Panama's claim to the Gran Golfo de Panama as a historic bay, and such recognition may have affected the direction of the perpendicular line.

(16) *France–Australia, Agreement No. 71.*

42. In its *Comments* on this agreement, Libya gives only grudging acknowledgement that the lines are equidistant. The boundary between Heard and McDonald Islands, belonging to Australia, and Kerguelen Islands, belonging to France, is an equidistant line. The boundary through the Coral Sea is also an equidistant line giving full effect to the tiny atolls owned by each country. As pointed out earlier,[2] the long section facing Points 18 and 19 was a modified equidistant line using Middleton Reef as an Australian basepoint.

[1] See Libya's *Comments* on Agreement No. 56.

[2] In para. 11 above.

3. The Role of Equidistance in Maritime Boundary Agreements Since 1969

43. Libya's position on this question is revealed in two assertions contained in its Counter-Memorial. These are:

> "At the present juncture it is intended to show how, contemporaneously with the rejection of equidistance as a mandatory rule by the Courts (and also by the Third Conference on the Law of the Sea), the reliance on equidistance began to decline in agreements of delimitation between States".[1]

> "If a broad conclusion has to be framed as to the trend of delimitation agreements, then it would be that the equidistance method was never adopted as an obligatory method, that particularly after the Court's 1969 Judgment the incidence of its use declined, and this trend was accentuated in the newer move towards maritime boundaries".[2]

44. The evidence of this view is contained in the second volume of the Counter-Memorial entitled Annex of Delimitation Agreements. In order to test the proposition that reliance on equidistance has declined since 1969 the following steps were taken. First, all 71 agreements listed and analysed in the Annex just referred to were examined to see whether they involved any use of the equidistance method. For reasons given in the Counter-Memorial of Libya, namely that it "did not involve agreement on a boundary"[3] but rather the establishment of a Common Zone, the agreement between Saudi Arabia and Sudan was discarded. It is to be noted, however, that the narrow joint zone which Saudi Arabia and Sudan created between the 1,000 metres isobaths contains the location of the median line which would separate claims from those two countries.

45. Another agreement – that between Mauritania and Morocco – was also not taken into account in view of the fact that Mauritania withdrew its claim to the southern portion of the former Spanish Sahara, according to the terms of the agreement of Algiers reached with the Popular Front for the Liberation of Saguia il Hamra and Rio de Oro on 5 August 1979.[4]

46. On the other hand three other delimitations – not included in the Libyan list – were added. Two concern France and Fiji and the third was between Indonesia and Papua New Guinea.

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[1] Libyan Counter-Memorial, p. 104, para. 5.11.
[2] *Ibid.*, p. 110, para. 5.27.
[3] At p. 107, para. 5.18.
[4] *Africa Research Bulletin* 1979, Vol. 16, No. 8, p. 5379.

47. No agreement dealing with the territorial sea was included since these are expressly excluded by the Libyan Counter-Memorial.[1] On this ground, the boundary agreement between the Federal Republic of Germany and the German Democratic Republic[2] should not have been included in the Libyan list. In fact although it is not specifically called a territorial sea boundary, that is clearly the purpose it serves, as Libya itself accepts.[3] The seaward terminus is only 5.5 nautical miles from the most distant coast and Article 3 of the agreement states that the boundary is to be marked on charts pursuant to the Convention on the Territorial Sea and Contiguous Zone. No account has therefore been taken of this delimitation.

48. The second step involved classifying each boundary according to whether it separated adjacent or opposite States. The term "boundary" is used here as denoting a distinct boundary even if more than one such distinct boundary may have been delimited in the same agreement. Thus the agreement between Indonesia and Malaysia in 1969 defined three distinct boundaries: two were defined in accordance with equidistance, while the third followed some course other than the median line. Each of these three boundaries, therefore, is dealt with separately. However, where two States simply extend an existing boundary, as India and Sri Lanka did on 23 March 1976, only one boundary is recorded.

49. It is recognized that there may be differences of opinion as to whether a particular boundary should be classified as one which separates opposite States or one which separates adjacent States. However the classification may be relevant and it has for that purpose been carried out. With this in mind, this task has been performed in the least exceptionable manner.

50. Within each major class of adjacent or opposite States, the boundaries were then subdivided into two further subdivisions according to whether they relied on equidistance or not. Finally these subdivisions were distinguished into agreements entered into before the end of 1969 or after.

51. The results of this tabulation are as follows:

	BOUNDARIES BETWEEN OPPOSITE STATES		BOUNDARIES BETWEEN ADJACENT STATES	
	Equidistant (Table 1)	*Other (Table 2)*	*Equidistant (Table 3)*	*Other (Table 4)*
Pre-1970	10	1	9	5
Post-1969	34	5	11	4

52. This table shows that before 1970 the proportion of boundaries which relied on equidistance was 76%. In the period since 1969, 83% of boundaries defined by agreement have relied on equidistance.[4]

[1] See Annex of Delimitation Agreements, p. 1, para. 1.
[2] Agreement No. 39.
[3] *Ibid., Comments.*
[4] The agreements on which the table has been worked out are set out, in their appropriate classification, in Tables 1, 2, 3 and 4 attached to this Opinion.

53. The only conclusion that can be drawn from the facts given above is that equidistance played an important role both before and after 1969, and that since that date the incidence of equidistant boundaries has, if anything, increased.

4. The Rôle of Physical Features and of Different Coastal Lengths in Maritime Boundary Agreements

54. Libya attaches great importance to two assertions of a physical character. The first is that there is between the two countries an area which Libya calls a "Rift Zone"; and the second is that the relevant Libyan coastline is about nine times longer than that of Malta.

55. An examination has therefore been carried out of all known boundary agreements in order to discover whether similar considerations as those advanced by Libya have played an important rôle in the delimitation of the boundary established by agreement between States.

56. This examination has revealed that, even in those agreements were no element of equidistance can be detected, there is only one agreement which was significantly affected by considerations of a marked disruption or discontinuity of the seabed. The agreement is that between Australia and Indonesia signed on 3 October 1972, and the physical feature in question is the Timor Trough or Trench which lies between Australia and the Indonesian Island of Timor. According to Libyan sources[1] this Trough "is more than 550 nautical miles long and an average of 40 miles wide, and the sea-bed slopes down on opposite sides to a depth of over 10,000 feet".

57. The boundary between these two States is still only partly settled. At the time the settlements took place (Agreements of 18 May 1971, 9 October 1972 and 26 January 1973) the eastern part of the Island of Timor belonged to Portugal and the discussions were therefore restricted to the areas west and east of this Portuguese territory. Now that Indonesia has assumed control of Portuguese Timor it has become necessary for Indonesia and Australia to close their seabed boundary across what has become known as the "Timor Gap" and Indonesia is understood to be pressing to complete the boundary by means of a median line. In "The Age", a Melbourne newspaper, of 31 March 1984, some comments by Dr. Mochtar, the Indonesian Foreign Minister, were reported. He is quoted as saying that the Australian position was based on the 1958 Convention on the Continental Shelf (presumably the depth and exploitability principles) while Indonesia based its position on the 1982 Convention on the Law of the Sea (presumably the distance principle).

58. With respect to the second question viz. whether a marked difference in the lengths of the coastlines of the countries involved appeared to be a factor in delimiting maritime boundaries, an examination of the boundary agreements reveals that, here too, there is only

[1] Libyan Memorial, p. 100 note 1.

one example where the relative lengths of the coastlines is believed to have played a part.

59. The two countries are France and Spain and the area involved is the Bay of Biscay. The evidence that part of the dividing line established by the agreement of 29 January 1974 is based on "the ratio of the artificial coastlines of the two States" is provided by The Geographer.[1] The agreement itself only specifies the basis on which the first part of the dividing line was defined namely that the line "is, in principle, the line whose points are all equidistant from the French and Spanish baselines".[2]

60. Conversely, the examination of the boundaries established by agreement has revealed that there are a number of cases in which significant depressions in the seabed have apparently been ignored when boundaries were delimited in their vicinity.

61. These cases, and the relevant data concerning them, may be summarized as follows: –

Countries	*Date of Agreement*	*Name of Feature*	*Depth of Sea*
(a) Norway–UK	10. 3.1963	Norwegian Trough	400 metres
(b) Norway–Denmark	8.12.1965	Norwegian Trough	700 "
(c) Cuba–Mexico	26. 7.1976	Campeche Escarpment and Yucatan Channel	3000 "
(d) Cuba–Haiti	27.10.1977	Cayman Trough	2900 "
(e) Colombia–Dominican Republic	11. 1.1978	Aruba Gap	4600 "
(f) Dominican Republic–Venezuela	3. 3.1979	Aruba Gap	4600 "

62. With respect to these cases the following additional points may be made.

(a) The Anglo–Norwegian Agreement signed on 10 March 1965 produced an equidistant boundary. Although the Libyan Counter-Memorial states that "It is unclear whether the presence of the Norwegian Trough was taken into account during the discussions concerning the delimitation line",[3] it is perfectly clear that any consideration of this feature had no significance to the final outcome.

(b) Even though the Norwegian Trough reaches its greatest depth between Denmark and Norway, it had no effect on the final delimitation of the boundary, which is a median line established by agreement on 8 December 1965.

(c) On 26 July 1976 Cuba and Mexico delimited an equidistant

[1] *Limits in the Seas* No. 83, pp. 13-14.
[2] For Agreement See Libyan Counter-Memorial, Vol. 11 Part 1, Agreement No. 34.
[3] *Ibid.*, Agreement No. 8.

boundary which separated their exclusive economic zones and continental shelves. The agreed line is a median line, ignoring completely the physical features of the area. Thus the northern part of this boundary cuts across the well defined geological and structural grain of the seabed. The agreed line also cuts across the Banco de Campeche (the broad submerged margins lying off the north coast of Mexico's Yucatan Peninsula) just south of the terminus of the Campeche Escarpment, and allocates to Cuba two areas of the continental slope which mark the edge of the continental margin surrounding the Yucatan peninsula. These two areas are separated by the Catoche Tongue, which is the largest submarine valley cut into the northeast part of the Banco de Campeche.

(d) The boundary agreed between Cuba and Haiti – which is also an equidistant boundary – cuts across another significant depression: the Cayman Trough. This feature has been described by Uchupi in the following terms:

> "Cayman Trough is a structural low 1700 km long and over 100 km wide extending from the Gulf of Honduras to the Gulf of Gonave in Hispaniola (Banks and Richards, 1969). Its seismicity and rugged topography make this depression one of the major tectonic units of the Carribean".[1]

(e) The Dominican Republic signed boundary Agreements with Colombia on 11 January 1978 and with Venenzuela on 3 March 1979. The equidistant boundaries which resulted are unrelated to the Aruba Gap which is the deep water connection between the Colombia and Venezuela Basins.[2] These two basins are separated by the Beata Ridge which extends southwards for 210 nautical miles from Punta Beata on the South coast of the Dominican Republic. This ridge is a complex faulted horst which is tilted to the east and inclined to the south.

(f) The effect of these last two boundaries is to place the southern parts of the Beata Ridge, which is geologically, structurally and geomorphologically part of the Dominican Republic, within the national maritime zones of Colombia and Venezuela.

[1] Uchupi, E., 1975 "Physiography of the Gulf of Mexico and the Caribbean Sea", in *The Gulf of Mexico and the Caribbean, The Ocean Basins and Margins*, Vol. 3, edited by A. E. M. Nairn and F. G. Stehli, New York, p. 44.

[2] *Ibid.*, p. 37.

TABLE 1 .

Agreements, which have relied on equidistance, concluded between States with coasts that are mainly opposite.

States	*Date*[1]	
Bahrain–Saudi Arabia	22. 2.1958	(26. 2.1958)
Norway–United Kingdom	10. 3.1965	(29. 6.1965)
Protocol[2]	22.12.1978	
Netherlands–United Kingdom	6.10.1971	(23.12.1966)
Protocol[3]	25.11.1971	(7.12.1972)
Denmark–Norway	8.12.1965	(3. 6.1980)
Protocol[4]	24. 4.1968	(24. 4.1968)
Denmark–United Kingdom	3. 3.1966	(6. 3.1967)
Protocol[5]	25.11.1971	(7.12.1972)
Italy–Yugoslavia	9. 1.1968	(21. 1.1970)
Iran–Saudi Arabia	24.10.1968	(21. 9.1969)
Iran–Qatar	20. 9.1969	(10. 5.1970)
Indonesia–Malaysia[6]	27.10.1969	(17.11.1969)
Australia–Indonesia	18. 5.1971	(8.11.1973)
Bahrain–Iran	17. 6.1971	(14. 5.1972)
Italy–Tunisia	20. 8.1971	(9.12.1978)
United Kingdom–West Germany	25.11.1971	(7.12.1972)
Indonesia–Thailand	17.12.1971	(16. 7.1973)
Canada–Denmark	17.12.1973	(13. 3.1974)
Japan–Korea[7]	5. 2.1974	(22. 6.1978)
Italy–Spain	19. 2.1974	(16.11.1978)
India–Sri Lanka	26. 6.1974	(8. 7.1974)
Extension[8]	23. 3.1976	(10. 5.1976)
Iran–Oman	25. 7.1974	(28. 5.1975)
India–Indonesia	8. 8.1974	(17.12.1974)
Cuba–Mexico	26. 7.1976	(26. 7.1976)
India–Maldives	28.12.1976	
Greece–Italy	24. 5.1977	(12.11.1980)
Colombia–Dominican Republic	13. 1.1978	
Colombia–Haiti	17. 3.1978	(24.11.1980)
Netherlands–Venezuela[9]	31. 3.1978	
India–Thailand	22. 6.1978	(15.12.1978)
Australia–Papua New Guinea	18.12.1978	
Dominican Republic–Venezuela	3. 3.1979	
Denmark–Norway	15. 6.1979	(3. 6.1980)
France–Tonga	11. 1.1980	(11. 1.1980)
France–Mauritius	2. 4.1980	(2. 4.1980)
New Zealand–United States (Cook Islands)	11. 6.1980	
New Zealand–United States (Tokelau)	2.12.1980	
France–St. Lucia	4. 3.1981	(4. 3.1981)
Australia–France[10]	4. 1.1982	(10. 1.1983)
Fiji–France[11]	19. 1.1983	

Footnotes overleaf

[1] The first date is the date when the agreement was signed; the second is the date when the agreement came into force.
[2] The original boundary was extended.
[3] The original boundary was amended following the 1969 judgment in the *North Sea* cases.
[4] One point in the original agreement was altered.
[5] The original boundary was amended following the 1969 judgment in the *North Sea* cases.
[6] This agreement contains two equidistant boundaries. The third, which is not equidistant, is listed in Table 4.
[7] This agreement defined a boundary and a joint development zone.
[8] The original boundary was extended.
[9] This agreement contains two equidistant boundaries.
[10] This agreement contains two equidistant boundaries.
[11] This agreement contains two equidistant boundaries.

TABLE 2

Agreements, which have not relied on equidistance, concluded between States with coasts that are mainly opposite.

Countries	*Date*[1]	
Trinidad–Venezuela	26. 2.1942	(22. 9.1942)
Australia–Indonesia	8.10.1972	(8.11.1973)
Dubai–Iran	21. 8.1974	
Colombia–Costa Rica	17. 3.1977	
France–Venezuela	17. 7.1980	(28. 1.1983)
Iceland–Norway	22.10.1981	(2. 6.1982)

[1] The first date is the date the agreement was signed; the second is the date it came into force.

TABLE 3

Agreements, which have relied on equidistance, concluded between States with coasts that are mainly adjacent.

Countries	*Date*[1]	
Norway–Soviet Union	15.12.1957	(24. 4.1957)
Netherlands–West Germany	1.12.1964	(18. 9.1965)
Extension[2]	28. 1.1971	(7.12.1972)
Finland–Soviet Union	20. 5.1965	(25. 5.1966)
Extension[3]	5. 5.1967	(15. 3.1968)
Denmark–West Germany	9. 6.1965	(27. 5.1966)
Extension[2]	28. 1.1971	(7.12.1972)
Norway–Sweden	24. 7.1968	(18. 3.1969)
East Germany–Poland	28.10.1968	(16. 4.1969)
Poland–Soviet Union	28. 8.1969	(13. 5.1970)
Mexico–United States[4]	23.11.1970	(18. 4.1972)
Indonesia–Papua New Guinea[5]	18. 5.1971	(18.11.1973)
Extension[6]	12. 2.1973	(26.11.1974)
Extension[7]	9. 9.1982	
Brazil–Uruguay	21. 7.1972	(12. 6.1975)
Finland–Sweden	29. 9.1972	(15. 1.1973)
Argentina–Uruguay	19.11.1973	(12. 2.1974)
France–Spain	29. 1.1974	(5. 4.1975)
Kenya–Tanzania	17.12.1975	(9. 7.1976)
Colombia–Panama	20.11.1976	(30.11.1977)
Costa Rica–Panama	2. 2.1980	(11. 2.1982)

[1] The first date is the date the agreement was signed; the second is the date it came into force.

[2] This extension was made following the 1969 Judgment in the *North Sea* cases.

[3] The original boundary was extended.

[4] The agreement defined two distinct boundaries: one in the Gulf of Mexico, the other in the Pacific Ocean. These boundaries were extended by an agreement signed on 4.5.1978, but the Senate of the United States has not ratified it.

[5] This agreement was entered into by Australia on behalf of Papua New Guinea. The boundary south of the island called New Guinea has been included as part of the Australia–Indonesia boundary listed in Table 1. This agreement also drew a short segment of boundary north of the island called New Guinea, and this boundary only is included in this Table.

[6] This agreement defined the land boundary between Papua New Guinea and Indonesia, and it included a short extension of the sea boundary agreed south of the island called New Guinea.

[7] This agreement extended the existing boundary north of the island called New Guinea.

TABLE 4

Agreements, which did not rely on equidistance, concluded between States with coasts that are mainly adjacent.

Countries	*Date*[1]	
Ecuador–Peru	18. 8.1952	(6. 5.1955)
Chile–Peru	18. 8.1952	(6. 5.1955)
Guinea Bissau–Senegal	26. 4.1960	(26. 4.1960)
Qatar–Abu Dhabi	20. 3.1969	(20. 3.1969)
Indonesia–Malaysia[2]	27. 4.1969	(7.11.1969)
Malaysia–Thailand	21.12.1971	(16. 7.1979)
Gambia–Senegal[3]	4. 6.1975	(27. 8.1976)
Colombia–Ecuador	23. 8.1975	(22.12.1975)

[1] The first date is the date the agreement was signed; the second is the date it came into force.

[2] This is the boundary which commences on the north shore of the island called Borneo. The other two boundaries defined by this agreement are listed in Table 1.

[3] There are two boundaries defined by this agreement.

CERTIFICATION

I, the undersigned, EDGAR MIZZI, Agent of the Republic of Malta, hereby certify that the copies of the documents attached as Annexes 1, 2 and 3 of the Reply submitted by the Republic of Malta are accurate copies of the documents they purport to reproduce.

This 12th day of July, 1984.

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Edgar Mizzi
Agent of the Republic
of Malta.