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Cour internationale
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La HAYE

YEAR l993

Public sitting

held on Wednesday 13 January 1993, at 10 a.m., at the Peace Palace,

President Sir Robert Jennings presiding

in the case concerning Maritime Delimitation in the Area between Greenland and Jan Mayen

(Denmark v. Norway)

VERBATIM RECORD

ANNEE 1993

Audience publique

tenue le mercredi 13 janvier 1993, à 10 heures, au Palais de la Paix,

sous la présidence de sir Robert Jennings, Président

en l'affaire de la Délimitation maritime dans la région située entre le Groenland et Jan Mayen

(Danemark c. Norvège)

COMPTE RENDU

Present:

President	Sir Robert Jennings
Vice-President	Oda
Judges	Ago
	Schwebel
	Bedjaoui
	Ni
	Evensen
	Tarassov
	Guillaume
	Shahabuddeen
	Aguilar Mawdsley
	Weeramantry
	Ranjeva
	Ajibola
Judge *ad hoc*	Fischer
Registrar	Valencia-Ospina

Présents:

Sir Robert Jennings, Président
M. Oda, Vice-Président
MM. Ago
Schwebel
Bedjaoui
Ni
Evensen
Tarassov
Guillaume
Shahabuddeen
Aguilar Mawdsley
Weeramantry
Ranjeva
Ajibola, juges

M. Fischer, juge *ad hoc*

M. Valencia-Ospina, Greffier

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Mr. John Bernhard, Ambassador, Ministry of Foreign Affairs,
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Mr. Milan Thamsborg, Hydrographic Expert,

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Ms. Jeanett Probst Osborn, Ministry of Foreign Affairs,

Ms. Birgit Skov, Ministry of Foreign Affairs,

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Mr. Per Tresselt, Consul General, Berlin,
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comme personnel technique.

The PRESIDENT: This morning we continue the Danish presentation with Mr. Per Magid.

The Conduct of Denmark

Mr. MAGID: Mr. President, and Members of the Court, I have the honour to address you, Sir and this distinguished Court. I shall, with the Court's permission consider the conduct of Denmark and the legal effects which Norway sees as following from the Danish conduct.

Norway argues that, by reason of Denmark's own conduct, a medium line boundary must be recognized as the boundary required by law. This conduct, it is alleged, constitutes a recognition of, or acquiescence in, such a boundary; or even acts as an estoppel against Denmark, precluding Denmark from arguing for a different boundary than the median line before this Court.

The conduct in question is mainly Denmark's own, domestic legislation. Before I turn to examine that legislation in more detail, I would like to make a few observations of a general character.

First, as the Court has emphasized in the Anglo-Norwegian Fisheries case,

> "The delimitation of sea areas has always an international aspect; it cannot be dependent merely upon the will of the coastal State as expressed in its municipal law." (*I.C.J. Reports 1951*, p. 132.)

Thus, whatever Danish law provided - or Norwegian law for that matter - it could not be conclusive on the question now before this Court. This Court applies international law, not Danish law.

The correctness of this rather elementary proposition is not altered by the fact that two qualifications might have to be made to it. These are that, *exceptionally*, the municipal legislation of the two States might reflect their agreement on where an equitable boundary should lie; and so their conduct would provide one of the *indicia* the Court might use in finding an equitable boundary, as in the 1982 *Tunisia/Libya* case. Or, even more *exceptionally*, a situation might exist in which the legislation of one State created a true estoppel on which the other State could rely. It has never happened yet, at least with regard to a maritime boundary, but it is a theoretical possibility.

My *second* preliminary observation is the following. Legislation tends to be general in

character. As this Court has recognized many times, each maritime boundary case is a *unicum* requiring a delimitation which is equitable in the light of all the relevant factors of the specific case. General rules do not provide a solution divorced from the circumstances of a particular case. For this reason alone, one must be very wary of assuming that general legislative enactments will ever provide the equitable solution in a particular case.

My *third* preliminary observation is that domestic legislation often lags behind the evolution of international law. This may be because States prefer to see the evolution of an emerging rule completed, before they change their law. Or it may simply be because their parliaments are under such a heavy work-load that other matters, in particular of a domestic nature, are given priority. But, for whatever reason, the fact is that municipal legislation frequently reflects the international law rule of a previous era.

For example, as late as 1990, some eight years after the 1982 Convention was adopted, there were still ten States claiming only a 3-mile territorial sea. Even more relevant for our case, some 34 States drawn from every continent, claimed a continental shelf on the basis of the 1958 Geneva formula - out to 200 meters or to the depth of exploitability (*Limits in the Seas*, National Claim to Jurisdiction, No. 36, 6th Ed.). Many of these States, like Denmark, had modelled their legislation on the 1958 Geneva Convention, and so included not only the definition of the shelf as in Article 1 but also a boundary provision modelled on Article 6 of the 1958 Convention.

But could it seriously be argued that this Court, if faced today with a delimitation dispute involving one of those States, would apply Article 1 of the 1958 Convention regarding the outer limits of the shelf; or Article 6 regarding delimitation, *simply because that particular State's legislation had not yet been updated*? I find it inconceivable that it would. The Court would, I submit, apply the contemporary law as the Court itself has expounded it. And not simply because a State's entitlement to a shelf exists *ipso jure* and does not depend on its own proclamation or legislation, but above all because domestic legislation does not dictate international law, or resolve boundaries disputes - except where an agreement or an estoppel exist.

Mr President, with those preliminary remarks I can now turn to the specific Danish conduct

on which Norway relies.

1. The Danish Royal Decree of 7 June 1963 concerning the exercise of Danish sovereignty over the continental shelf

This Decree was clearly intended to implement the 1958 Geneva Convention. For the reasons I have already given, it is irrelevant to the task of delimitation now being undertaken by this Court, nearly 30 years later. But even if Norway was justified in invoking this Decree, the fact is that Norway misconstrues its effects. The only point Norway makes is that Article 2, paragraph 2, of the Decree provides for the application of Article 6 of the 1958 Convention in relation to boundaries, but does so in terms which do not expressly include a reference to "special circumstances". And on that basis Norway would have the Court deduce that Denmark *excluded* the possibility that, in relation to Greenland and Jan Mayen, "special circumstances" might exist to justify a boundary other than the median line. Therefore, Norway argues, the median line must be the boundary.

There are so many reasons why this reasoning is wrong that I fear I shall weary the Court in going through them. So I will try to be brief.

First, the 1963 Decree was *general* law enacting the 1958 Convention. It did not deal specifically with Jan Mayen, no more than did the 1958 Convention, and no specific commitment as regards Jan Mayen can be deduced from it.

Second, and this is important, the Danish Prime Minister, in submitting the question of ratification of the 1958 Geneva Convention for the Danish Parliament, had expressly referred to "special circumstances" (Reply, Ann. 86, p. 214).

Third, Article 2, paragraph 2, of the Decree stated that boundaries shall be determined "in accordance with Article 6 of the Convention..." That means all of it. So, if Article 6 includes a reference to "special circumstances", that reference is automatically included by Article 2, paragraph 2.

Fourth, the reason why Article 2, paragraph 2, said "in the absence of special agreement, the boundary is the median line...." is a purely practical one. This is simply that, in the view of the Danish Government, in practice, any situation of "special circumstances" would have to be

accommodated by way of agreement. A departure from the median line, where special circumstances existed, could scarcely be promulgated or decreed unilaterally: it would have to be agreed, so in fact the real alternatives were median line or agreement.

This is perhaps borne out by the role of a court. As the Chamber of this Court rightly pointed out in the *Delimitation of the Maritime Boundary in the Gulf of Maine Area* case: "Where, however, such agreement cannot be achieved, delimitation should be effected by recourse to a third party possessing the necessary competence." (*I.C.J. Reports 1984*, p. 299, para. 112 (1))

If agreement and judicial settlement are the alternatives, a situation of "special circumstances" has to be accommodated in one or other of those alternatives. It makes no more sense to see "special circumstances" as separate from agreement, than it makes to see "special circumstances" as separate from judicial settlement. To put the point in another way, it is in practice inconceivable that "special circumstances" could be accommodated by unilateral act: they would always require either an agreement, or reference to a third party.

My submission is, Mr. President, that there is no possible basis for arguing that, by virtue of the 1963 Decree, Denmark committed itself to a median line boundary as between Greenland and Jan Mayen.

I will now turn to the next piece of legislation on which Norway relies.

2. The Danish Act of 9 June 1971 on the continental shelf

This is an awkward piece of legislation for Norway, because it does not fit the Norwegian thesis.

The primary purpose of this Act was to vest the resources of the Danish shelf in the Danish State. The reason why the legislation is awkward for Norway is that, in presenting the Act to the Parliament - in form of a Bill - the Danish Government referred expressly to "special circumstances".

The Government's comments on the Section 1 - publicly available - said expressly,

> "In those cases where the Danish continental shelf borders portions of the shelf appertaining to other States, the delimitation must - in accordance with the Convention - primarily be sought effected through agreement between the neighbouring States. In the absence of agreement, the delimitation must be effected in accordance with the principle of equidistance unless special circumstances dictate an alternate line of delimitation." (Reply,

Annex 88.)

I repeat the last phrase: "unless special circumstances dictate an alternate line of delimitation".

This is the phrase which is awkward for Norway, because it confirms expressly that Denmark was not setting aside "special circumstances". The phrase contradicts the whole of Norway's argument based on the 1963 Decree.

The Norwegian Rejoinder (paras. 291-294) is extraordinary. In essence, Norway says that, since only Section 3 of the 1963 Decree was repealed by the 1971 Act, Norway can ignore the rest of the Act. The poverty of that response is so obvious that I need not detain the Court with any lengthy refutation. It must be clear that Denmark's express reference to "special circumstances" completely destroys any argument to the effect that Norway believed Denmark had renounced all reliance on "special circumstances", and that Norway was entitled to rely on Denmark's clear and unambiguous declaration to that effect. The argument is nonsensical if Denmark has said exactly the opposite.

Let me now turn to the third piece of Danish legislation on which Norway relies.

3. The Danish Act of 17 December 1976 on the fishing territory of the Kingdom of Denmark

Norway claims that the 1976 Act on the Fishing Territory of Denmark does not authorize the Danish Government to demand more than a median line delimitation of the fishing zones in the waters between East Greenland and Jan Mayen.

The Court will recall the background to the enactment of the 1976 Act. A number of countries bordering on the Danish, Greenland and Faroese waters had extended their fishery zones to 200 nautical miles. If the waters around Greenland and the Faroese Islands were left as the only important fishing grounds in the North Atlantic Ocean, open to all countries, it would have been extremely harmful to the populations of Greenland and the Faroese Islands, populations which are crucially dependent on the fishing industry (Memorial, paras. 36-38). So they had to be protected.

Section 1, paragraph 2, of the Act contains the following delimitation rule:

> "Failing any agreement to the contrary, the delimitation of the fishing territory relative to foreign States whose coasts are situated at a distance of less than 400 nautical miles opposite the coasts of the Kingdom of Denmark ... shall be ... the median line."

Denmark and Norway are in agreement that the language of this provision corresponds to Article 2, paragraph 2, of the 1963 Royal Decree on the Continental Shelf (Counter-Memorial, para. 238).

It is, therefore, not surprising that Norway proposes an interpretation of the delimitation rule in the 1976 Act similar to Norway's interpretation of the 1963 Decree and thus similarly mistaken.

In the written presentation of the Bill, the Prime Minister explained that the extension of Denmark's fishing limits in a number of cases gives rise to problems of delimitation in relation to other countries. He then stated:

> "According to the general rules of international law, delimitation must be according to the median line principle, as it is in respect of the continental shelf, over which as you know Denmark already has sovereign rights according to the rule in force." (Rejoinder, Ann. 88, p. 229.)

This written statement by the Prime Minister was given only a few years after the Court's Judgment in the *North Sea Continental Shelf* cases, and there is no reason to believe that the Prime Minister, by these words, was attempting to change the delimitation rules of international law or to waive Denmark's rights to benefit from these rules. The Prime Minister's written statement did not purport to be a detailed description of the delimitation rules of international law.

The explicit reference in the text of the delimitation provision "[f]ailing any agreement to the contrary" shows that, as in the 1963 Decree, special circumstances may play a role in the delimitation as part of an agreement.

The wording of the provision setting forth a median line delimitation vis-à-vis foreign States in the absence of special agreement is based on the assumption that the opposite coast under international law generates full maritime zones.

This understanding is clearly evidenced by the reply given on 9 December 1976 by the Minister for Greenland to the Parliamentary Commission established to hear the Bill. The Minister was asked by the Committee why the Government did not intend to enact an immediate extension of the fishing territory around the whole of Greenland. The Court will find his answer in Annex 89 to the Reply. The Minister said *inter alia*:

> "Extending the limit vis-à-vis Iceland northward, a delimitation problem vis-à-vis the Norwegian island of Jan Mayen will arise. According to information available Norway has no intention, at this point in time, to extend the fishery limit around Jan Mayen, and since it is not quite clear to what extent an island with the characteristics of Jan Mayen (the island is

> uninhabited, except for a few scientists and meteorologists) may under international law generate maritime zones, it would be inexpedient to raise the question of delimitation now."

Is it likely that Denmark, knowing that a delimitation issue existed towards Jan Mayen, would pass a legislation which precluded Denmark from claiming a full 200-nautical-mile zone? It is not.

It is evident that the Bill as it was worded would authorize the Danish Government to extend the fishing zone off the coast of East Greenland to a full 200-nautical-mile zone provided this was in accordance with international law. In fact the reason for the Greenland Minister's hesitation is that he was not sure Jan Mayen would be entitled to any maritime zone, beyond the territorial sea.

Norway cannot succeed in conveying the impression of a clandestine Danish operation aimed at misleading the world, and in particular Norway, by using language in the Act which did not convey the true nature of the Danish goals. Norway refers to "private" consultations between the Minister for Greenland and the Parliamentary Committee showing preoccupation with "the timing and tactical considerations" for the establishment of fishing zones around Greenland (Rejoinder, paras. 307-308).

It is correct that the consultation between the Minister for Greenland and the Parliamentary Committee was not public. That would be normal practice in most countries. But the relevant content of the information from the Minister to the Committee was certainly not privileged. Thus, it was a well-known fact - known also to Norway - that much uncertainty existed as to what extent an uninhabited island like Jan Mayen under international law may generate broad maritime zones. The Court will recall that Iceland in July 1975, nearly one and a half years earlier, had issued regulations whereby Jan Mayen would be given no effect on Iceland's 200-mile maritime zone (Memorial, Ann. 14, para. 73).

From a statement made in the Norwegian Parliament in June 1980 by the Norwegian Foreign Minister, Knut Frydenlund, we know Iceland's position in the initial delimitation negotiations. Iceland argued that Jan Mayen had no right to maritime zones beyond the territorial sea. And according to the Norwegian Foreign Minister this was a view shared by other countries (Counter-Memorial, Ann. 11, p.52).

So what could make Norway believe that Denmark had waived its right to claim a full

200-nautical-mile zone vis-à-vis Jan Mayen? The answer is nothing.

In the comments to Section 1, paragraph 2, of the Bill it is explained that upon extension to 200 nautical miles the need arises for agreements on delimitation *inter alia* around Greenland. Since agreement is mentioned specifically this is as an indication that a median line delimitation would not apply in all situations.

The proposed Bill did not exclude a 200-nautical-mile delimitation vis-à-vis a third State. This was also understood by a Member of the Parliament from the Faroese Islands. The said Member pointed out that the distance between Rockall and the Faroese Islands was less than 400 nautical miles and requested that when a decree was issued the Faroese fishing limits should then be given full extent. His suggestion was not to change the wording of the Bill. That would not have been necessary. Consequently his intervention did not call for a reply and the Prime Minister did not comment on the intervention (Rejoinder, Ann. 88, p. 234).

I submit that the extension of the fishery limit off the east coast of Greenland was within the scope of the enabling act. The enabling act is to be construed in the light of international law.

My conclusion is, Mr. President, that the 1976 Act does not support Norway's argument in any way.

I turn now to further legislative acts by Denmark on which Norway seeks to rely.

4. The Danish Executive Orders of 14 May 1980 and 31 August 1981 on the fishing territory in the waters surrounding Greenland

Norway has four themes which are repeated in connection with these Orders.

First, it is alleged that the establishment of the 200-nautical-mile fishery zone east of Greenland vis-à-vis Jan Mayen is in clear contravention of the enabling instrument and beyond the authority granted under the 1976 Fishing Territory Act (Counter-Memorial, paras. 359-360; Rejoinder, paras. 313, 316, 319-320).

I have dealt with this issue earlier, and shall not repeat what I said. It is evident that the Danish Government under national legislation had the authority to issue the 1980 Order as well as the 1981 Order.

Mr. President, permit me to make one additional observation. I believe that it is generally recognized that a State is in a better position to interpret its own laws than other States. If the Danish Government had felt that it lacked authority to issue the 1980 and the 1981 Executive Orders it may safely be assumed that the Danish Government would have obtained authority by having the enabling Act amended.

Second, it is alleged, by Norway, that Denmark was so involved in its median line policy that the 1980 Order respected the median line delimitation in the maritime areas between Greenland and Jan Mayen and that no immediate challenge of Norway's claim to exercise jurisdiction up to the median line was made (Counter-Memorial, paras. 243-244, 316, 318).

It appears to have been overlooked by Norway that the 1980 Order actually did establish a 200-nautical-mile zone off the East Coast of Greenland vis-à-vis Jan Mayen. Neither the 1980 Order nor the Danish Note of 9 June 1980 could leave any doubt. Denmark claimed a full 200-nautical-mile zone vis-à-vis Jan Mayen. To say that there was no immediate challenge of Norway's claim to exercise jurisdiction up to the median line is simply mistaken.

Third, it is argued that Denmark's initial decision not to exercise jurisdiction beyond the median line evidences that the median line actually was in place (Counter-Memorial, para. 536) and shows "Denmark's continued strong support of the median line" (Rejoinder, paras. 316 and 362). I have to say that I find it extraordinary that a measure of restraint of this kind should be treated as something prejudicial to the interests of Denmark. It is commonly found, in international disputes, that States will attempt to exercise restraint pending a resolution of their dispute. It has never, to my knowledge, been suggested that their legal positions are thereby prejudiced. For example, the Court will well recall that in the *Libya/Malta* dispute, Libya had exercised a certain restraint as regard to the petroleum concessions granted by Libya in an area claimed by Malta. Libya had instructed the oil companies concerned not to work in the particular areas which were subject to Maltese claims (Libyan Memorial, Vol. 1, p. 62). There is nothing in the Court's subsequent Judgment which suggests, in any way, that Libya was thereby prejudiced in its claim against Malta. And, to its credit, Malta did not seek to take advantage of this restraint by Libya. One can find similar

examples in recent cases. In the *Gulf of Maine* case, the same problem of overlapping claims occurred and, pending a resolution of the dispute, both the United States and Canada undertook to exercise measures of restraint as regards both fishing and mineral exploration. There is no suggestion in the Judgment by the Chamber of the Court that either the United States or Canada was to be regarded as prejudiced by such restraint. To cite an even more recent example, in the dispute between France and Canada over the maritime delimitation affecting the French Islands of St. Pierre et Miquelon, the Canadian Government exercised certain restraints as regards fishing in the disputed area, prior to the submission of the dispute to arbitration. In the Award of the Arbitral Tribunal of 10 June 1992, there is no suggestion whatever that the legal position of Canada was prejudiced by the adoption of these measures of restraint.

Mr. President, I need scarcely say that if the Norwegian argument was to receive any support in this Court, a very serious blow would be dealt to the cause of peaceful settlement of disputes. States would be afraid to adopt measures of restraint, for fear that their legal position might be weakened. That would be extremely damaging for international relations generally.

Finally, Norway goes to the extent of alleging that Denmark, in 1980, had an interest in concealing its opinion as to the delimitation between Greenland and Jan Mayen because it could have undesirable effects in relation to other outstanding delimitations (Rejoinder, paras. 316-317).

Mr. President, this calls for one or two comments. Denmark made no secret of its point of view concerning Jan Mayen. Denmark made it specifically known to Norway as early as March 1979. And since Norway at the time knew that Iceland, and probably a number of other countries, would question Jan Mayen's entitlement to the new broad maritime zones it ought not to have come as a surprise.

And then Norway states, without one jot of evidence, that the exercise of Danish jurisdiction in 1980, beyond the median line between Greenland and Jan Mayen, could have had "undesirable effects in relation to other outstanding delimitations" (Rejoinder, para. 317). Norway does not offer one example to support this allegation. For good reason. There are none. There was no difference in Denmark's position on delimitation issues in 1980 when the restraining clause was adopted and in

1981 when it was deleted.

5. The Danish position during the negotiations at the Third Law of the Sea Conference

The Norwegian Government seeks to use the position of Denmark during the Third Law of the Sea Conference as a basis for arguing that Denmark had, at the Conference, committed itself to an exclusive median line approach. It must be obvious that this argument is unfounded. As is well-known, Denmark certainly formed part of that group of States which, as regards delimitation, sought to persuade the Conference to adopt the equidistance - special circumstances rule. But, Mr. President, as everyone knows, that was rejected by the Conference, and the formula adopted by the Conference for both the continental shelf and the exclusive economic zone did not adopt that position. Having failed at the Conference, it would be really quite extraordinary if Denmark were now held in this Court to be committed to a legal rule on delimitation which was rejected by the Conference as a rule of law.

In any event, Mr. President, it is clear from the records of the Conference - including even the statements which Norway itself cites in its written pleadings (Counter-Memorial, para. 351; Rejoinder, para. 326) that the formula for delimitation supported by Denmark was not equidistance *per se*. It was the formula of Article 6 of the 1958 Convention, that is to say, equidistance combined with special circumstances.

Second, there is a great deal of confusion in the Norwegian pleadings over the difference between entitlement and delimitation. The Norwegian Government invokes (Rejoinder, para. 327) a statement by the Danish delegate affirming the entitlement to a maritime zone of "oceanic islands". Denmark sees no reason to withdraw from that statement, or to qualify it in any way. Denmark does not dispute that an island has entitlement. The question before the Court is not one of entitlement per se, but rather of the appropriate delimitation in relation to a particular island. This is an entirely different matter.

And the delimitation rule suggested by the Danish delegate at the Conference was in accordance with the Danish position on the rule in Article 6 of the 1958 Convention.

I would finally comment on Norway's attempt to derive support from what was paragraph 3 of the Negotiating Group's proposal to the Conference (NG7/2, dated 20 April 1978, Rejoinder, para. 328). Now that full paragraph of the proposal envisaged the use of the median line as a measure of restraint pending agreement for settlement of a boundary. In other words, the use of a median line was a temporary measure in the interest of restraint, and without prejudice to the eventual boundary to be agreed, or to be determined by third party settlement. Everything that I have said previously about the non-prejudicial character of restraint applies equally to this third paragraph of the proposal by the Negotiating Group. It cannot possibly prejudice Denmark's position.

There is finally the note of complaint which creeps into the Norwegian pleadings (Rejoinder, paras. 330-331). Norway appears to be complaining that during the Conference, when Denmark was supporting the equidistance/special circumstances formula, Denmark did not intimate to Norway that the median line solution would not apply to Jan Mayen. Mr. President, in these large multilateral conferences, States are not encouraged to raise specific issues. The Conference is concerned to adopt general rules and to avoid involvement in particular disputes. Moreover, as Norway well knows, Norway was told specifically in March of 1979 by Denmark, that the median line solution for Jan Mayen was unacceptable to Denmark.

I will now turn to

6. The contacts between the Foreign Ministers of Denmark and Norway on the Danish maritime claims

Norway complains that when the Danish Minister for Foreign Affairs in March, July, and August 1979 told his Norwegian counterpart that a median line delimitation between Jan Mayen and Greenland would not be acceptable to Denmark the Danish Foreign Minister did not use the term "special circumstances" (Rejoinder, paras. 330-331).

Mr President, I submit that the complaint is scarcely justified. It is not appropriate for one Foreign Minister to lecture another and, after all, the rather special circumstances in this case - such as the minimal length of the coast of Jan Mayen compared to the long coast of Greenland, or the absence of any permanent population on Jan Mayen compared to Greenland - these salient

differences were apparent to everyone. And it scarcely needed the Danish Foreign Minister to point them out to his Norwegian counterpart.

7. Legal effects of the Danish conduct

Mr. President, having now surveyed these various pieces of Danish conduct on which Norway seeks to rely, I can now turn to the legal conclusions which Norway attempts to derive from this conduct.

The first conclusion is that, by virtue of this conduct, Denmark has "recognized", or "approved", or "adopted" a median line boundary between Greenland and Jan Mayen (Rejoinder, paras. 343, 350). The difficulty with this Norwegian thesis is that it totally ignores the facts. The facts are, first, that none of the statements or other conduct on which Norway relies refer specifically to the boundary between Greenland and Jan Mayen. The statements, whether in legislation or in statements made before the Law of the Sea Conference, are of a general character and cannot possibly be interpreted to apply specifically to this particular boundary. Second, as I have already explained, all of the statements by Denmark saw the median line solution not in isolation but as part of a more comprehensive formula which linked the median line with special circumstances. That formula, which clearly envisaged the possibility that, in special circumstances, the median line would not be used, was the formula contained in the 1958 Convention and therefore the formula to which Denmark had adhered since the early years of the 1960s.

When I read the Norwegian pleadings I was struck by the fact that, in final analysis, the whole Norwegian theory of recognition derives from the 1963 Decree of Denmark. It is on that Decree that the whole Norwegian argument essentially depends. But, Mr President, that Decree not only did not refer to Jan Mayen; and not only did not exclude "special circumstances" as a reason for departing from the median line, but it was a decree enacted by Denmark at a time when Denmark was fully entitled to base its view of the law on the 1958 Geneva Convention.

But the law has changed! The law has developed and progressed since that time, both by virtue of judicial and arbitral practice, State practice and the adoption of the 1982 Convention of the Law of the Sea. We are now in the year 1993, some 30 years after the adoption of the 1963 Decree.

Like international instruments, national acts are to be interpreted and applied within the framework of the legal system prevailing at the time of interpretation.

Mr President, I turn now to the last of the grounds upon which Norway contends that Denmark is bound to accept a median line delimitation: this is the argument of estoppel, and it is an argument which is both audacious and completely unfounded. The Court has dealt with the principle of estoppel in several of its cases: I need only mention the *North Sea Continental Shelf* cases, the *Temple of Preah Vihear* case, and more recently the *Elsi* case. So there is no need for me to enter into any detailed discussion of this concept. But the essentials of an estoppel are well recognized and what I will do, to assist the Court, is to go through these essentials simply to demonstrate that there is no possible basis upon which Norway can argue that an estoppel exists against Denmark.

The first essential of an estoppel is that the statement made must be clear and unambiguous. In the *Serbian Loans* case the Permanent Court required a "clear and unequivocal representation" (*P.C.I.J., Series A, No. 20*, p. 39). In the *North Sea Continental Shelf* cases the Court rejected the argument that Germany was estopped from denying the applicability of the 1958 Treaty régime, the Court finding that there was no "very definite, very consistent course of conduct" (*I.C.J. Reports 1969*, p. 26, para. 28) on the part of Germany to support an allegation. Now in the present case we simply have no statement by Denmark at all to the effect that the boundary, the boundary required by law, between Greenland and Jan Mayen should be the median line boundary. It is not simply that Denmark made no statement to that effect; Denmark made no such statement at all! So the very first essential of an estoppel argument is missing in this case. The whole of the Norwegian argument is based upon pure inference as to what the boundary in this particular case might be, inferences based upon statements of a quite general principle. Now that will simply not do. You cannot base an estoppel on pure inference. There must be a clear and unambiguous statement, and we simply do not have such a statement in this case. A second and fundamental requirement of any estoppel is that the party invoking the estoppel must be shown to have relied upon that statement to its detriment. In short, Norway has to show not only that Norway relied upon such a clear and unambiguous statement, but in addition that it did so to its prejudice or to its

detriment. So the question is, in what respect has Norway suffered any detriment? The first illustration of so-called "detriment" by Norway is given in paragraph 363 of Norway's Rejoinder. In effect Norway argues that it would not have reached the agreement it did with Denmark in relation to the boundaries between Norway and the Faroese Islands in 1979, had Norway believed that Denmark would depart from the median line principle in relation to Jan Mayen.

The point made by Norway is simply contradicted by the facts. The agreement was entered into on 15 June 1979, three months *after* the Danish Minister for Foreign Affairs advised his Norwegian counterpart, in March of that year, that a median line delimitation between Jan Mayen and Greenland would not be acceptable to Denmark. So Norway *knew*, when it accepted the Faroese agreement, that Denmark would not accept a median line with Jan Mayen.

Now, the second example of so-called "prejudice" given by Norway in paragraph 364 of the Rejoinder is the Norwegian Agreement with Iceland of 28 May 1980. In effect, Norway now suggests that it would not have reached that Agreement with Iceland had it known that Denmark would insist upon a departure from the median line principle in relation to Jan Mayen. This is entire speculation and, frankly Mr. President, I do not believe a word of it. We know the background to the 1980 and 1981 Agreements between Iceland and Norway. We know the outcome of the conciliation process which let to the 1981 Agreement and at least, to judge from the conciliation process, the issue of a boundary between Jan Mayen and Greenland played no part whatsoever in the final result which was recommended by the conciliation commission. All the Agreement of 1981 did was to embody the solution recommended by the conciliation commission.

The suggestion that Norway would not have entered into the Agreements with Iceland if it had known the Danish position is contradicted, not only by the fact that the Danish Minister for Foreign Affairs three times in 1979 had told his Norwegian counterpart that a median line delimitation between Greenland and Jan Mayen would not be acceptable to Denmark, but also by the debates in the *Storting*. During the debate in the *Storting*, which was held on 6 June 1980 the Norwegian Foreign Minister, Knut Frydenlund, informed the Parliament that Denmark, with effect from 1 June 1980, had established a 200-nautical-mile fishing zone in the area between Greenland and

Jan Mayen, and that the Norwegian Government had lodged a reservation (Counter-Memorial, Ann. 11, p. 55).

The conclusion must be, Mr. President, that Norway can show, and has shown, no possible prejudice at all. And the reason for this is quite obvious. The reason is that Denmark had never made any such statement upon which Norway could rely, and certainly Norway did not rely upon any such statement to its detriment.

The Conduct of Norway

Bear Island

Mr. President, distinguished Members of the Court, I have dealt with the conduct of Denmark. I have tried to demonstrate that the acts and actions of Denmark in relation to maritime delimitations can not be invoked by Norway as binding Denmark to accept a median line boundary with Jan Mayen. I shall now turn to the conduct of Norway. However, before I commence an examination of the conduct of Norway, I would like to make one preliminary observation. While Norway has attempted to employ the conduct of Denmark to demonstrate that Denmark has approved a median line between Greenland and Jan Mayen, or is estopped from claiming an area beyond a median line, we do not suggest that the conduct of Norway can be used to show Norway's acquiescence in a Danish 200-nautical-mile zone off Greenland vis-à-vis Jan Mayen, or that Norway's conduct leads to an estoppel. What we do suggest is that Norway's conduct clearly demonstrates Norway's perception of an equitable solution in delimitation situations resembling the present delimitation case.

The conditions for the maritime delimitation between Greenland and Jan Mayen are not unique. In the same area, there are two other maritime delimitations having a bearing on the present case. One is the delimitation by agreement between Iceland and Jan Mayen which my colleague, Ambassador Lehmann, will deal with, the other is the delimitation undertaken unilaterally by Norway vis-à-vis Bear Island, which I will now address.

I submit that the delimitation between the economic zone off the mainland of Norway and the

maritime area around Svalbard constitutes an important precedent in this case. And with your permission, Mr. President, I will try briefly to explain that this delimitation shows not only that, according to Norway, an island with the characteristics of Bear Island should have no effect in the delimitation of the maritime zone off the mainland of Norway, but also that this view apparently was approved by a number of States parties to the Spitsbergen Treaty.

First, Bear Island, like Jan Mayen, is a barren, uninhabited island unable to sustain economic life. With its 178 square kilometres, it is nearly half the size of Jan Mayen. Like Jan Mayen, it is situated off a mainland cost, 215 nautical miles off the coast of Norway, while Jan Mayen is 250 nautical miles off the coast of Greenland. A glance at the map, distributed to the Court this morning, displaying the northern coast of Norway, Bear Island and parts of Svalbard shows the resemblance to the geography of the present case. The geographical and socio-economic similarities between Jan Mayen and Bear Island have not been disputed by Norway.

Second, both cases constitute international delimitations. At this point Denmark and Norway disagree. In the Counter-Memorial, Norway maintains that "no delimitation in international law has been effected" (Counter-Memorial, para. 459) and in the Rejoinder even that no delimitation at all has been considered or effected (Rejoinder, para. 635). Clearly this can not be right.

The Court will recall that while the Treaty of Spitsbergen of 1920 recognizes Norwegian sovereignty over the Archipelago of Svalbard, including Bear Island, it was a *quid pro quo* that nationals of all the Contracting Parties had an equal right to exploit the resources of the Archipelago of Svalbard and its territorial waters. Under the Spitsbergen Treaty Norway is obliged to exercise its sovereign rights in the interest of all the Contracting Parties (Reply, Ann. 79).

With the emergence of the new legal concepts of a continental shelf and, later, of a 200-nautical-mile zone, the question arose whether the Spitsbergen Treaty applied to the new maritime zones. This issue remains to be resolved. No conference has been held and none of the parties to the Treaty has asked the Court or any other tribunal for a legal decision. And of course, Mr. President, the present case does not call upon the Court to consider and decide upon the correct interpretation of the Spitsbergen Treaty. However, we ask, the Court to note two pertinent matters.

Firstly, that Norway and the other parties to the Spitsbergen Treaty disagree on the interpretation of the Treaty. *Secondly*, and this is very important, Norway has tried to avoid becoming engaged in an open dispute on this disagreement.

From at least 1970, the Norwegian Government knew that other parties to the Spitsbergen Treaty did not agree with Norway's interpretation of the Treaty. Norway's position was and is that the Spitsbergen Treaty does not confer any rights concerning the continental shelf outside the territorial waters of Svalbard on the other contracting Parties to the Treaty. The Government of Norway has later taken the same position in relation to the economic zone.

From a statement made by the Norwegian Foreign Minister in the *Storting* in May 1976, we know that as early as 1970 the then USSR had advised Norway that the Spitsbergen Treaty applied to the continental shelf around Svalbard. In 1974 the United States of America and Great Britain reserved their rights in relation to the continental shelf under the Spitsbergen Treaty, and according to the Norwegian Foreign Minister other western countries have made similar reservations (Danish Annex 97). In a debate held in June 1976 in the *Storting* following the account given by the Minister for Foreign Affairs, the Chairman for the Committee on Foreign Policy and Constitutional Matters acknowledged that the Norwegian legal arguments in support of the limited interpretation of the Spitsbergen Treaty have not been internationally accepted (Danish Annex 98). Thus, it is evident that in 1976 - as in the past - the Svalbard issue was not a minor matter easily overlooked or forgotten by Norway. On the contrary, it was an ever-present and sensitive problem for the Norwegian Government and the *Storting*.

Over the years it has been the Norwegian Government's firm and declared policy to avoid confrontations with other States on issues relating to Svalbard. This was also the case in December 1976 when Norway established an economic zone in the waters off the Norwegian mainland. This zone was not to impinge upon the continental shelf and the other broad maritime zones appertaining to the Archipelago of Svalbard. If it did, Norway could expect confrontations not only with the USSR and other East European countries, who had advised Norway that the Spitsbergen Treaty also applied to the continental shelf of Svalbard, but also with the United States

of America, Great Britain and other western countries who had reserved their position on this issue. The delimitation vis-à-vis Bear Island and the remaining parts of Svalbard had to be done in such a manner that disputes with other parties to the Spitsbergen Treaty would be avoided.

The actual delimitation unilaterally effected by the Government of Norway demonstrates how Norway perceived the effect of an uninhabited island in a maritime delimitation opposite a populated mainland. Norway must have been confident that reducing the zone attaching to Bear Island, so as to allow a full 200-nautical-mile zone to the Norwegian mainland was "non-controversial", and unlikely to arouse opposition. To our knowledge this delimitation carried out in 1976 did not cause other States Parties to the Spitsbergen Treaty to protest or to make reservations.

How Norway and the other countries in 1976 perceived the 200-nautical-mile zone off the coast of the Norwegian mainland vis-à-vis Bear Island is further illustrated by the conduct of Norway and other States in relation to the fishery protection zone around Svalbard established shortly after. By Royal Decree of 3 June 1977 a 200-mile fishery protection zone in the maritime areas around Svalbard was established. Contrary to the 200-nautical-mile economic zone in the waters off the mainland of Norway the fishery protection zone was established on a non-discriminatory basis. The fishery protection zone was restricted by the outer limits of the economic zone off the Norwegian mainland. Mr. President, do we know why the Government of Norway opted for a fishery protection zone around Svalbard and not an economic zone as Norway claims to be entitled to? We do. On 6 June 1977 the Norwegian Minister for Foreign Affairs, in the *Storting*, gave, as one of the two reasons for not establishing an exclusive zone around Svalbard, the following explanation:

> "that the immediate establishment of a zone with exclusive rights for Norwegian fishermen could therefore have led to a confrontation with other Contracting Parties. This would hardly be in the interest of Norway." (Reply, Ann. 82.)

Against this background, one can hardly believe that Norway did not consider the delimitation between the zones of Svalbard and the zones of mainland Norway when the 200-nautical-mile exclusive economic zone off mainland Norway was established, as a problem of international, maritime delimitation. It was not a purely internal, administrative matter.

The reaction from the other Contracting States evidences the importance attached to the delimitation between the two zones. While the establishment of the 200-nautical-mile exclusive economic zone off the mainland of Norway apparently did not create any adverse reaction from the other Contracting States, this can hardly be said about the less radical, non-discriminatory, fishing protection zone around Svalbard.

In a foreign policy debate of the *Storting* held on 27 November 1978 - nearly one and a half years after the establishment of the fishery protection zone, Minister Jens Evensen gave an account of the Contracting States' reaction to the Norwegian Government's decision. Minister Jens Evensen stated:

> "The government has previously given an account of its choice, as point of departure, of the principle of a non-discriminatory fishery protection zone as opposed to the introduction of a full economic zone, an action which per se the government had legal authority to take. Still, we did not avert reactions from other countries. The reactions were based on Svalbard's special status under the Svalbard Treaty. The western countries acknowledged the access to and the need for Norwegian regulatory measures, but reserved their position in principle, invoking the Svalbard Treaty.
>
> The reactions from the Soviet Union and a few other East European countries were stronger. It is probably correct to say that they protested formally against the establishment of the zone and contested the foundation in international law to take such a step." (Danish Annex 99.)

The reaction from other States to the establishment of a fishery protection zone makes it impossible to accept the Norwegian position that by the delimitation between the 200-nautical-mile zone and the fishery protection zone "no delimitation in international law has been effected".

As mentioned before, to our knowledge none of the States Parties to the Spitsbergen Treaty protested or made reservation in connection with the full exclusive economic zone off the mainland of Norway, thereby acknowledging that Bear Island and the remaining parts of Svalbard were not entitled to impinge upon the 200-nautical-mile zone off the mainland of Norway. However, when it came to the fishery protection zone, protests and reservations were made.

Mr. President, in conclusion, when Norway established the broad maritime zones off the mainland of Norway, the Norwegian Government was painfully aware that their effect on the maritime zones around Svalbard was an issue giving rise to dispute. Norway did not want a confrontation with the other Contracting States. Norway had therefore to implement the

200-nautical-mile zone off the coast of mainland Norway in such a manner that States claiming that the Spitsbergen Treaty applies to the broad maritime zones of Svalbard had no reason to protest or make reservations to Norway. Norway did not believe that Bear Island was entitled to impinge upon the Norwegian zone. And rightly so. This delimitation was accepted by the other States concerned. Mr. President, I believe that this delimitation unilaterally carried out by Norway, and the international society's acceptance of it, clearly shows that equitable principles justified a full Norwegian 200-nautical-mile zone vis-à-vis Bear Island. It must follow that equitable principles equally justify a full 200-nautical-mile zone for Greenland vis-à-vis Jan Mayen.

Mr. President, distinguished Members of the Court I thank you for your attention and your patience and, after me, Mr. President, I will leave the floor to Mr. Lehmann who will address the Norwegian conduct as evidenced by the Agreement between Norway and Iceland on the delimitation of the maritime zones between Jan Mayen and Iceland.

The PRESIDENT: Thank you very much, Mr. Magid.

Mr. Lehmann, I think perhaps we can take our break now and come back afterwards. Thank you very much.

The Court adjourned from 11.15 to 11.30 a.m.

The PRESIDENT: Mr. Lehmann, please.

Mr. LEHMANN: Mr. President, distinguished Members of the Court,

1. We are now moving closer to the actual confrontation between Jan Mayen and Greenland and to the central issue of the method of drawing the line in the waters between Greenland and Jan Mayen in such a way that an equitable solution is reached. Professor Bowett will deal with that issue of the method of delimitation in our next intervention.

Before that I shall follow-up upon the intervention just made by my colleague, Per Magid, and comment upon another and most instructive precedent which has a most direct bearing on the present case, namely the delimitation already effected between Norway and Iceland in the waters between Jan Mayen and Iceland. Through the conclusion of the two Agreements with Iceland of 1980 and 1981 dealing with fisheries and continental shelf questions, respectively (Memorial, Anns. 16 and 28), Norway has already shown what delimitation method it would be reasonable to adopt for the island of Jan Mayen vis-à-vis a territory with such characteristics as Iceland. Though Iceland and Greenland are of course not of the same size, they are both populated territories overwhelmingly dependent on fisheries, as recognized for a long time by the international community, first in connection with the adoption at the first United Nations Conference on the Law of the Sea in 1958, of Resolution No. VI bearing the title "Special Situations relating to Coastal Fisheries"; and later, as we all know, in Article 71 of the 1982 United Nations Convention on the Law of the Sea (Memorial, para. 305; Reply, para. 325).

It was stated in the *Libya/Malta* case that where there is agreement there is for all practical purposes also equity (paragraph 46 of the Judgment). No doubt this dictum holds true for the two agreements between Iceland and Norway. These agreements must be seen as reflecting an equitable result striking a fair boundary in the waters between the two territories. In the words of the Conciliation Commission established to prepare recommendations with regard to the dividing line for the shelf area between Iceland and Jan Mayen its function was "to make recommendations to the two Governments which in the unanimous opinion of the Commission will lead to acceptable and equitable solutions of the problems involved" (Report of the Conciliation Commission, p. 823). I

stress this function of recommending acceptable and equitable solutions to the two Governments. The Commission's actual recommendation to join the shelf boundary to the delimitation line for the fishery zones following the outer limit of Iceland's 200-mile economic zone was consequently seen by the Commission as an equitable solution. The same attitude was then adopted by the two Governments which based their 1981 Agreement on the Commission's recommendation (fifth preambular paragraph of the Agreement). As to the first Agreement on fishery questions of 1980, the Chairman of the Foreign Affairs Committee of the Norwegian Parliament, in recommending the Parliament to approve that agreement, stated that the whole Committee agreed that the aim had been to reach a negotiated settlement with Iceland and that the present agreement is acceptable (Counter-Memorial, Ann. 11, p. 38). Other participants in the debate characterized the agreement as one of "equity", one representing "a reasonable approach" (*ibid*., pp. 47-48, Mr. Per Karstensen); an agreement "as good as it could be" (*ibid*., p. 63, Mrs. Hanna Kvanmo); an agreement "to the mutual benefit of the interests of both parties" (*ibid*., p. 66, Mr. Sven Stray); an agreement which "strikes a balance between what is right and what is reasonable" (*ibid*., p 74, Mr. Jakob Aano). Thus, the boundary in the waters between Iceland and Jan Mayen must be seen as an equitable result - not a political concession as now asserted by Norway.

If we were to believe what is written in the Norwegian Counter-Memorial about the Danish claims in the present dispute, then the agreements between Iceland and Norway would have to be characterized as "a major departure from the realities of the geographical situation" (Counter-Memorial, para. 670) a "trespass deeply into the basic entitlement of Jan Mayen" (Counter-Memorial, para. 515); the agreements "would be contrary to common sense, and constitute a threat to legal stability" (Counter-Memorial, para. 685); the claims of Iceland for maintaining its 200-mile economic zone would "appear entirely without foundation" (Counter-Memorial, para. 692). I believe the Norwegian Parliament would have been alarmed had it been asked to give its consent to such agreements violating common sense and basic norms of international law. As can be seen from the Parliamentary debate on the two agreements there was no reason for alarm. On the contrary. The agreements represented an international recognition of the status of Jan Mayen as an island

under international law adding some 330,000 km^2 of territories to Norway equal to the total area of mainland Norway - as it was stated before the Norwegian Parliament by the Chairman of the Foreign Affairs Committee (Counter-Memorial, Ann. 11, p. 40).

In actual fact the line of reasoning reflected in the quotations from the Norwegian Counter-Memorial which I have just read out, has been adopted by Norway specifically to suit the Norwegian aims in the present case. At the time when the agreements with Iceland were contemplated in 1978-1979 a Norwegian 200-mile fishery zone around Jan Mayen was not even expected to meet with the approval of other countries. This fact was stated clearly by the Norwegian Foreign Minister during the debate in the Norwegian Parliament on 6 June 1980: "But we must also face the fact that it would have been a zone which other countries would not have respected, and which Iceland would probably actively have opposed." (Counter-Memorial, Ann. 11, p. 54.) In the light of that statement by Norway's Foreign Minister the boundary between Iceland and Jan Mayen, according a maritime zone of some 90 nautical miles to the island of Jan Mayen vis-à-vis Iceland, must be characterized as very favourable to Norway and therefore acceptable to the Norwegian Parliament, also reflecting an equitable solution.

The Norwegian Parliament, I believe, would have been equally alarmed had they been presented with the sketch-map now shown in Annex 72 to the Counter-Memorial, indicating that Norway accepts that Jan Mayen would have no effect on Iceland's 200-mile economic zone, whereas the Icelandic rock of Kolbeinsey will be given full effect. As you will see from that sketch-map, which has been produced *ad hoc* for the present proceedings, the map deviates on this point - concerning Kolbeinsey - decisively from the original map presented to the Norwegian Parliament shown in Annex 57 of the Danish Reply. (That is one of the first annexes in the Reply - the original map presented to the Norwegian Parliament.) The original map stops at the intersection point between Iceland's and Greenland's 200-mile zone and then continues along a median line between Iceland and Greenland, whereas the newly produced map (Counter-Memorial, Ann. 72) takes the Icelandic 200-mile line further north up to the intersection of that line with a median line between Greenland and Jan Mayen, thus respecting the rock of Kolbeinsey. But for Norway to accord full

effect to the Icelandic rock of Kolbeinsey and only partial effect to its own island Jan Mayen simply does not make sense. And the Norwegian Government could, of course, not be expected to present a proposition to its Parliament which does not make sense. The map presented to the Norwegian Parliament in 1981 does not, therefore, depict such a distortion in the relative effect to be given to Kolbeinsey and Jan Mayen as now appears in the sketch-map presented in the Norwegian Counter-Memorial.

The reality, as already mentioned, is that the agreements - there are two agreements - between Iceland and Norway as presented to the Norwegian Parliament do express a sensible and equitable solution - otherwise they would not have been agreed to. These agreements, therefore, create a most important precedent with regard to the delimitation situation between *Greenland* and *Jan Mayen* which, practically speaking, is the same as that between Iceland and Jan Mayen.

In the Rejoinder (para. 374), Norway states that the Agreement with Iceland of 28 May 1980 was approved by the Norwegian Parliament explicitly on the basis that no precedent was being created in relation to other delimitations, and that this is accepted by the Danish Government in the Reply (para. 319). I beg to disagree. The Danish Government does not accept that interpretation. In the Reply (para. 319) Denmark noted that the Norwegian Parliament and Government did not *wish* the agreement to form a precedent, but then it is added in the Reply "[b]ut the precedent was nevertheless created by the ratification of the two Agreements". Norway tries several times in the Rejoinder to belittle the Danish reasoning by labelling it "wishful thinking". Talking about wishful thinking, the assertion by the Norwegian Government and Parliament that the agreements with Iceland did *not* create any precedent is indeed a piece of wishful thinking to which I shall revert a little later during this presentation. Lest there should be any further misunderstanding I wish to stress once again that Denmark is not applying for most-favoured nation treatment, as asserted by Norway (e.g., paragraph 700 of the Counter-Memorial), but is simply pointing to a most relevant precedent which, in the circumstances, clearly represent an equitable result.

Mr. President,

2. I should like also to point out that the maritime boundary between Norway and Iceland was

first put in place with effect for the fishery zone and afterwards for the continental shelf area. This shows the sequence of events when the new broad maritime zones were introduced and accepted in this region of the North Atlantic. When negotiations between Denmark and Norway started in December 1980, some six months after the conclusion of the first Icelandic-Norwegian agreement, the discussions followed the same pattern as that established between Norway and Iceland. First the delimitation of the fishery zone was discussed. Later the delimitation of the continental shelf area was joined to the negotiations.

If we were to believe the Norwegian thesis and primary legal argument in the present case, namely that the continental shelf boundary between Greenland and Jan Mayen was already in place when negotiations started in December 1980, and that the outstanding question was just the exact demarcation of the shelf boundary to which the fishery zone would then have to be joined, why then did we spend days, months and years arguing separately about the boundary for the fishery zone? The answer of course is that we did so because neither the shelf boundary nor any other common boundary were in place in the area, and because it corresponded to the facts of the case which centered around the fishery resources in the area, whereas the mineral potential of the shelf was not known and still is not. The Norwegian thesis ignores the facts of the case. It is simply invented to serve Norway's needs in the present dispute. My good friend and colleague, Per Tresselt, can confirm this description as he was present during the first round of negotiations in December 1980 in Oslo where, as correctly stated in the Norwegian Counter-Memorial (para. 257) "Each Party provided a detailed presentation of its legal position."

Together the two Agreements between Norway and Iceland, from 1980 and 1981, establish a single line of maritime delimitation of the fishery zones and the continental shelf area between Iceland and Jan Mayen. Or, if Norway prefers, we may say that the two agreements establish two *identical* lines of delimitation for these maritime areas. At any rate, the line or lines are drawn in a way which fully respects Iceland's 200-mile economic zone. Jan Mayen has not been allowed in any way to reduce Iceland's 200-mile zone, neither as regards the fishery zones nor as regards the continental shelf area.

3. Mr. President, in commenting briefly on each of the two Agreements, I wish to show to the Court that both Agreements contain a recognition in law by Norway of Iceland's right to a 200-mile economic zone unaffected by the presence of the island of Jan Mayen.

Let me first deal with the *Agreement* of 28 May 1980.

That Agreement settled the Norwegian-Icelandic dispute on *fishery* rights in the waters between Jan Mayen and Iceland.

The Agreement is clearly based upon legal considerations, as stated expressly in the Preamble to the Agreement. Thus preambular paragraph 8 refers to the work carried out by UNCLOS III. Moreover, preambular paragraph 5 contains an explicit recognition by Norway of Iceland's 200-mile economic zone. The recognition is based on legal considerations. First, reference is made in preambular paragraph 4 to Iceland's dependency on fisheries in accordance with Article 71 of the text of the Conference on the Law of the Sea, as it stood at the time. Secondly, the special circumstances clause is referred to in preambular paragraph 6.

Iceland for its part - after having been inclined to consider Jan Mayen as merely a rock not entitled at all to broad maritime zones under international law - has given in, in this Agreement, to the Norwegian claim to accord island status to Jan Mayen, but only to the extent that it be recognized that Jan Mayen's maritime zones would have no effect upon Iceland's full 200-mile economic zone (preamble 5). This result was actually established at the national level in Norway even before the Agreement was signed, by Norwegian Royal Decree of 23 May 1980 (Danish Memorial, Ann. 7), that is, five days before the Agreement with Iceland was signed. The Decree states expressly that: "The outer limit of the [Norwegian] fishery zones shall be drawn ... not ... beyond the line constituting the outer limit of the economic zone of Iceland ..." The Norwegian Royal Decree of 23 May 1980 entered into force on 29 May 1980, i.e., one day after the agreement with Iceland was signed, but before it entered into force.

It shows that Norway was more than ready to secure an agreement with Iceland which gave recognition to Jan Mayen as an island under international law entitled to broad maritime zones, i.e., with full effect to the east towards the high seas and with partial effect vis-à-vis the competing coast

of Iceland.

I shall now turn to the 1981 *Agreement* (the one on the continental shelf).

As already stated the Agreement of 28 May 1980 also established a conciliation commission of three persons with the task of recommending a line of delimitation with regard to the continental shelf area between Iceland and Jan Mayen. The members of that Commission were three most distinguished international lawyers and scholars within the field of the law of the sea, namely, as Chairman, the Honourable Elliot L. Richardson; as conciliator for Iceland, Mr. Hans G. Andersen, the Legal Adviser at the time to the Foreign Ministry of Iceland; and as conciliator for Norway, the then Under-Secretary for Legal Affairs in the Norwegian Ministry of Foreign Affairs, now the honourable Judge Jens Evensen. In its "Report and Recommendations to the Governments of Iceland and Norway" dated May 1981, the Conciliation Commission recommended that the delimitation line for the continental shelf should coincide with the 200-mile economic zone proclaimed by Iceland.

On the basis of the Report, Norway and Iceland subsequently concluded the Agreement of 22 October 1981 on the continental shelf in the area between Iceland and Jan Mayen. According to its own words that Agreement is built upon the recommendation of the Conciliation Commission and consequently states in Article 1 that the delimitation line of the shelf shall coincide with the delimitation line already established for the Parties' economic zones.

Even though the Commission should not act as a court of law, it is to be noted that its report from May 1981 contains in Section IV a legal evaluation of the question of the status of Jan Mayen under present day international law, resulting in the recognition of Jan Mayen as an island entitled to broad maritime zones, and not as a rock. Furthermore, the recommendations of the Commission are based upon a study of State practice and court decisions. To quote the Commission's Report (as published in International Legal Materials, Vol. XX p. 823):

> "Although not a court of law, the Commission has thoroughly examined State practice and court decisions in order to ascertain possible guidelines for the practicable and equitable solution of the questions concerned."

As a result of that examination, the Commission presents an outline of the typical solutions where islands are involved; from solutions where full weight is given to solutions applying the so-called

"enclave principle", the limited weight solution and situations where islands involved are "traded off", so to speak (page 823 of the Report).

Taking into consideration, Mr. President, the fact that the Commission consisted of three outstanding legal experts within the field of the Law of the Sea, each of them serving as head of delegation of their respective Governments to UNCLOS III, the legal approach adopted by the Commission seems most natural and must have been in line with the expectations of both Norway and Iceland when choosing these legal advisers as members of the Commission.

Against this whole background it is fully justified to consider the two Norwegian-Icelandic Agreements as indeed establishing a very important legal precedent in the present case deserving the closest attention from the Court.

Together the two Agreements establish exactly the same solution for the delimitation between Jan Mayen and Iceland which Denmark considers to be reasonable and just for the delimitation between Greenland and Jan Mayen, i.e., a boundary which gives only partial effect to Jan Mayen.

The possibility - or should I rather say danger - that these Agreements would be of the utmost importance as precedents in relation both to the delimitation between Greenland and Jan Mayen and to the delimitation with the then Soviet Union in the Barents Sea was taken into account by Norway.

I refer to the various statements made in the Norwegian Parliament in relation to the presentation of the two Agreements (Counter-Memorial, Anns. 11 and 15).

The Foreign Minister, Mr. Knut Frydenlund, expressed his expectations rather bluntly when he said during the parliamentary debate on 6 June 1980 that: "[c]learly there is a potential source of conflict here with Denmark" (Counter-Memorial, Ann. 11, p. 55), Mr. Hermand Eian found it

> "hard to see how Norway will be able to maintain its former principles with the same authority in negotiations with other neighbouring countries once they have been abandoned in relation to Iceland" (Counter-Memorial, Ann. 11, p. 58).

Mr. Per Saevik felt that

> "[t]he claim that this departure [from previous practice] will not form a precedent in agreements with other countries is not particularly reassuring" (Counter-Memorial, Ann. 11, p. 60).

Another member of the Norwegian *Storting*, Mr. Kare Rönning, was

> "very much afraid that this complete acceptance of Iceland's 200-mile zone can have very

> considerable consequences for other as yet unsettled boundary questions..." (Counter-Memorial, Ann. 11, p. 71),

and Mr. Björn Erling Ytterhorn - during the debate in May 1982 on the shelf agreement - directly described the Agreement as an "extremely dangerous precedent" (Counter-Memorial, Ann. 15, p. 89).

We agree with these assessments.

In its Counter-Memorial Norway has tried to belittle the importance of the two Norwegian-Icelandic Agreements in relation to the present case by stressing repeatedly that these Agreements are political in nature and therefore cannot provide a legal precedent (e.g., Counter-Memorial, para. 650).

It may be true that both agreements to some extent can be seen as the result of a political deal between the two countries. But that deal relates to the arrangements applying *beyond* the Icelandic 200-mile economic zone as described in the Danish Reply (paras. 312-315). Thus, the significant additional rights accorded to Iceland in relation to fisheries and the continental shelf area in the otherwise exclusive Norwegian zone, may suitably be described, as Norway does, as "the product of generous political concessions" (Counter-Memorial, para. 559).

But that explanation does not hold true with regard to Norway's acceptance of Iceland's economic zone of 200 nautical miles (see paragraphs 312-315 of the Reply).

Let me conclude these remarks on the two agreements between Norway and Iceland of 1980 and 1981 reiterating that the Government of Denmark is of the opinion that these agreements contain most convincing evidence and constitute a legal precedent in support of the Danish view that the island of Jan Mayen - though entitled to maritime zones of its own - may not generate full maritime zones vis-à-vis the competing coast of Greenland. The logical conclusion to be drawn from a comparison of the present case with the Jan Mayen/Iceland precedent is that the island of Jan Mayen can only be given partial effect vis-à-vis Greenland, leading to a maritime zone of some 50 nautical miles, that is, more than double the size of the contiguous zone of 24 nautical miles.

Mr President, distinguished Members of the Court,

4. The agreements between Norway and Iceland are the most relevant items of State practice

to be considered in the context of the present case. Norway attempts to explain the reasoning behind *State practice* in other regions of the world, but has hardly anything to say about its own agreements concerning Jan Mayen. Instead Norway adopts a very contemptuous attitude towards the way in which Denmark has treated the item of State practice in regard to islands (paragraphs 462-464 of the Rejoinder).

It is correct that Denmark has exercised a certain restraint in putting forward our interpretation as to the motives of other States in reaching a particular result in a delimitation situation involving islands. As we have stated already in the Memorial, the difficulty is that the specific reasons for a particular delimitation are generally not known. They remain in the archives of the State Parties (paragraph 269 of the Memorial).

The examples of State practice presented must necessarily be of varying importance, depending on different factors such as the geographical location of the particular islands, their size and length of coastline, population, etc. The evaluation of the weight these examples ought to have in the present case is no easy task due to the variety of the characteristics of each individual case. Monumental pleadings could be developed in each particular case in support of the various claims - as can be seen from the present dispute.

All kinds of assertions can therefore be made in relation to the interpretation of individual cases of State practice. The Norwegian presentation in the Counter-Memorial (paras. 618-658) as well as in the Rejoinder (paras. 462-496) bears witness to this fact as also pointed out in the Danish refutation of the Norwegian assertions (paragraphs 214-259 of the Reply). Already the heading to the Norwegian presentation of State practice is grossly misleading. It says: "The Practice of other States in Similar Geographical Situations" (page 176 of the Counter-Memorial and page 140 of the Rejoinder). May I ask where in the Norwegian list of State practice do we find a situation *similar* to that of Greenland versus Jan Mayen? Nowhere, I submit. The new map (Map VII in the Rejoinder, that is the last map in the Rejoinder) highlights this fact. I can't see on that map any delimitation situation which even remotely bears any resemblance to that existing between Greenland and Jan Mayen. Shouldn't we rather concentrate on the State practice which one of the Parties to this

dispute, Norway, has *itself* established with regard to the very same island, Jan Mayen, which has given rise to the present dispute? That piece of well-documented State practice is furthermore supported by Norway's own attitude vis-à-vis Bear Island which in many central aspects is similar to the situation between Greenland and Jan Mayen, which exists in the same region of the North Atlantic, and which is also well documented.

It is, indeed, ironic that Norway should dismiss as irrelevant two well-documented examples of delimitations carried out in the North Atlantic region and resembling that of the Jan Mayen-Greenland delimitation at the same time as Norway cites as relevant a number of quite different examples of State practice in other and quite different regions of the world.

Realizing that the state of affairs with regard to the role of islands in maritime delimitation cases present a kaleidoscopic picture scarcely explained in case-law - to borrow a pertinent phrase used by Professor Prosper Weil in his learned dissertation on the law of maritime delimitation (*The Law of Maritime Delimitation - Reflections*, p. 233) - Denmark has adopted the approach of trying to extract from State practice and case-law the type of methods which have been used in maritime delimitation involving islands which prima facie would appear to have a distorting effect on an otherwise equitable boundary. The methods used by States have been to give the island *partial* effect or to *enclave* the island, typically by establishing a 12-mile territorial sea or zone around the island. Professor Bowett will in our next intervention present in much more detail, and with maps, the actual method of delimitation in the present case. And this analysis of the method of delimitation is not an academic exercise, as Norway has chosen to name it (paragraph 462 of the Rejoinder), but a legal analysis which is at the heart of any delimitation process.

As it is the view of Denmark that the small and uninhabited island of Jan Mayen is in itself creative of inequity when the maritime boundaries are to be established between that island and the surrounding territories of Iceland and Greenland, the island of Jan Mayen cannot be accorded full effect, but only partial effect. An enclave solution is not, however, called for in the present circumstances where the distance between the respective coastal length is more than 200 nautical miles. Thus, in the delimitation between Iceland and Jan Mayen, the island of Jan Mayen generates

its 12-mile territorial sea plus an additional 80-nautical-mile fishery zone and continental shelf area. The Danish claim will likewise allow for a 12-nautical-mile territorial sea plus a fishery zone and continental shelf area of some 40 nautical miles. All in all Jan Mayen would have a maritime zone of some 45 nautical miles as a minimum which is icefree most of the year, as compared to the remaining Greenlandic zone which is covered with ice most of the year (see the Figure describing the ice situation on page 41 of the Memorial).

In paragraph 467 of the Rejoinder, referring to the Danish Reply, Norway summarizes the delimitation practice in the North Atlantic region in the following way:

> "In the present context, it is necessary to point out that, if practice in the North Atlantic region is adverted to, then the norm of delimitation is the median line, as the Reply recognises, referring to Canada-Greenland, Greenland-Iceland, Iceland-Faroe Islands, Faroe Islands-Norway, and Shetland Islands-Norway (Reply, pp. 122-123, para. 331). The only case of delimitation not based on a median line is that of Jan Mayen-Iceland. Why, then, does Denmark prefer the exception to the regional norm?"

A question is asked, and my answer is as follows.

Firstly, it is to be noted that Norway regards the practice in the North Atlantic region as a norm and the Jan Mayen-Iceland boundary as an exception to that norm - so, the exception is part of a norm. We agree. Secondly, Denmark prefers the exceptional norm to the regional norm because no two delimitation cases could be more similar in nature than the delimitation between Iceland and Jan Mayen and that between Greenland and Jan Mayen. Not only are these two delimitation cases geographically proximate but, as far as one of the land territories involved is concerned, namely Jan Mayen, they are identical. The two land territories involved on the other side, Greenland and Iceland, bear to a large extent similar characteristics. They are both situated in the same oceanic region (Memorial, Map I). Both are of a very considerable size whether seen in isolation or in comparison with their opposite delimitation partner, Jan Mayen. Topographically their coastlines, relevant for this case, are very similar, as further described in the Danish Memorial, paragraph 21. Even the coastal ratios vis-à-vis Jan Mayen are comparable, namely, a ratio of around 9:1 in favour of Greenland as Mr. Thamsborg has already explained in detail, and one slightly greater in favour of Iceland. And, finally, their populations are in both cases heavily dependent on fisheries for their survival and further economic development. Therefore, Mr. President, Denmark considers the

exceptional norm created for the maritime boundary between Iceland and Jan Mayen to be applicable too in the waters between Greenland and Jan Mayen.

Mr. President, this concludes my intervention on the case of Jan Mayen versus Iceland.

And, if the Court agrees, Professor Bowett will start out tomorrow dealing with the actual method for drawing a single line of delimitation within the relevant area.

I thank you Mr. President.

The PRESIDENT: Thank you very much Mr. Lehmann. So we will hear Professor Bowett at 10 o'clock tomorrow morning.

The Court rose at 12.15 p.m.