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of Justice
THE HAGUE

Cour internationale
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La HAYE

YEAR l993

Public sitting

held on Monday 18 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 lundi 18 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

The Government of Denmark is represented by:

Mr. Tyge Lehmann, Ambassador, Legal Adviser, Ministry of Foreign Affairs,

Mr. John Bernhard, Ambassador, Ministry of Foreign Affairs,

as Agents;

Mr. Per Magid, Attorney,

as Agent and Advocate;

Dr. Eduardo Jiménez de Aréchaga, Professor of International Law, Law School, Catholic University of Uruguay

Mr. Derek W. Bowett, C.B.E, Q.C., F.B.A., Emeritus Whewell Professor of International Law in the University of Cambridge,

as Counsel and Advocates;

Mr. Finn Lynge, Expert-Consultant for Greenland Affairs, Ministry of Foreign Affairs,

Ms. Kirsten Trolle, Expert-Consultant, Greenland Home Rule Authority,

Mr. Milan Thamsborg, Hydrographic Expert,

as Counsel and Experts;

Mr. Jakob Høyrup, Head of Section, Ministry of Foreign Affairs,

Ms. Aase Adamsen, Head of Section, Ministry of Foreign Affairs,

Mr. Frede Madsen, State Geodesist, Danish National Survey and Cadastre,

Mr. Ditlev Schwanenflügel, Assistant Attorney,

Mr. Olaf Koktvedgaard, Assistant Attorney,

as Advisers, and

Ms. Jeanett Probst Osborn, Ministry of Foreign Affairs,

Ms. Birgit Skov, Ministry of Foreign Affairs,

as Secretaries.

The Government of Norway is represented by :

Mr. Bjørn Haug, Solicitor General,
Mr. Per Tresselt, Consul General, Berlin,
as Agents and Counsel;

Le Gouvernement du Danemark est représenté par :

M. Tyge Lehmann, ambassadeur, conseiller juridique, ministère des affaires étrangères,

M. John Bernhard, ambassadeur, ministère des affaires étrangères,

comme agents;

M. Per Magid, avocat,

comme agent et avocat;

M. Eduardo Jiménez de Aréchaga, professeur de droit international à la faculté de droit de l'Université catholique de l'Uruguay,

M. Derek W. Bowett, C.B.E., Q.C., F.B.A., professeur émérite de droit international à l'Université de Cambridge (chaire Whewell),

comme conseils et avocats;

M. Finn Lynge, consultant spécialisé pour les affaires du Groenland, ministère des affaires étrangères,

Mme Kirsten Trolle, consultant spécialisé, autorité territoriale du Groenland,

M. Milan Thamsborg, expert hydrographique,

comme conseils et experts;

M. Jakob Høyrup, chef de section, ministère des affaires étrangères,

Mme Aase Adamsen, chef de section, ministère des affaires étrangères,

M. Frede Madsen, expert en géodésie de l'Etat, service topographique et cadastral danois,

M. Ditlev Schwanenflügel, avocat auxiliaire,

M. Olaf Koktvedgaard, avocat auxiliaire,

comme conseillers, et

Mme Jeanett Probst Osborn, ministère des affaires étrangères,

Mme Birgit Skov, ministère des affaires étrangères,

comme secrétaires.

Le Gouvernement de la Norvège est représenté par :

M. Bjørn Haug, procureur général,
M. Per Tresselt, consul général, Berlin,

comme agents et conseils;

Mr. Ian Brownlie, Q.C., D.C.L., F.B.A., Chichele Professor of Public International Law, University of Oxford; Fellow of All Souls College, Oxford,

Mr. Keith Highet, Visiting Professor of International Law at The Fletcher School of Law and Diplomacy and Member of the Bars of New York and the District of Columbia,

Mr. Prosper Weil, Professor Emeritus at the Université de droit, d'économie et de sciences sociales de Paris,

as Counsel and Advocates;

Mr. Morten Ruud, Director General, Polar Division, Ministry of Justice,

Mr. Peter Gullestad, Director General, Fisheries Directorate,

Commander P. B. Beazley, O.B.E., F.R.I.C.S., R.N. (Ret'd),

as Advisers;

Ms. Kristine Ryssdal, Assistant Solicitor General,

Mr. Rolf Einar Fife, First Secretary, Permanent Mission to the United Nations, New York,

as Counsellors;

Ms. Nina Lund, Junior Executive Officer, Ministry of Foreign Affairs

Ms. Juliette Bernard, Clerk, Ministry of Foreign Affairs,

Ms. Alicia Herrera, The Hague,

as Technical Staff.

M. Ian Brownlie, Q.C., D.C.L., F.B.A., professeur de droit international public à l'Université d'Oxford, titulaire de la chaire Chichele; *Fellow* de l'All Souls College d'Oxford,

M. Keith Highet, professeur invité de droit international à la Fletcher School of Law and Diplomacy et membre des barreaux de New York et du District de Columbia,

M. Prosper Weil, professeur émérite à l'Université de droit, d'économie et de sciences sociales de Paris,

comme conseils et avocats;

M. Morten Ruud, directeur général de la division des questions polaires au ministère de la justice,

M. Peter Gullestad, directeur général de la direction des pêcheries,

Capitaine de frégate P. B. Beazley, O.B.E., F.R.I.C.S., R.N. (en retraite),

Mme Kristine Ryssdal, procureur général adjoint,

M. Rolf Einar Fife, premier secrétaire à la mission permanente de la Norvège auprès de l'Organisation des Nations Unies à New York,

comme conseillers;

Mme Nina Lund, fonctionnaire administratif au ministère des affaires étrangères,

Mme Juliette Bernard, agent administratif au ministère des affaires étrangères,

Mme Alicia Herrera, La Haye,

comme personnel technique.

The PRESIDENT: We resume the hearing of the Norwegian case in the first round. Mr. Bjørn Haug.

Mr. HAUG:

Applicable Treaty Law and Conduct of the Parties

1. Introduction. Overview

Mr. President, distinguished Members of the Court, it is my task now to present the Norwegian arguments in regard to treaty provisions which are relevant to the dispute. In this connection I shall also elaborate on the view of the Norwegian Government that the consistent conduct of the Parties in respect of maritime delimitation has become binding in law, with the effect that the Danish claims for a 200-mile boundary for its continental shelf and its fishery zone vis-à-vis Jan Mayen must be rejected, and with the effect that the median line constitutes the boundaries for the continental shelf areas as well as the fisheries zone for delimitation purposes.

The treaty provisions that I shall consider are the following:

- The Agreement of 8 December 1965 between Norway and Denmark, concerning the continental shelf;
- The Geneva Convention of 29 April 1958 on the Continental Shelf; and
- The Law of the Sea Convention of 10 December 1982.

I shall initially consider the treaty situation in respect of continental shelves, and later revert to the treaty situation in respect of the fisheries zones and exclusive economic zones.

Finally, I shall address the subject of the consistent conduct of the Parties, and the legal effect thereof.

In some of the quotations from Norwegian or Danish documents I shall be suggesting a more precise translation into English than the translations offered by the Danish side. To facilitate the Court's control of the translations I have included in the manuscript the original Norwegian and

Danish wording, in parentheses, but will not be reading them out.

We have produced a folder which is given to the Court and to the Danish side, with three sketch-maps and some of the pertinent texts, in chronological order and with consecutive page numbers.

2. The Treaty of 8 December 1965

This Agreement appears as Annex 46 to the Norwegian Counter-Memorial (Vol. II, p. 172) [Text in folder, p. 7].

Introduction

Allow me first, Mr. President, to point out the geography. As a practical matter, I shall be coming back to it in a more detailed fashion later, but if one looks at the sketch-map which is included, on page 1, we shall be speaking of a treaty which in Article 2 is connected with this stretch. But I shall also be speaking initially about the Treaty between the United Kingdom and Norway which goes up here (in the sketch-map). And later, we shall talk of the extensions in 1979, of the further extension between the United Kingdom and Norway up to here (in the sketch-map), and the following small stretch between the Danish Faroe Islands and Norway. I thought this might give the first initial glimpse of the Norwegian/Danish Treaty, the English/Norwegian Treaty of 1965, the Protocol of 1979 and the Agreement of 1979.

The disagreement between Norway and Denmark concerning the scope of their Agreement of 8 December 1965, essentially harks back to the distinction between an agreement on general principles of delimitation and the actual specification or articulation of a boundary at various points in time. The Danish Government has tried to convince the Court that the general principle of delimitation which was agreed in 1965 was restricted in scope to the North Sea area. In the Norwegian view, the principle of delimitation was clearly established with general applicability by the 1965 Agreement, while the only boundary which it was found necessary to specify at that time was the boundary in the North Sea. There can be no other interpretation of the language in Article 1 than that it sets out the principles of delimitation in general terms.

May I first make a few comments on this kind of delimitation agreements.

The rights of coastal States to explore and exploit resources in the sea-bed became of general interest after the Second World War. There was a corresponding interest in clarifying and settling questions of the extent and delimitation of the continental shelf. This is manifest in the development leading up to the 1958 Geneva Convention on the Continental Shelf. A number of States unilaterally proclaimed their rights to the continental shelf and implemented national legislation to this effect. Numerous boundary agreements were entered into before - but especially after - the Geneva Continental Shelf Convention.

At the time when the Geneva Convention on the Continental Shelf - which I shall hereafter refer to as "the Geneva Convention" or "the 1958 Convention" - was signed and later entered into force, in 1964, the question of the outer limits of the continental shelf was still in a state of development. At the same time, the approach to delimitation of entitlements between opposite or adjacent States appears to have been more settled. As the Court well knows, the 1958 Convention operated with a dual definition in regard to the outer limit of the continental shelf: either to a depth of 200 metres or, beyond that limit, where the depth of the waters admits of the exploitation of the natural resources in the sea-bed and subsoil. The Convention recognized that the outer limit was not definitely settled, but might develop dynamically with the advance of technology. The criterion for delimitation between States was more settled, being primarily the principle of equidistance from the respective coasts, but with the recognition that "special circumstances" might warrant modification. Such circumstances do not change with technological or economic development.

This unsettled situation concerning the outward extension of the continental shelf is sometimes reflected in the scope and structure of those earlier agreements. While the principles of delimitation could be agreed definitely, the actual drawing of the boundary line was sometimes restricted to those parts of the continental shelf which it was of interest to exploit at the time of the agreement.

There has subsequently developed a general consensus that the breadth of the shelf extends at least to 200 miles from the baselines, regardless of the depth of the sea or the geological or geomorphological structure of the sea-bed within that area, and otherwise to the full extent of the

continental margin. This consensus has notably been reflected in the provisions of Article 76 of the 1982 United Nations Convention on the Law of the Sea.

The many continental shelf delimitation agreements entered into in the years since 1945, particularly in the light of the 1958 Convention, have clarified and stabilized the legal situation concerning delimitation of the shelf between States. No doubt, general international law has developed further since those agreements were entered into. But there is certainly no general tendency today that all those earlier agreements settling the continental shelf boundaries are subject to reformation, or ought to be "modernized" in accordance with later developments and preferences in general international law.

Specifically, it is not contended, and would indeed be denied by Norway, that the 1965 Agreement should have been invalidated by the subsequent development in international law.

In the *Aegean Sea Continental Shelf* case, the Court said:

> "Whether it is a land frontier or a boundary line in the continental shelf that is in question, the process is essentially the same, and inevitably involves the *same element of stability and permanence*, and is subject to the rule excluding boundary agreements from fundamental change of circumstances." (*I.C.J. Reports 1978*, p. 35, para. 85; emphasis added.)

The Norway-United Kingdom Agreement of 10 March 1965

Before I go into an interpretation of the delimitation Agreement of 8 December 1965 between Norway and Denmark, it may be instructive to look at the structure of the delimitation Agreement between Norway and the United Kingdom, which was negotiated during the same period and was entered into a little earlier the same year, on 10 March 1965 (Counter-Memorial, Vol. II, Ann. 44, p. 166)) [Text in folder].

That Agreement, as well as the later supplementary Protocol of 22 december 1978 (Counter-Memorial, Vol. II, Ann. 67, p. 255), makes the distinction between the generally agreed principle of continental shelf delimitation and the step-by-step specification or drawing of the boundary line eminently clear. In the Preamble of the Agreement, it reads as follows:

> "The Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Kingdom of Norway;
>
> Desiring to *establish the boundary between the respective parts* of the

Continental Shelf; . . ." (Emphasis added.)

While Article 1, in the same general terms, stipulates:

> "The dividing line . . . shall be based, with certain minor divergencies for administrative convenience, on a line, every point of which is equidistant from the nearest points of the baselines from which the territorial sea of each country is measured."

Article 2 then specifies the geographical co-ordinates for eight specific points.

But, Article 3 (2) thereafter expressly spells out that

> "For the time being the Contracting Parties have not deemed it necessary to draw the dividing line further north than Point No. 8."

One word of explanation may perhaps be offered why Norway and the United Kingdom chose not to specify or demarcate the actual boundary further north in 1965. It was the stated policy of Norway to move cautiously in the matter of continental shelf exploration and exploitation. It was determined initially not to open up the continental shelf north of latitude 62❍ N. Both States found it unnecessary to draw the line further north at that time. Also, the sketch-map in Counter-Memorial, Volume II, page 168, illustrates that Norway and the United Kingdom were only drawing the actual boundary in an area where the depth of the sea-bed was less than 100 fathoms, or about 200 metres, and thereby remained within an area which was a part of the continental shelf indisputably pertaining to the two Contracting Statesat the material time.

The structure and wording of the Norwegian-United Kingdom Agreement leaves no doubt that Article 1 spells out the general principle of delimitation, namely that of equidistance, while the implementation of this principle, for one part of the shelf, is provided for in Article 2. In the Agreement it was clearly foreseen that further implementation according to the same principle might come up on a later occasion. Later history also demonstrates that the agreed principle of delimitation set out in the 1965 Agreement was applied in 1979 when it became convenient to draw the boundary further north.

In the case of Norway and the United Kingdom, the further articulation of the boundary 13 years later took the form of a supplementary Protocol dated 22 December 1978, and was based

clearly and without dispute on the median line.

In Norway's submission, there can be no doubt that the further drawing of the continental shelf boundary line between Norway and the United Kingdom represented a direct implementation of the general principle laid down in the earlier Agreement of 1965. Since the supplementary boundary agreement, like the earlier agreement, only related to the continental shelf, not to fisheries zones or exclusive economic zones, one was able to choose the form of a supplementary protocol to the earlier Agreement.

The Norway-Denmark Agreement of 8 December 1965

Turning then to the delimitation Agreement of 8 December 1965 between Norway and Denmark (Counter-Memorial, Vol II, Ann. 46, p. 172), that Agreement was entered into not long after the Norway-United Kingdom Agreement [the text of that Agreement is in the folder at Page 7].

It will be found that the structure of the Two Agreements is precisely the same: there is a generally-worded Preamble and a statement of principle in Article 1, while Article 2 of the Agreement specifies, with geographical co-ordinates, the boundary for the part of the continental shelf which it was found necessary to specify or demarcate at that time.

The Preamble of the Norwegian-Danish Agreement reads as follows:

> "The Preamble of the Norwegian-Danish Agreement reads as follows:
>
> "The Government of the Kingdom of Denmark and the Government of the Kingdom of Norway, having decided to establish the common boundary between the parts of the continental shelf over which Denmark and Norway respectively excercise sovereign rights for the purposes of the exploration and exploitation of natural resources, have agreed as follows:"

Article 1 stipulates in equally general terms that:

> "The boundary between those parts of the continental shelf over which Norway and Denmark respectively exercise sovereign rights shall be the median line which at every point is equidistant from the nearest points of the baselines from which the breadth of the territorial sea of each Contracting Party is measures."

Article 2 then stipulates an implementation of that principle, in the following terms:

> "In order that the principle set forth in Article 1 may be properly applied, the boundary shall consist of straight lines (compass lines) through the following points, in the sequence given below: ...."

In Norway's submission, there is every reason to conclude that the structure of the contemporary Norway-United Kingdom and Norway-Denmark Agreements was indeed intended to be identical and that the Agreements should therefore be read in the same manner. There is no basis for a conclusion that the Norway-Denmark Agreement was to be radically different and - in the face of its clear language to the contrary - should be somehow limited in scope. May I remind the Court that Dr. Jiménez de Aréchaga in his intervention referred to a Norwegian press release (CR 93/2, p. 61) stating that the two Agreements were very similar.

As for the interpretation of the Norwegian-Danish Agreement, the only disagreement between the Parties seems to be the geographical scope or extent of the principle of delimitation expressed in Article 1. Should it be read with the same geographical restriction as the practical implementation or specification contained in Article 2?

I would like to comment upon the following elements of interpretation:

1. The wording and natural meaning of Article 1, which is entirely unrestricted as to its geographical scope.
2. The purpose of the Agreement and the general context of the situation when the Agreement was entered into, which strongly support that a general scope of application was intended.
3. The particular circumstances which made it convenient to limit the actual drawing of the boundary to the North Sea for the time being, but which did not apply to the establishment of an agreed general principle of delimitation.
4. Finally, I shall also comment on some other arguments concerning interpretation made by Denmark.

1. The principal element of interpretation of any treaty is of course the wording of the agreement itself.

As already pointed out, the intention of the Parties expressed in the preamble, as well as the principle of delimitation expressed in Article 1, is entirely general in its wording, and therefore covers the entirety of the continental shelf over which the two Contracting States exercise sovereign rights.

The ordinary meaning of the words used in the Preamble and in Article 1 is clearly that the Parties intended to regulate the boundaries of the Norwegian and Danish continental shelf wherever they abut. The ordinary meaning of the words chosen gives no support to the Danish interpretation, that the scope of the agreed principle should be limited only to the region of the North Sea.

2. The purpose of the Agreement and the general context in which the Agreement was made, strongly indicate a general scope of application of the agreed principle.

May I point out that the Geneva Convention on the Continental Shelf of 21 April 1958 was ratified by Denmark on 31 May 1963. Norway, for several reasons, chose not to ratify the four Geneva Conventions at the time, but adopted and accepted the rules of the Convention concerning the Continental Shelf as expressing general international law in the matter.

I shall come back to the details of the consistent conduct of the Parties a little later. But in order to give the general background and context of the 1965 Agreement I may summarize the general attitude and practices of the Parties during this period as follows:

1. Both Parties issued unilateral proclamations of their sovereign rights over the continental shelf: Norway on 31 May 1963 (Counter-Memorial, Vol. II, Ann. 21, p. 98), and Denmark only one week later on 7 June 1963 (Counter-Memorial, Vol. II, Ann. 29, p. 111).

   Both countries decreed that the boundary in relation to foreign States, in the absence of special agreement, "shall be the median line". There is no reference in the texts of the two Decrees to "special circumstances" or other modifying factors. I shall come back to them later [the text is in the folder]. The declarations were general and unrestricted in their geographical scope, and therefore applicable to a number of areas [map in folder at p. 2]

(a) in the case of Norway we speak about: Mainland Norway, Jan Mayen and Svalbard;

(b) in the case of Denmark we speak about: Mainland Denmark, the Island of Bornholm, the Faroe Islands and Greenland.

For mainland Norway that meant that a unilateral and unreserved declaration would have potential application for nine places: between Norway and Sweden; between Norway and the

Danish mainland; between Norway and the United Kingdom, between Norway and the Danish islands of the Faroes; and between Norway mainland and Russia, at that time the Soviet Union. And further for Norway, in respect of Jan Mayen, this declaration would have relation to Iceland and to Greenland. As for Svalbard, which is part of the Kingdom of Norway, there would be Denmark in relation to Greenland ,and Russia, then the Soviet Union.

Now for the 17 areas in respect of Denmark: Denmark's mainland would be in relation to the former German Democratic Republic; to Sweden; to Norway; a little bit to the United Kingdom; to the Federal Republic of Germany and, as it was then perceived, also to the Netherlands, when we recall the *North Sea* cases, which makes that there is not a boundary between Denmark and the Netherlands, but at that time that was the picture.

As for the island of Bornholm the Decree would be related to Sweden, Poland and the former German Democratic Republic.

In respect of the Faroe Islands it would be in respect of Norway, the United Kingdom and Iceland.

And in respect of Greenland it would be Svalbard, Jan Mayen, Iceland and, outside this map, Canada.

For all these areas the median line was established as the continental shelf boundary, in the absence of agreements.

2. Negotiations were subsequently conducted by both Norway and Denmark with third States, and I briefly mention the continental shelf agreements entered into during this period:

- 10 March 1965: Norway-United Kingdom, which I just commented upon (Counter-Memorial, Vol. II, Ann. 44, p. 166);
- 9 June 1965: Denmark-Federal Republic of Germany (Counter-Memorial, Vol. II, Ann. 45, p.169);
- 8 December 1965: Norway-Denmark (the one Agreement we are now considering) (Counter-Memorial, Vol. II, Ann. 46, p. 172);
- 3 March 1966: Denmark-United Kingdom (Counter-Memorial, Vol. II, Ann. 47, p. 175);

- 31 March 1966: Denmark-The Netherlands (Counter-Memorial, Vol. II, Ann. 48, p. 178;

- 24 July 1968: Norway-Sweden (Counter-Memorial, Vol. II, Ann. 52, p.190).

As I shall demonstrate later, all these Agreements were based on the median line as the method for delimitation.

Fifteen years after the 1965 Agreement, in November 1980, the Danish Minister for Energy was answering questions to the Danish Parliament (Norwegian Annex 105). Responding to a question concerning the possible renegotiation of the 1965 Agreement with Norway, the Minister stated, among others, the following:

> "Denmark's right to the continental shelf in respect of the exploration and exploitation of natural resources was set out in Royal Decree No. 259 of 7 June 1963. On the basis of the 1958 Convention concerning the continental shelf, delimitation agreements were subsequently concluded with Norway, Great Britain and the Federal Republic of Germany in the years 1965, 1966 and 1971.
>
> Thus, the delimitation of the continental shelf between Denmark and Norway was established by an Agreement of 8 December 1965 between the Danish and the Norwegian Governments
>
> . . .
>
> The agreement, which is thus based on the median line principle, is in accordance with the main principle governing delimitation which applies in international law according to the 1958 Convention concerning the continental shelf.
>
> . . .
>
> Since we are dealing with a clear median line delimitation with an equal division of the continental shelf areas between Denmark and Norway, it follows that there is no basis for raising the delimitation issue again."

Those authoritative statements confirm that the declared principle of delimitation was indeed intended by the Danish Government to be as general in scope and as unconditional as it was formulated in the Agreement with Norway in 1965.

There were also several agreements entered into in subsequent years. There is full conformity between the general wording of Article 1 and the general positions taken in the number of agreements entered into by Denmark concerning continental shelf delimitations over a long period of time. Only the position so abruptly taken in 1979-1980, in respect of the boundary between Jan Mayen and Greenland, represents a deviation from a consistent median line approach to delimitation.

Therefore, the general context of the situation in which the 1965 Agreement between Norway and Denmark was entered into, clearly indicates that the generally-worded method or principle of delimitation expressed in Article 1 was indeed intended to be unlimited in its geographical scope.

3. Denmark seeks to argue that, since the actual drawing of a boundary in Article 2 was restricted to the North Sea area, the agreed principle of delimitation in Article 1 should also be interpreted with the same geographical limitation.

However, the reasons for restricting the actual drawing of the boundary did not apply to the agreement of a general delimitation principle.

One reason was the stated Norwegian policy not to open up its shelf north of latitude 62° N for exploitation. This policy is expressed, *inter alia*, in a Recommendation to the Norwegian Parliament in 1979, submitted in the present dispute by Denmark (Reply, Vol. II, Ann. 84, p. 202), where it is said, with a somewhat more precise translation than offered by Denmark:

> "On 8 December 1965 [this was said in 1979], Norway and Denmark signed an agreement concerning delimitation of the continental shelf between the two States.
>
> The agreement did not encompass delimitation or demarcation *("avgrensning")* of the continental shelf in the area between Norway and the Faroe Islands. One of the reasons for this was that the *Norwegian Government did not at that time wish to open the shelf areas north of 62° N for exploitation*.
>
> For this reason the boundary line between Norway and the United Kingdom of Great Britain and Northern Ireland in the Agreement of 10 March 1965 was also drawn up from the Norwegian/Danish/British tripoint to the south to the boundary point No. 8 at 61° 44' 12" N - 1° 33' 36" E. The extension of this line was drawn up by a supplemental Protocol of 22 December 1978 ..." etc. (Emphasis added.)

The reason is clearly stated and documented. I would add that, even if Norway and Denmark had wished to draw the boundary for the small stretch between mainland Norway and the Faroe Islands already in 1965, it would have been inconvenient to do so before the northernmost point of the future boundary line between Norway and the United Kingdom had been fixed.

I may also mention that the Agreement of 10 March 1965 between Norway and the United Kingdom expressly stated that the parties had not deemed it necessary to draw the dividing line further north than a certain point. Up to this point the depth of the sea-bed was about 200 metres. As for the small stretch of boundary between mainland Norway and the Faroe Islands,

north of the median line between Norway and the United Kingdom, which was drawn up in 1979, the depth of the sea-bed between the Faroe Islands and the Norwegian mainland is more than 1,500 metres. At the stage of technological development obtaining in 1965, this part of the continental shelf between Norway and Denmark would, in any event, have been less convenient to exploit. The observation in the Agreement of 1965 between Norway and the United Kingdom, that it was not necessary, for the time being, to specify the boundary of the continental shelf further north, was equally applicable to the situation as between Norway and Denmark.

The particular reasons for stopping at 62° N for the time being have no relevance to the geographical scope of the general principle of delimitation.

A clear indication of Norway's and Denmark's adherence to a step-by-step articulation of the actual boundary can be found in the supplemental Agreement of 1979 (Counter-Memorial, Vol. II, Ann. 69, p. 262), which is also in the folder and where it is said in the Preamble that:

> "The Government of the Kingdom of Denmark and the Government of the Kingdom of Norway,
>
> Having decided to delimit the continental shelf in the area between the Faroe Islands and Norway,
>
> Having decided that, for the time being, (and that is in 1979), they will not establish the boundary farther north than to the point which lies 200 nautical miles from the nearest points of the baselines from which the width of the Contracting Parties' territorial sea is measured, ..."

So they say, in 1979, that they decided to stop at a point 200 nautical miles from the nearest points from, respectively, the Faroe Islands and Norway's mainland. At this point in time, in 1979, it was well established that the continental shelf of a coastal State would, in any event, extend to 200 miles from its baselines, or otherwise to the full extent of the continental margin. The two Contracting States expressly agreed, "for the time being", to restrict the drawing of the actual boundary to that part of their continental shelves for which no further consideration of the geological or geomorphological features was necessary.

Consequently, there was nothing contradictory in establishing in 1965 a general principle for delimitations of the continental shelf between Norway and Denmark, while restricting the actual drawing of the boundary to that part of the continental shelf which it was at that time found practical

to open for exploitation and which indisputably appertained to the Contracting States.

4. I must also comment on some further arguments made by Denmark.

(a) First, it is the Danish argument (Reply, p. 129, para. 347) that, since allegedly no common shelf did exist between Jan Mayen and Greenland in 1965 within the meaning of the 1958 Geneva Convention, the delimitation principle of the 1965 Agreement could not apply to that area.

This argument is contradicted not only by the general wording and the general purpose of the 1965 Agreement, but also by the very fact that both Parties expressly adopted the dynamic and flexible definition of the outer limit of the continental shelf. Let me go a little further into this aspect.

Denmark ratified the Geneva Convention on 31 May 1963 and issued its Continental Shelf Decree on 7 June 1963 (Counter-Memorial, Vol. II, Ann. 29, p. 111) [Text in folder, p. 4]. The Decree made specific reference to Articles 1 and 6 of the 1958 Convention. Article 2, paragraph 1, of the Danish Decree reads as follows:

"Article 2

> 1. In accordance with Article 1 of the Convention, the term 'continental shelf' is used as referring (a) to the sea-bed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said area; (b) to the sea-bed and subsoil of similar submarine areas adjacent to the coasts of islands."

Through this proclamation and by its ratification of the Geneva Convention in 1963, Denmark expressly adopted the Convention's definition of the outer extent of the continental shelf. Norway, for its part, in its corresponding proclamation of 31 May 1963 [text also in folder] and in its legislation, made express reference to the exploitability criterion. So, it was clearly the intention of the Parties to pursue the definition of the breadth of the continental shelf as it would develop.

The inherent flexibility of the continental shelf definition was pointed out by the Vice-President of this Court, Judge Oda, in his book *International Control of Sea Resources* (Leyden 1963):

> "The concept of exploitability seems too ambiguous ... The coastal State need not necessarily engage by itself in the exploitation of its continental shelf. Each coastal State is, of course, free to grant to any foreign country or foreign nationals resources therein contained ... Thus understood, the concept of exploitability must be interpreted each time in terms of

the most advanced standards of technology and economy in the world."

The dynamic character of the continental shelf definition as assumed by the Parties can also be illustrated by an incident which took place in 1974, nine years after the signing of the 1965 Agreement and three or four years before the dispute in the Jan Mayen/Greenland area arose. On 2 December 1974 the Norwegian authorities lodged a complaint (Rejoinder, Ann. 86, p. 214) against American drilling operations that had been carried out partly on the Jan Mayen ridge, south of the island, and partly in an area called the Voering Plateau, west of the Norwegian mainland. It will appear from the complaint that the drilling had taken place in depths considerably greater than the previously defined 200 metres.

I may add that the depth of the sea-bed on the Jan Mayen ridge where the drilling took place was between 732 and 915 metres.

(b) Second, Denmark has pleaded (Reply, p. 127, para. 341) that there is nothing in the *travaux préparatoires* to support the Norwegian contention. It would be more pertinent to point out that the travaux préparatoires are silent on this matter and give no support whatsoever to the Danish contention that Article 1 of the Agreement should be restricted to only one part of the continental shelf.

(c) Third, it is contended by Denmark (Reply, p. 128, para. 343) that since the 1979 Agreement concerning the area between Norway and the Faroe Islands made no express reference to the earlier 1965 Agreement, one may conclude that the earlier agreement of principle only applied to the North Sea.

The realities of the matter in 1979 speak against this formal argument.

First of all, Article 1 of the 1979 Agreement pronounced exactly the same principle for continental shelf delimitation as that contained in the 1965 Agreement. The Article states that:

> "The boundary ... shall, in so far as the exploration and exploitation of natural resources is concerned, be the median line ... "

Further, the Recommendation to the Norwegian Parliament (Reply, Vol. II, Ann. 84, p. 204) describes the drafting of the 1979 Agreement as follows:

> "During the negotiations, Denmark and Norway each tabled a proposal for an agreement on the maritime delimitation issue. Both proposals had been prepared *according to*

> *the pattern of* ("utarbeidet etter mønster af") [the translation should be amended here] the 1965 Agreement, maintaining the median-line principle, and were incidentally based on the positions which had previously been calculated for the boundary line by the Norwegian Institute of Geographical Survey and the Danish National Administration of Shipping and Navigation. *The differences between the proposals were therefore basically of an editorial and terminological nature*." (Emphasis added)

The translation offered by the Danish side does not quite bring out the precise meaning of this comment. In this more exact translation, the comment clearly confirms the new Agreement's very close relationship to the 1965 Agreement.

Also, the circumstances of the negotiations in 1979 clearly reflect the fact that the median line principle for continental shelf delimitation was considered as already settled between the Parties. It appears from the same Recommendation that Norway only sent to the negotiations a junior official of the Ministry of Foreign Affairs plus a technician to work out the geographical co-ordinates. The negotiations were concluded in two days. There was virtually no discussion of the principle or principles of delimitation to be applied. In its Reply (p. 94, para. 252) Denmark suggests that considerations of the Faroe Islands' political status, its population and its dependency on fisheries, may have been decisive for the choice of the median line for delimitation purposes. The simple and demonstrable fact is that no discussion of the delimitation principles took place at all.

As for the chosen form of a separate Agreement in 1979, may I also point to the following.

The delimitation Agreements in 1965 both between Norway and the United Kingdom and between Norway and Denmark applied to the continental shelf only. In 1978, when time had come to articulate the boundaries further north, Norway and the United Kingdom agreed that the extension of the boundary should apply to the continental shelf only, as before. The supplementary Agreement could therefore take the form of a protocol.

In the case of Norway and Denmark (Counter-Memorial, Vol. II, Ann. 69, p. 262), it had been agreed in advance that the supplementary agreement should cover both the delimitation of the continental shelf and the delimitation of the fisheries zone around the Faroe Islands and the economic zone for Norway, which had come into existence in the meantime. It had also been agreed that the shelf and the zones boundaries should coincide. As a matter of form, it would theoretically have

been possible to issue two documents, one being a supplementary protocol concerning the continental shelf boundary, and another, separate, agreement concerning the delimitation of Denmark's new fisheries zone and Norway's exclusive economic zone. In light of the agreement that the two boundaries should coincide, it was obviously found more convenient to issue one document dealing with the common boundary and covering both aspects of delimitation.

One can hardly deduce from this practical approach, or from the absence of a formal and express reference to the 1965 Continental Shelf Agreement, that the earlier agreement was somehow to be considered inapplicable to the new area.

On the contrary, the 1979 Agreement lends strong support to the view that the parties continued to make a distinction between the principles of delimitation and the actual implementation thereof. The Agreement explicitly stated that, for the time being, the parties did not wish to implement a delimitation further north than up to a point 200 miles from their respective baselines. By this decision, the parties demonstrated that the Agreement was by no means exhaustive or definite in regard to further delimitation as between them. It is also reasonably clear that the equidistance principle, established by the 1965 Agreement and implemented again in 1979, was indeed intended to govern the relationship between the two States when further delimitation would be required.

The Government of Norway therefore submits that the 1979 Agreement concerning the area between Norway and the Faroe Islands, as far as the continental shelf is concerned, was an implementation of the principle already laid down in the 1965 Agreement. The absence of a formal reference to the earlier agreement is no evidence to the contrary. The fact also remains that the 1965 Agreement, by its own wording, applies generally to any area where the Norwegian and Danish continental shelf may abut.

It may be noted that Denmark, during the negotiations resulting in the 1979 Agreement, gave no indication that it would be denying the established equidistance principle when the delimitation in the area between Jan Mayen and Greenland would come on the agenda. As I shall indicate a little later, Norway had every reason to rely on Denmark's consistent attitude as to the median line principle. If Denmark had announced a firm intention to negate the application of the established

principle between them, Norway would not have entered into any agreement in 1979 separately for the Faroe Islands area.

It may also be noted, as a matter of form, that the 1979 Agreement first dealt with the delimitation principle for the continental shelf, and the implementation of this principle, in Articles 1 and 2, while the agreement to let the fisheries zone and exclusive economic zone boundary coincide with the continental shelf boundary was expressed by way of reference in a subsequent Article to the continental shelf boundary provisions. One may say that the fisheries and exclusive economic zone boundaries were put on top of the continental shelf boundary already in place. May I stress, however, that the boundaries, although physically in the same place, were legally and conceptually treated separately.

(d) As a further argument, Denmark refers to a comment in the Recommendation to the Norwegian Parliament concerning the 1979 Agreement (Reply, p. 128, para. 342, Reply, Vol. II, Ann. 84, p. 202). The comment is alleged to state that the 1965 Agreement "does not cover" this case. However, it will appear from the text immediately following the quoted comment that it refers to the area of demarcation in Article 2 and not to the *general principle of delimitation* in Article 1 of the 1965 Agreement. The Norwegian word for delimitation *("avgrensning")* may mean both delimitation in a general sense and the actual drawing of a boundary. That the latter meaning is the right one will appear when the Danish translation in the Reply (p. 128, para. 342) is made a little more precise and is supplemented with the immediately following sentences of the proposal:

> "On 8 December 1965 Norway and Denmark signed an agreement concerning the delimitation of the continental shelf between the two States.
>
> The agreement did not encompass delimitation/demarcation *("avgrensning")* of the continental shelf in the area between Norway and the Faroe Islands. One of the reasons for this" as I read before "was that the Norwegian Government did not at that time wish to open the shelf areas north of 62° N for exploitation.
>
> For this reason the boundary line between Norway and Great Britain in the Agreement of 10 March 1965 was also *drawn up* from the Norwegian/Danish/British tripoint to the south to the boundary point No. 8 of 61° 44' 12" N-1° 33' 36" E. The extension of this line was *drawn up* by a supplemental Protocol of 22 December 1978 to the Agreement of 10 March 1965 ..." (Emphasis added.)

Consequently, the Recommendation to the Norwegian Parliament relied upon by Denmark has

no relevance to the interpretation of Article 1 in the 1965 Agreement. On the contrary, it lends strong support to the understanding that the whole exercise of the supplemental Agreement was to draw up the actual boundary further north, and not to discuss principles or methods of delimitation.

(e) Denmark also seeks support for its restrictive interpretation of Article 1 in the arguments used in the negotiations in the years 1980-1988 concerning the Jan Mayen-Greenland area (Reply, p. 130, para. 350). Denmark says that, during those eight years, the negotiations "were never concerned with the 'details of the demarcation'", and "no mention was ever made by Norway - let alone Denmark - of the 1965 bilateral Agreement".

It is true that the negotiations never reached the stage of discussing "details of the demarcation" between Jan Mayen and Greenland. However, the reason for this should be obvious and throws no light whatsoever on the proper interpretation of the 1965 Agreement:

It will appear from the facts admitted by Denmark that throughout the negotiations from 1980 to 1988 Denmark persisted in claiming a full 200-mile fisheries zone vis-à-vis Jan Mayen. This extreme position maintained by Denmark gave the negotiations a flavour of political claims and bargaining rather than of settlement in accordance with legal principles. Norway was strongly in favour of finding a negotiated settlement of the disagreement over the boundaries, but, in view of the far-reaching Danish claims, it is hardly surprising that the negotiations never reached the stage of discussing details of demarcation of an actual boundary.

Denmark cannot deny that the negotiations were principally aimed at the delimitation of the fisheries zones, a subject not covered by the 1965 Agreement. However, it was natural to take the continental shelf boundaries into consideration as a starting point. The Danish Reply (p. 130, para. 350) refers to and obviously agrees with the statement in the Counter-Memorial (p. 73, para. 258), where it was observed:

> "It is noteworthy that, throughout these negotiations, both Parties maintained that the 1958 Convention continued to govern their relationships in respect of the continental shelf, and formed the natural point of departure also in respect of the negotiation of a boundary relating to the fisheries zone."

Nor can Denmark deny how the parties perceived at the time the conformity of the 1965 Agreement with the main principle of delimitation according to Article 6 of the 1958 Convention.

On 19 November 1980, only a few weeks before the negotiations concerning Jan Mayen-Greenland started in December 1980, the Danish Minister for Energy answered questions in the Danish Parliament. His statement has already been quoted, but I would like to repeat the essence of it also in this present context (see Norwegian Annex 105):

> "Thus, the delimitation of the continental shelf between Denmark and Norway was established by an Agreement of 8 December 1965 between the Danish and the Norwegian Governments. ...
>
> The agreement, which is thus based on the median line principle, is in accordance with the main principle governing delimitation which applies in international law according to the 1958 Convention concerning the continental shelf."

With this agreed conformity of principles as to continental shelf delimitation it is difficult to see how details of the arguments used in the course of the negotiation from 1980 to 1988 can be of any help in the interpretation of the 1965 Agreement.

Most certainly, there is no evidence, or even allegation, that any rights under the 1965 Treaty were abandoned in the course of those negotiations.

The Danish side admits in its Memorial (p. 15, para. 47) that the Danish Minister had already in August 1979 ventured the opinion that "Greenland must not be treated less favourably than Iceland in relation to Jan Mayen". In the deliberations in the Norwegian Parliament about one year later, in June 1980, in connection with the approval of the fishery agreement with Iceland (Counter-Memorial, Vol. II, Ann. 11, p. 38), it was clearly expressed, as Mr. Tresselt has shown, that the concessions granted to Iceland were of a political nature and that under no circumstances would there be any basis or precedent for granting similar political concessions to Denmark on account of Greenland.

None the less, during eight years of negotiations and talks Denmark persisted in claiming the same favours as had been granted to Iceland. In the view of Norway it was - and remains - impossible to reconcile the excessive Danish claims with any aspect of international law - be it the bilateral Treaty of 1965, the Continental Shelf Convention of 1958, the Law of the Sea Convention of 1982 or general international law. If one should attempt to cast the Danish aspirations in legal terms, it would rather have to be whether there is any basis in international law for an obligation to

give all States a "most-favoured nation" treatment. Such an obligation was of course never accepted by Norway, neither legally nor politically, and is not part of general international law.

Conclusion

My conclusion as to the 1965 Agreement is therefore that Article 1 is general in scope of application and therefore also applies to the continental shelf in the area between Jan Mayen and Greenland. It is also unconditional in its application of the median line without reservations for special circumstances.

3. The 1958 Continental Shelf Convention

Introduction. Relationship to the 1965 Agreement

I shall now turn to a consideration of the 1958 Continental Shelf Convention and the relevance to this case of the fact that both Norway and Denmark became parties to, and still are parties to, the 1958 Convention on the Continental Shelf [text of Articles 1 and 6 in folder, page 4].

Denmark has been very reticent about this Convention, both in its written pleadings and in its oral presentation. But the Danish Memorial (p. 59, para. 210) confirms without reservation that the Convention remains in force as between the two States.

May I first comment upon the relationship between the Agreement of 8 December 1965 and the Geneva Convention on the Continental Shelf.

It is well-known that Article 6, paragraph 1, of the Geneva Convention prescribes that the parties shall primarily attempt to agree on the continental shelf boundary between them. When Norway and Denmark entered into their Agreement of 8 December 1965, the Geneva Convention was already in force. Denmark was a party to the Convention. Norway, as already mentioned, had chosen not to accede to those four Conventions until 1971, but recognized the delimitation principles of Article 6 as being in conformity with general international law.

One could say that the bilateral Agreement of 1965 amounts to an implementation of the

principle expressed in Article 6, paragraph 1, of the 1958 Convention.

However, whether or not one would find that the 1965 Agreement also qualifies as an agreement according to Article 6, paragraph 1, it remains a fact that Norway and Denmark entered into this specific and independent agreement in 1965.

That 1965 Agreement is still valid and binding. In particular, [I would mention] Norway's accession to the Geneva Conventions in 1971 did not imply that the 1965 Agreement was invalidated, or replaced by the general provisions of Article 6.

Instead of regarding the 1965 Agreement as an implementation in substance, if not in form, of Article 6, paragraph 1, Denmark turns the argument on its head. It contends that the specific 1965 Agreement should be regarded as abrogated in 1971 and replaced by the general provisions of Article 6 from the time Norway acceded to the Geneva Convention. Dr. Jiménez de Aréchaga suggested a *lex posterior* analogue (CR 93/2, p. 71). This view has no merit. The specific 1965 Agreement remained in full force and determines the continental shelf delimitation between the two parties.

There would only be reason to consider the effects of the 1958 Geneva Convention if the Court should find that the geographical scope of the 1965 Agreement does not extend to the area between Jan Mayen and Greenland. In that sense, my pleading under this section is a pleading in the alternative.

General comments on the 1958 Conventions

A few words may be said in general about the 1958 Geneva Conventions, and in particular the Continental Shelf Convention.

The work of the International Law Commission and the first United Nations Conference on the Law of the Sea, and the resulting Geneva Conventions of 1958, represented a major step in the development and clarification of international law, and not least in regard to the continental shelf. During the course of the following years, substantial parts of the continental shelves around the world were defined and delimited, in accordance with the rules and principles as expressed in the

1958 Convention. The Convention has had a major stabilizing and clarifying effect as regards the delimitation of the continental shelf everywhere, including the shelf around larger and smaller islands.

The delimitation rules and principles of the Continental Shelf Convention also produced a further, and indirect, effect. When 15 or 20 years later the fisheries zones and the concept of exclusive economic zones were generally recognized as extending to a distance of 200 miles from the coasts, a corresponding need for delimitation of the new and extended zones arose. To a considerable degree it was found equitable and practical that the new boundaries should coincide with the continental shelf boundaries already in place.

One can therefore say that the rules and principles expressed in the 1958 Convention have in practice had a continued and strong impact on delimitation practice all around the world, for the continental shelf as well as indirectly for exclusive economic and fisheries zones.

Specific points relating to the 1958 Convention

I would like then to comment on a few specific points relating to the 1958 Convention.

1. My first point is to confirm that both Norway and Denmark are parties to the 1958 Convention, and have been so at all times material to this dispute. The Convention was opened for signature on 29 April 1958 and went into force on 10 June 1964. The Convention was ratified by Denmark on 31 May 1963, while Norway acceded to the Convention on 9 September 1971.

In other words, the Geneva Convention has been in force as between the two Parties since 1971 and therefore long before 1979-1980, when the present dispute materialized. The Convention has remained in force between them throughout the negotiation period from 1980 to 1988, as well as throughout the litigation period before this Court, up to this day.

2. My second point is that the Continental Shelf Convention is still valid and binding as a treaty between Norway and Denmark. Consequently, this Treaty governs the delimitation of the continental shelf in the specific area between Jan Mayen and Greenland, again with the reservation that the Government of Norway principally holds that the 1965 Agreement between Norway and Denmark conclusively determines the matter.

The Geneva Convention has not ceased to be binding as a treaty between the two Parties, by reason of later developments in international law.

It must also be noted, as a matter of principle, that the Law of the Sea Convention of 1982 has not, either in form or reality, abrogated or modified the Continental Shelf Convention. First, there is the fact that the 1982 Convention has been signed but not ratified by Norway or Denmark, and the Convention has not as yet entered into force. But second and equally important, the provisions of the 1982 Convention would not abrogate, but expressly refer to, the delimitation provisions contained in the 1958 Convention. I shall come back to the relationship between the 1958 and 1982 Conventions in a little while.

Nor has the 1958 Convention ceased to be binding upon the Parties by reason of later developments of general international law.

I may again make reference to the quotation from the *Aegean Sea Continental Shelf* case mentioned earlier. The treaty relationship remains unabated.

To demonstrate the attitude of the Applicant State, Denmark as late as 9 November 1984, that is two years after the conclusion of the Law of the Sea Convention, entered into a delimitation agreement with Sweden. This Agreement expressly states that it is concluded in accordance with the Continental Shelf Convention of 1958 (Counter-Memorial, Vol. II, Ann. 74, p. 282). I shall come back to that Treaty a little later.

The Danish Memorial (p. 59, para. 210) also states without reservation that the Convention "remains in force as between the two States".

Thus, the conclusion must certainly be that the 1958 Continental Shelf Convention is still a valid and binding treaty between the two Parties, and has not been generally invalidated or superseded by general, customary international law.

3. My third point is that the 1958 Convention must be construed and applied on its own merits. To the extent the substance of the treaty provisions would differ from general international law, the treaty provisions must, in principle, prevail.

Another matter is, as we will try to show, that whether one applies Article 6 of the Convention

or general international law, the emerging result will in both cases be the median line.

4. My fourth point is to remind the Court that the Parties have not entered into any special agreement or *compromis* in regard to this particular dispute. Consequently there is no agreement which could be construed as modifying the Continental Shelf Convention or making it inaplicable in the present case.

It is well-known in international State practice - one example will be the *Gulf of Maine* case (*I.C.J. Reports 1984*, p. 246) - that parties may enter into such a special agreement, requesting the Court or an arbitral tribunal to draw a single line of delimitation, with the legal consequence that their legal relationship under the 1958 Convention shall not apply. This is not the situation in the present case. The Government of Norway responds, of course, to the unilateral application brought by the Government of Denmark, but maintains that the dispute is to be decided according to applicable international law, including all treaty provisions generally binding upon the two Parties.

I shall then turn to an interpretation of the Convention and it may then be convenient to make an intermission.

The PRESIDENT: Thank you very much. We will take our break now, if that is convenient for you? Thank you.

The Court adjourned from 11.20 to 11.35 a.m.

The PRESIDENT: Mr. Haug.

Mr. HAUG:

Interpretation and application of the 1958 Continental Shelf Convention

Mr. President, Distinguished Members of the Court, I turn then to an interpretation of the 1958 Convention in relation to the issue of delimitation of the continental shelf in the area between Jan Mayen and Greenland.

(a) The first observation to be made concerns the scope of application of the Convention.

Article 1 of the Convention defines the continental shelf, as we read earlier, either "to a depth of 200 metres or, beyond that limit to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas ..."

I have described the dynamic aspects of this definition earlier. In the present connection, I shall only make the observation that, when two States are parties to the 1958 Convention, they must be bound by the Convention within the geographical scope as it develops at any time. There can be no doubt that the rights and obligations of the Parties under the 1958 Continental Shelf Convention extends to the area of dispute in this case.

(b) My second observation concerns the primacy of an agreement to determine the boundary between the Parties, cf. Article 6, paragraph 1.

As already stated, the Agreement of 9 December 1965 amounts to an agreement within the meaning of Article 6, paragraph 1. In that perspective, there is no reason to venture further into the application of Article 6 of the Convention.

However, in the alternative that the Court should not find the 1965 Agreement applicable in the Jan Mayen-Greenland area, then no formal agreement would have been reached concerning the continental shelf in that area, and there would have been an absence of agreement within the meaning of Article 6, paragraph 1.

(c) My third observation is that there can be no doubt that the coasts

of Jan Mayen and Greenland are *opposite* coasts. It is clear, then, that the question of delimitation falls under paragraph 1 of Article 6 of the Convention.

In that situation, Mr. President, paragraph 1 of Article 6 provides that: "In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary is the median line ... "

The main element of that language is prescriptive and self-executing: "In the absence of agreement ... the boundary is the median line". There is no detour by way of reference to "principles" which require "application", as in paragraph 2 relating to adjacent States. The language is direct and dispositive, and has room for only one element of appreciation: the proviso for the event that "another boundary line is justified by special circumstances".

(d) The question therefore becomes, first, is the situation with regard to Jan Mayen and Greenland such that there is present one or more special circumstances within the meaning of Article 6; and second, if so, can such "special circumstances" be held to "justify another boundary line"?

Professor Weil will later touch upon the meaning of Article 6. Let me, at this stage, only emphasize that it was very much the concern within the International Law Commission, where the provision was drafted, to establish a *general* rule for the situation which would arise if two States did not agree on a boundary. It was recognized that this general rule, or "major principle", could not be inflexible, but had to "partake of some elasticity" in order to be able to accommodate a variety of mainly *geographical* situations.

We can conclude from contemporary records that the *types* of circumstances which were foremost in the minds of the original drafters, as well as of the participants in the 1958 Conference, were limited to "navigation and fisheries interests" (*ILC Yearbook 1953*, Vol. II, p. 79), "any exceptional configuration of the coast, as well as the presence of navigable channels" (op. cit., Vol. II, p. 216, para. 82), and the presence of islands, special mineral exploitation rights or fishing rights, or the presence of a navigable channel (UNCLOS I, *Official Records*, Vol. VI, p. 93).

There has been much discussion of whether the institution of the median line/equidistance

principle as the general rule implied that the proviso for special circumstances was to be regarded as a *subsidiary* rule, and whether there would be a *burden of proof* for the party invoking the presence of any special circumstance. That question need not delay us now. The only judicial decision which has dealt with a delimitation matter governed by the 1958 Convention, namely, the 1977 Award in the *Franco-British Channel* arbitration (*UNRIAA*, Vol. XVIII, pp. 3 and 130 ff.), found that the rule in Article 6 was "a single one, a combined equidistance-special circumstances rule", which meant that "it may be doubted whether, strictly speaking, there is any legal burden of proof ...". The question of the existence of special circumstances, and their effect, was integrated, as a question of law, with the rule of the equidistance principle (*op. cit.*, p. 45, para. 68).

But, if there is no burden of proof to be formally observed, it is equally clear that the mere invocation by Denmark of an alleged "special circumstance" is not sufficient to establish that any phenomenon invoked in *law* constitutes such a circumstance which excludes the direct application of the operative rule of the median line. In keeping with the dictum of the Court of Arbitration, "that question is always one of law of which ... the tribunal must itself, *proprio motu*, take cognizance when applying Article 6" (para. 68 in fine).

It is difficult to find in Denmark's pleadings any attempt to substantiate its contention that "Jan Mayen, *par excellence*, falls within the concept of 'special circumstances' and should be given no effect ..." (Reply, p. 163, para. 448). And nowhere in the Danish pleadings do we find any reasoned argument seeking to demonstrate specifically that any particularity of geography, other than the disparity in coastal lengths, would constitute a special circumstance within the meaning of Article 6.

And, Mr. President, the relationships of coastal lengths has never been held to fall within that ambit.

Let us instead look at the existing situation and see what the fundamental facts are: two coasts which are easily identifiable, with no notable irregularities in this region, no incidental special features, against a background of broad ocean expanses, with no intruding third coasts which affect the broad picture between Jan Mayen and Greenland, and no constricting environment of an enclosed

or semi-enclosed sea.

Mr. President, it is sometimes difficult positively to prove the negative, such as the *absence* of any special circumstance. In the present alternative, I would respectfully ask the Court to recognize the absolute normality of the situation obtaining between Jan Mayen and Greenland in relation to the operation of Article 6.

It would, perhaps, also be of interest to consider Denmark's international practice in another relation where the question of the existence or otherwise of any special circumstance under Article 6 was the subject of considerable discussion. I am referring to the negotiation of the Agreement of 9 November 1984 between Denmark and Sweden on the delimitation of the continental shelf and fishery zone (Counter-Memorial, Vol. II, Ann. 74, p. 282). That negotiation was at times characterized by a high political temperature and by the direct involvement of the Prime Ministers on both sides.

Much of the controversy was concentrated on whether the tiny island of Hesselø (0.7 square kilometres), situated north of Zealand, was to be taken into consideration in the calculation of a median line. In relation to the other coasts which governed that operation, Hesselø would qualify handsomely as an *incidental special feature*.

The outcome was an agreement which expressly states that it is entered into *in accordance with* the Geneva Convention on the Continental Shelf (Preamble), and that "the demarcation line ... shall, in principle, be the median line ...". At the close of the negotiations, both parties confirmed that full weight was given to Hesselø - 0.7 km^2 - (as well as to two far more important Danish islands in the Kattegat), and that very small islands in the Baltic (the Danish Ertholmene and the Swedish Utkippan) had been taken into account in drawing the boundary between the Swedish mainland and the Danish island Bornholm.

There is of course no binding precedent in the negotiation of an agreed boundary, but when it is stated clearly that the parties are giving expression to their interpretation of a conventional obligation under international law, one may perhaps take that statement to be expressive of a more

general assessment of the legal impact of that convention in question.

On this basis, Mr. President, Norway submits that the situation does not admit of the presence of any special circumstance, and that the application of paragraph 1 of Article 6 of the 1958 Geneva Convention thus has as a direct and immediate consequence in law that the boundary of the continental shelf is the median line between the coasts of Jan Mayen and Greenland.

4. The 1982 Law of the Sea Convention

Unfortunately it is not mentioned in the index, but the text of Articles 74, 83 and 113 is contained in the folder, at page 11.

I have already touched upon the relationship between the provisions of the 1958 Convention and the influence on them by general international law. In this connection, it is a fact that the Law of the Sea Convention, although not yet in force, has had a considerable influence on the development of general international law.

I would like to comment a little further on the relationship between the 1958 Continental Shelf Convention and the 1982 Law of the Sea Convention.

In Norway's view, as I have already stated, the 1982 Convention would not abrogate or replace the delimitation provisions of Article 6 of the Geneva Convention when or if it enters into force.

The final text of Article 83, paragraph 1, of the 1982 Convention reads as follows:

> "The delimitation of the continental shelf between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution."

The 1982 Convention, by its Article 311, paragraph 1, proposes to determine that

> "This Convention shall prevail, as between States Parties, over the Geneva Conventions on the Law of the Sea of 29 April 1958."

But Article 6 would remain unchanged even if the 1982 Convention would enter into force. The arguments leading to this result is succinctly summed up by Professor Lucius Caflisch, in his revised article "The Delimitation of Marine Spaces" in "A Handbook on the New Law of the Sea" (1991), at page 479:

> "The formula just quoted, which the International Court of Justice has already referred to in the context of several cases, is destined to govern a large number of delimitation cases and should therefore be discussed at some length. Its content is characterized by three elements. The first element is the call for delimitation by agreement. The second element appears to be that the substance of the delimitation agreement should be in conformity with the rules of international law flowing from the sources enumerated in Article 38 of the Statute of the International Court of Justice, principally from custom and treaties, the implicit inclusion of the latter being intended as a reference to *Article 6 of the 1958 Continental Shelf Convention which will thus continue to govern delimitation operations between States Parties to that Convention.* The third element would be that the delimitation agreement and, consequently, the application of the rules of international law to which that agreement conforms, must lead to an equitable solution; as has been pointed out, this is a postulate which had already formed the basis of the customary rules in matters of delimitation and of Article 6 of the 1958 Convention as well." (Emphasis added.)

His footnote 166 to this passage reads as follows:

> "This conclusion emerges from Article 83 (1), especially when the latter is read in conjunction with Article 311 (1) and (5) of the 1982 Convention. Article 311 (1) provides in fact that '[t]his Convention shall prevail, as between States Parties, over the Geneva Conventions on the Law of the Sea of 29 April 1958' (emphasis added), a formulation indicating that those instruments are not simply abrogated as between States Parties to the 1982 Convention. Article 311 (5) adds that Article 311 'does not affect international agreements expressly permitted or preserved by other articles of this Convention'. *This squarely applies to Article 6 of the 1958 Continental Shelf Convention, 'preserved' by the reference to international law - including existing treaty law - contained in Article 83 (1) of the 1982 Convention*." (Emphasis added.)

In the Norwegian Counter-Memorial (Counter-Memorial, p. 88, para. 313) went on to say that

> "It has also been the stated view of both Parties that the 1958 Convention continues in force, undisturbed by the 1982 Convention. As far as Denmark is concerned, that is made clear by the statement of a prominent negotiator for Denmark at UNCLOS III, writing in *Danish Foreign Policy Yearbook 1983* on the new Convention and Denmark's law of the sea policies (see Annex 81). Similar public statements have been made by Norwegian representatives."

The statement here referred to was by a prominent negotiator for Denmark at the Third Law of the Sea Conference, Mr. Peter Brückner (see Counter-Memorial, Vol. II, Ann. 81, p. 307):

> "From a Danish point of view, it is essential that the rule does not imply any modification of the legal situation. In relation to those States which are party to the 1958 Geneva convention on the Continental Shelf (e.g., Sweden and Norway), the median line principle of this Convention thus applies as heretobefore. In relation to other States, customary law applies in conformity with international jurisprudence."

In *conclusion*, it must be stated that even taking into regard the 1982 Law of the Sea Convention, Article 6 of the Geneva Convention would continue to apply, which again would determine, in the present case, that the median line applies.

5. Treaties relating to fisheries zones and exclusive economic zones

[As for treaties,]My presentation so far has concentrated on treaties applicable to the continental shelf boundary and the delimitation of the continental shelf in the Jan Mayen-Greenland area.

As for treaties relating to the fisheries zones and exclusive economic zones, I can be very brief. There is no agreement in existence which directly applies in the Jan Mayen-Greenland area.

Another matter is, as we shall be exploring later, that treaties determining continental shelf boundaries can have the indirect effect of also determining fisheries zones' boundaries.

6. The conduct of the Parties

Introduction

I then move, Mr. President, to the conduct of the Parties, and the legal consequences which, in the view of the Government of Norway, can be derived from that conduct.

It is well-known that the conduct and behaviour of a State may under the circumstances be of legal consequence according to general principles of international law. There is a spectrum of such legally relevant conduct, ranging from express or implied recognition, tacit admissions, or acquiescence, or sometimes the lack of response or objection where such would be called for by the circumstances. The common denominator of such phenomena is that others may rely on such behaviour, and are found justified in doing so. The legal effects here referred to are actually an integral part of a fundamental aspect of international law, namely that of stability of legal relationships as they appear and must reasonably be understood by others.

In the present dispute the conduct of the Parties is relied on in three distinct respects:

- First, a Party's behaviour may provide evidence of the proper interpretation of agreements entered into, or declarations made. I have already referred to the consistent conduct and practices of Denmark in support of the interpretation of the Agreement of 8 December 1965.
- Second, I shall now consider a series of circumstances in respect of delimitation which must have the effect of serving as binding on the part of Denmark, binding in the sense that the consistent conduct is opposable to it.
- Third, Professor Brownlie will later explore the elements of an equitable solution if one were

to consider the present dispute under the perspective of general international law. The consistent conduct of the Parties will also constitute a relevant factor in the perspective of a delimitation exercised according to customary international law.

The relevant facts pertaining to the conduct of the Parties, as well as the legal principles applicable to these facts, are described in greater detail in the Norwegian Counter-Memorial (Part II, Chapter II, pp. 91 *et seq*.), and in the Norwegian Rejoinder (Part II, Chapter III, pp. 78 *et seq*.). In Norway's view, both in respect of the continental shelf delimitation and the fisheries zones' delimitation, the legal consequence must be that the median line has been recognized by, and is opposable to, Denmark.

The relevant elements of conduct are not quite the same in respect of the continental shelf and in respect of fisheries or economic zones. I shall therefore first look at the conduct of particular relevance to the continental shelf, and thereafter to the conduct relevant in respect of the fisheries zones. In Norway's view, it will emerge that the conduct of the parties has been consistent and in effect identical in both areas.

Various types of conduct

I may perhaps start by classifying various types of conduct.

1. Some proclamations made by States are in the form of unilateral declarations or communications, appearing to be addressed to the international community and intended to have legal effect in international law for the country which promulgates that statement.

Examples of such unilateral proclamations are the Norwegian Royal Decree of 31 May 1963 concerning the continental shelf (Counter-Memorial, Vol. II, Ann. 21, p. 98) and the Danish Royal Decree of 7 June 1963 (Counter-Memorial, Vol. II, Ann. 29, p. 111) concerning the same.

2. On the national level, legislation and other legal instruments may contain equally clear statements.

Of course, provisions in national law will primarily have legal effect on the national level, and set limits for the authority which can be exercised by representatives of that State.

But a national legal instrument may also have an international aspect. It contains a

declaration to the world at large how that country has decided to exercise its national authority and powers, for instance in relation to the exploration and exploitation of resources in the sea-bed or the water column above it. The national legal instrument renders a clear international message. Other States, and persons or corporations belonging to other States, will naturally rely on such promulgations as evidence of the position that State is taking, also in international relations.

The consistency of national Danish legislation is significant in giving weight to this declarative function of Danish national legislation.

I may in passing mention one example where national legislation was given weight in an international relationship, namely, in the Norwegian *Fisheries case* (*I.C.J. Reports 1951*, p. 116).

3. It has been Denmark's consistent practice, in bilateral agreements, to pursue the median line as the delimitation principle in regard to the continental shelf as well as fisheries zones. Consistent State practice also lends support to the expectations of others.

4. A State may consistently have expressed, in general terms, its position and attitude in matters of international law.

Denmark, like Norway, has consistently declared its general adherence to median line delimitation, both in respect of the continental shelf and of fisheries or exclusive economic zones.

A relevant example in this context is the Danish position consistently taken during the Third Law of the Sea Conference. The firm and consistent position taken by Denmark supports the consequence in law that other States should be able to assume that Denmark will behave in the future according to its own stated convictions.

5. Finally, any State with a consistent pattern of behaviour must be aware of the impression such manifold declarations must leave with other parties. To the extent a State is able to retract from its previous positions, it must be reasonable to expect that State to clearly communicate its intention to change position, so as to enable others to protect their own interest.

In this case, Denmark failed to give proper advance notice of its change of position in respect of delimitation between Jan Mayen and Greenland.

The conduct of Denmark in respect of continental shelf delimitation

Following this attempt at a classification of types of consistent conduct of the Parties, I shall make some comments to underline or supplement what has been pointed out in our written submissions, and then first in respect of delimitation of the continental shelf.

(a) *Declarations intended to have international effect*

The Danish Royal Decree of 7 June 1963 (Counter-Memorial, Vol. II, Ann. 29, p. 111) is clear and unreserved. The full text of Articles 1 and 2, paragraphs 1 and 2, is as follows:

"Article 1

Danish sovereignty shall be exercised, in so far as the exploration and exploitation of natural resources are concerned, over that portion of the continental shelf which, according to the Convention on the Continental Shelf which was opened for signature at Geneva on 29 April 1958 (hereinafter referred to as the "Convention"), belongs to the Kingdom of Denmark, cf. Article 2.

Article 2

1. In accordance with Article 1 of the Convention, the term 'continental shelf' is used as referring (a) to the sea-bed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas, (b) to the sea-bed and subsoil of similar submarine areas adjacent to the coasts of islands.

2. The boundary of the continental shelf in relation to foreign States whose coasts are opposite the coasts of the Kingdom of Denmark or are adjacent to Denmark shall be determined in accordance with Article 6 of the Convention, *that is to say*, in the absence of special agreement, *the boundary is the median line*, every point of which is equidistant from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured."

3. The Ministry of Public Works may, if necessary, cause official charts to be prepared on which the boundary line shall be entered. (Emphasis added.)

This declaration, by its form and content, is a definite communication to third States of the principles and policy which Denmark will adhere to in respect of delimitations of its continental shelf. As pointed out in the Norwegian Rejoinder (p. 79, para. 278) Denmark underscored the international aspect of its Decree by communicating it by the diplomatic channel to the countries immediately affected by the declaration (Rejoinder, Ann. 84).

As for the delimitation aspect, the wording of the Danish declaration is clear and unreserved.

Not only does it state that the boundary shall be determined in accordance with Article 6 of the Continental Shelf Convention, but it goes on to declare how that provision is to be implemented.

It will be seen that the Decree proclaims the median line as the boundary, without any reference being made to the consideration of special circumstances.

No argument has been presented to obscure the fact that Denmark, after careful study of its continental shelf areas, decreed that, in the absence of special agreement, the boundary of its continental shelf shall be the median line where it abuts with adjacent or opposite shelves, without any reservations for "special circumstances".

The Danish side attempts to argue that the travaux préparatoires of this declaration make reference to the full text of Article 6, paragraph 1, of the Convention. But the fact of the matter is that the declaration itself clearly stipulates the median line to be the boundary in the absence of a special agreement. There is no reason to go behind the clear meaning of the words as used in this international proclamation.

As already mentioned, the Danish declaration is general in geographical scope and therefore applies to some 17 areas to be delimited. [Refer sketch-map.]

The boundary proclamation contained in the Danish Decree of 7 June 1963 still stands unabated, nearly 30 years hence. It has never been repealed or modified, either internationally or in national legislation.

Denmark has tried to argue that national legislation is often lagging behind and not brought up to date. It is contended by Denmark that older proclamations should therefore not be binding according to their original contents, but be interpreted in the light of general international law at the time of interpretation. This argument must be rejected, for several reasons. First, the general principle of international law relating to boundary treaties (cf. the quotation from the Aegean Sea case) must equally apply to unilateral boundary declarations. Second, it is a demonstrable fact that Denmark, as late as May 1979 (Counter-Memorial, Vol. II, Ann. 37, p. 132) amended the 1963 Decree by repeating paragraph 3 of Article 2, without amending or repealing the proclamation concerning the median line in paragraphs 1 and 2 of the same Article.

I would also especially point out that when the 200-mile Danish fishery zone in East Greenland was declared in 1980, no corresponding expansion was decreed in respect of the continental shelf.

Additionally, with particular regard to the neighbouring State of Norway, the Danish Declaration must naturally be read in conjunction with the contemporary Norwegian Royal Decree, issued one week earlier, on 31 May 1963 (Counter-Memorial, Vol. II, Ann. 21, p. 98). The Norwegian Decree contains a corresponding, unconditional proclamation establishing the median line as the boundary for the continental shelf in relation to other States:

> "The sea-bed and the subsoil in the submarine areas outside the coast of the Kingdom of Norway are subject to the sovereign rights of Norway as regards exploitation and exploration of natural resources, ... *but not beyond the median line in relation to other States*." (Emphasis added.)

Mr. Magid in his intervention (CR 93/3, pp. 8-9) conceded that the municipal law of two States may, exceptionally, reflect their agreement as to where an equitable boundary should lie. I would not hesitate to state that when two States unconditionally declare the same boundary, and leave the situation unchanged for almost two decades, then those concurrent declarations have a binding force equal to a formal agreement.

(b) *National legislation and other legal instruments*

The Norwegian Continental Shelf Decree was followed up by a national Act dated 21 June 1963 (Counter-Memorial, Vol. II, Ann. 22, p. 99) which in its Section 1 communicated exactly the same message in respect of the median line boundary in relation to other States.

Denmark did not issue any corresponding national legislation together with its 1963 Declaration concerning the continental shelf. When Denmark came to pass an Act concerning the continental shelf some eight years later, on 9 June 1971 (Counter-Memorial, Vol. II, Ann. 30, p. 112), it did not include provisions concerning the boundary in the text. On the other hand, for that reason, the Act obviously took as its basis the boundary declaration in the Royal Decree, and did not

contain any communication to the outer world in respect of the continental shelf boundary.

It may be noted that Norway, in its Petroleum Act of 22 March 1985 (Counter-Memorial, Vol. II, Ann. 28, p. 110), defined the continental shelf as follows, in accordance with the 1982 Law of the Sea Convention:

> "seabed and substrata outside the Norwegian territorial sea, as far as it may be regarded as a natural prolongation of the Norwegian land territory, but no less than 200 nautical miles from the baselines from which the territorial sea is measured, and not beyond the median line in relation to other States".

On this point we updated but Denmark so far has not.

(c) *Delimitation agreements*

As for agreements between Denmark and other countries concerning the delimitation of continental shelf, the same consistent attitude emerges.

I have already commented in detail upon the Agreements with Norway of 8 December 1965 and 15 June 1979 concerning delimitation of the continental shelf, the latter Agreement referring also to the fishery zone of the Faroes Islands and the economic zone of Norway.

Denmark has concluded a number of other treaties with other countries, of which I will mention:

- Agreement 9 June 1965 with the Federal Republic of Germany concerning the continental shelf in the North Sea (Counter-Memorial, Vol. II, Ann. 45, at p. 170);
- Protocol to that Agreement 9 June 1965 with the Federal Republic of Germany concerning the continental shelf delimitation in the Baltic Sea (Counter-Memorial, Vol. II, Ann. 45, p. 169);
- Agreement 3 March 1966 with the United Kingdom about the continental shelf delimitation (Counter-Memorial, Vol. II, Ann. 47, p. 175);
- Agreement 31 March 1966 with the Netherlands concerning continental shelf (Counter-Memorial, Vol. II, Ann. 48, p. 178);
- Agreement 17 December 1973 with Canada concerning delimitation of the continental shelf between Greenland and Canada (Counter-Memorial, Vol. II, Ann. 55, p. 200).

All of these Agreements are based on the median line method when setting out the actual boundary.

For the sake of completeness, I will mention that after the decision of this Court in 1969 in the North Sea cases subsequent agreements based upon that Judgment were entered into:

- Agreement of 25 November 1971 with the United Kingdom (Counter-Memorial, Vol. II, Ann. 54, p. 198)
- Agreement of 28 January 1971 with the Federal Republic of Germany (Counter-Memorial, Vol. II, Ann. 53, p. 193).

There is also an Agreement of 14 September 1988 between Denmark and the former German Democratic Republic (Counter-Memorial, Vol. II, Ann. 77, p. 293) which is again based on the median line principle except for a small, very special area.

(d) *Statements and positions in international relations*

In regard to conclusive statements and positions taken in international relations the Norwegian Counter-Memorial (pp. 99-103, paras. 345-353) and the Norwegian Rejoinder (pp. 91-94, paras. 325-332) recite the firm and consistent positions expressed on behalf of Denmark. I refer to the details of the written submissions, which will show Denmark's unwavering adherence to the median line principle.

It has been pointed out from the Danish side that throughout UNCLOS III Denmark was declaring this adherence to the median line in combination with the special circumstances principle, not the unreserved application of a median line. Norway readily admits that this is so, but with the emphasis that the "special circumstances" relied on in this context by Denmark were circumstances of the kind contained in and referred to in the Continental Shelf Convention, Article 6. Denmark, like Norway, was in clear opposition to the "equitable principles" group at the Conference. And there was no position taken by Denmark to the effect that any "relevant factor" going into a consideration of general equity should also be capable of modifying the equidistance principle. The consideration of special circumstances under Article 6 of the Continental Shelf Convention would serve to arrive at equitable results, which, however, is not equivalent to saying that any conceivable factor would be covered by the equidistance/special circumstances rule.

Furthermore, Denmark stated its fundamental position on the specific subject of oceanic islands during the Caracas session in 1974 (see Rejoinder, p. 91, para. 326):

> "4. On the question of the continental shelf of islands, the basis for the Committee's deliberations should also be the 1958 Geneva Convention on the Continental Shelf. In Article 1, paragraph (b) of that Convention, the continental shelf of islands was defined in the same way as for other territories. International law concerning the delimitation of the continental shelf was, as a general rule, the same for islands as for the State as a whole. An *oceanic island* would have a full sea-bed area, and for *an island situated closer to another country*, the delimitation of the continental shelf would be based on the principle of equidistance in accordance with article 6, paragraph 1 of the Geneva Convention." (Statement by Mr. Kiaer of Denmark, emphasis added. UNCLOS III, Official Records, Summary Records of the Second Committee, 20th Meeting, on Tuesday 30 July 1974.)

During the oral pleadings, Denmark has reconfirmed its agreement with this statement (CR 93/3, p. 23).

Summing up, Denmark's conduct in respect of its continental shelf it has indeed been consistent, on all levels and types of conduct.

I shall later comment on the legal effect of that conduct.

The conduct of Denmark in respect of fisheries and exclusive economic zones

Moving then to Denmark's conduct in respect of fisheries zones, it shows an equally coherent and consistent picture, with a pronounced adherence to the median line as the chosen method of delimitation.

(a) When Denmark on 17 December 1976 enacted legislation for an extended fishery zone, it again stated in respect of delimitation that, failing any agreement to the contrary, the delimitation of the fishing territory relative to foreign States shall be the equidistance line, again without any reference to any modifications due to special circumstances or other intervening factors. The relevant provision of the Act (Counter-Memorial, Vol. II, Ann. 31, p. 116) reads as follows:

> "1. (1) The Prime Minister shall be empowered to enact that the fishing territory of the Kingdom of Denmark be extended to a breadth of 200 nautical miles ... The extension may be effected for one area at a time.
>
> (2) 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 or adjacent to Denmark, *shall be a line which at every point is equidistant from the nearest points on the baselines at the coasts of the two*

States (the median line)" (Emphasis added.)

This declaration is in full correspondence with the position taken by the Norwegian Act of 17 December 1976 relating to the economic zone of Norway (Counter-Memorial, Vol. II, Ann. 24, p. 101). The Norwegian Act includes the following provisions:

> "The outer limit of the economic zone shall be drawn at a distance of 200 nautical miles ... from the baselines applicable at any given time, but not beyond the median line in relation to other States ..."

Although there is thus complete congruence between the Norwegian and Danish delimitation provisions in those fisheries Acts, both the Danish and Norwegian provisions are general in scope and relate to all States with adjacent or opposite coasts. In the comments on the individual provisions of the Danish Bill (Rejoinder, Ann. 87, p. 216), it is stated:

> "Subsection (2), Section 1, of the Bill, relating to the delimitation of the Danish fishing territory in relation to other countries, has been drawn up on the same lines as earlier legal rules in this field, and prescribes that in the absence of an agreement in this respect, a boundary following a median line shall be established. Upon an extension to 200 nautical miles, the need arises for agreements on delimitation in the North Sea, the Baltic Sea, and the Kattegat, as well as around the Faroe Islands and Greenland."

It is also interesting to note the interrelationship in Danish law between the continental shelf and the fishery boundaries, which was commented on in the Danish Bill as follows:

> "Upon the establishment of a fishery limit of 200 nautical miles, questions of delimitation in relation to other countries will arise in a number of cases. Although in theory the possibility of different fishery and continental shelf boundaries cannot be ruled out, this would be an unrealistic solution. In practice, these limits must coincide. That means that where Denmark is concerned, continental shelf boundaries which have already been agreed may be used as fishery boundaries. In those cases where a shelf boundary has not yet been agreed, it is important, since the fishery limit also influences shelf delimitation, that both fishing interests and shelf interest be taken into account in future negotiations on the delimitation of the Danish area."

In other words, while Denmark did not purport to deviate from the rules and principles governing delimitations of the continental shelf, the comment speaks in favour of the practicability of having coinciding boundaries for the continental shelf and fishery zones. Where the continental shelf boundary is already in place, the proposal is to accept that for the fishery zone as well. May I point out that this is not a question of introducing a single line boundary régime, but a practical consideration of letting the two single-purpose boundaries coincide.

(b) A number of resolutions were passed in implementation of the Danish

enabling Act of 17 December 1976. All those resolutions were consistently declaring the median line to be applied for delimitation in the absence of a special agreement. This applies to

- Decree 21 December 1976 on 200 miles fishery zone around the Faroe Islands (Counter-Memorial, Vol. II, Ann. 32, p. 117);
- Executive Order 22 December 1976 concerning Denmark's fishery zone in the North Sea (Counter-Memorial, Vol. II, Ann. 33, p. 119);
- Executive Order 22 December 1976 on the Fishing Territory of Greenland (Counter-Memorial, Vol. II, Ann. 34, p. 120) - that is the southernmost part;
- Executive Order 22 December 1977 concerning Denmark's fishery zone in Skagerrak and Kattegat (Counter-Memorial, Vol. II, Ann. 35, p. 127) - that is around the mainland;
- Executive Order 14 May 1980 on the Fishing Territory in the waters surrounding Greenland (Counter-Memorial, Vol. II, Ann. 38, p. 133) - that is the northernmost part.

Going through the various sections of that last-mentioned Executive Order of 14 May 1980, for Greenland, one will see that in respect of the relation to Canada to the west and north, it was again stated that, in the absence of special agreement to the contrary, the boundary line of the fishing territory shall everywhere be the median line. The same applies to the area north of Jan Mayen, concerning the delimitation between Greenland and Svalbard (see Section 1 (4) of the Order.

The only exception to this consistent practice of Denmark is the Danish position vis-à-vis Jan Mayen. The Danish Order of 14 May 1980 declared there a full 200-mile zone, but abstained "for the time being" from exercising jurisdiction beyond the median line. Norway promptly objected to this legislative step. A formal note of objection was sent on 4 June 1980 (Counter-Memorial, Vol. II, Ann. 10, p. 37).

Later, in 1981, as we heard, Denmark went one step further, with its Decree of 31 August 1981 (Memorial, Vol. II, Ann. 11, p. 26). But Denmark has continued to abstain from exercising jurisdiction beyond the median line, pending negotiations and later the procedures before this Court.

The conduct of Norway

After this analysis of the Danish conduct, may I briefly comment on the conduct of Norway in the same matter.

Norway's legislative and bilateral agreement practice has been equally consistent, on all levels and types of conduct. The general and consistent attitude has in every respect been the same as that of Denmark: in the absence of agreement, the median line boundary applies vis-à-vis other States.

The main elements of the Norwegian legislation and treaty practice has already been mentioned, so I shall not repeat them here, but also refer to our written pleadings.

The Danish side has relied heavily on two items of Norwegian conduct which I shall have to comment on quite briefly:

1. *The Agreements with Iceland*

Denmark relies heavily on the two Agreements between Norway and Iceland, of 28 May 1980 for fisheries (Counter-Memorial, Vol. II, Ann. 70, p. 265) and of 22 October 1981 concerning the continental shelf (Counter-Memorial, Vol. II, Ann. 72, p. 272). Not only are these Agreements invoked as an expression of international delimitation law, as applied in the area of Jan Mayen (CR 93/3, p. 38). It is also contended that it forms, together with Norway's treatment of the Bear Island, a wholly exceptional rule of law applicable to the North Atlantic or at least to the Iceland-Greenland-Jan Mayen area.

The facts relating to these Agreements between Norway and Iceland are spelt out in the Norwegian Counter-Memorial (p. 56, para. 185, pp. 71-72, paras. 248-253, pp. 159-160, paras. 551-553), and have further been explored by my Co-Agent, Mr. Tresselt. In Norway's view, the facts of the case leave no doubt that these Agreements represent a political concession towards an island State heavily dependent on its fisheries and which has special relations to Norway.

May I only add the following:

There is nothing in the fisheries Agreement to suggest any resemblance to an ordinary delimitation treaty. The Agreement indirectly assumes, by default, that the outer limit of Iceland's exclusive economic zone is accepted as defining the Icelandic zone in relation to the Norwegian

fishery zone.

As for the Continental Shelf Agreement with Iceland of 1981, it was preceded by the work of an appointed Conciliation Commission. There is no doubt that the Commission consisted of very qualified international lawyers, but Denmark will have the Court believe that the Commission acted somewhat like an arbitral tribunal, handing down a decision purely based on law. The report of the Commission is publicly available (*International Legal Materials*, Vol. XX, 1981, p. 798), and I shall limit myself to make the following points:

1. First, the Commission did indeed make one conclusion of law. At page 803 *loc. cit.*, the Commission cites Article 121 of the draft Convention of the Law of the Sea, points out that the draft reflects the present status of international law on the subject of régime of islands, and concludes that "it follows from the brief description of Jan Mayen in Section III of this report that Jan Mayen must be considered as an island, (paragraphs 1 and 2 of Article 121 are thus applicable to it"). That legal point was made.

2. Although the Commission considered the status of international law in respect of continental shelf and zone delimitations, as a basis for finding a solution, it also expressly pointed out that its mandate was to reach an unanimous recommendation taking Iceland's strong economic interests into account (*loc. cit.*, p. 800).

3. It is worth noting that the Commission did not specifically recommend any boundary for the continental shelf delimitation, but recommended a survey and further exploration of the possibilities of hydrocarbons. It proposed that Norway should bear the costs of the first stage of such surveys, estimated "on the order of millions of dollars" (p. 830). No doubt this was an exercise in conciliation and not the outcome of judicial settlement.

The ensuing treaty between Norway and Iceland concerning the continental shelf was not, as Denmark will have us believe, the result of a purely legal process.

2. *Bear Island*

Denmark has also repeatedly referred to the Norwegian treatment of Bear Island, both in its written pleadings and now in the oral presentation. Again, I must be permitted to refer to Norwegian

responses in our written pleadings (Counter-Memorial, pp. 65-66, paras. 228-231; Rejoinder, Part III, Chap. I, pp. 187 *et seq.*).

The Danish argument is weak, to say the least. I may refer to Map No. 3 in the folder.

The argument seems to be that when Norway declared its full 200-mile exclusive economic zone around mainland Norway, Bear Island was totally ignored. This should then be taken as conclusive evidence of a legal admission by Norway of the status of an island like Bear Island, with corresponding effects in international law as regards Jan Mayen.

Norway's main objection to this kind of argument is that Svalbard, including Bear Island, is a part of the Kingdom of Norway. There is no question of delimiting overlapping areas pertaining to different States. The declaration of an exclusive economic zone around mainland Norway, and a little later of a fisheries protection zone around Svalbard, is within any State's power to define the extent and qualitative contents of its various zones.

But if the drawing of a full 200-mile economic zone around the mainland should be seen as trespassing on the economic zone rights of the Svalbard archipelago, then why does not Denmark go on and draw some consequences from the fact that the main island of Svalbard, Spitsbergen, has also been ignored?

So the evidence invoked by Denmark should actually be that Norway ignores the existence of any entitlement generated by an island the size of mainland Denmark, an island with an ongoing mining industry and other activities.

I may add that, if the Danes were really interested in how Norway regarded the generating powers of an island like Bear Island, they might have taken the trouble to look at the definition of the fishery protection zone [show on map]. It can be seen that Norway did indeed claim full entitlement in the southern most part on the basis of Bear Island.

We would have appreciated it if our Danish friends had done a little more of their homework before making this attack on Norway's cautious treatment of a politically sensitive area.

May I finally remind the Court that Denmark, on the basis of Norway's agreements with

Iceland, which obviously represented a political concession which any State is free to make, and on the basis of an administrative, internal distinction between two Norwegian zones, alleges that a specific legal norm of delimitation applicable to the North Atlantic region shall have been created.

The legal effects of the consistent conduct of the Parties

Finally, I come to the legal effects of the consistent conduct of the Parties.

Again, as a general remark, may I refer to the Norwegian written pleadings (Counter-Memorial, Part II, B, p. 93 *et seq*. and Rejoinder, Part II B, pp. 77 *et seq*.) for the details of our arguments.

The facts relied on are not, as we understand it, disputed.

The legal consequences to be drawn from those facts lead us into areas of international law where the categories may be both blurred and overlapping, and the legal situation in some respects uncertain. But that cannot deter us from invoking the protection of international law against the challenge of the Danish claims.

There are a number of concepts, related to the consequences of the actions, or omissions, of a State. Before we try to put the conduct of the Parties into the relevant legal categories, it may be worthwhile to recall some of the fundamental principles of international law.

1. First, there is the predominance of agreements to settle disputes, or conflicts of interest.

A fundamental norm is that settlement by agreement should be sought, and agreements should be kept. This fundamental viewpoint in international law would also extend to dispositive conduct, such as unilateral declarations and conclusive behaviour.

2. Second, there is the equally fundamental principle of *stability and predictability* in international relations.

In a variety of aspects and areas of international law the promotion of stability is evident. One aspect of this fundamental consideration is that other subjects on the international scene should be supported in their reliance on consistent and conclusive behaviour of other States.

3. Third, and closely related to my second point, States acting prudently and in good faith should not be penalized for doing so.

As for the law of the sea, and the law of maritime delimitation in particular, all nations, big and small, have had to cope with a rapidly and dramatically changing world. There is a distinctive shift from the benefits of exclusive rights to harvest resources to the obligation to protect the environment and the resources of the sea. Extensive international co-operation is called for, rather than the unrestricted pursuit of own benefits.

In this turbulent time of development and change the demands on all States should be to act in good faith, and for each State to take responsibility for its own acts as these must reasonably be understood by others.

Following these observations I shall attempt to categorize the conduct of the Parties in relation to their legal consequence in international law:

(a) In the submission of Norway, Denmark's consistent conduct has a cumulative declaratory effect, which must be binding upon Denmark and lead to a rejection of the Danish claims.

First of all, there is the unilateral, internationally addressed, or opposable, declaration of 7 June 1963 concerning continental shelf delimitation vis-à-vis other States.

That declaration is clear and dispositive, it has not been contradicted, but on the contrary has been affirmed in all possible circumstances, as we have seen in internal shelf legislation, numerous delimitation agreements and adherence to the Geneva Convention on the Continental Shelf.

May I recall that the Court in the Nuclear Test case has recognized that unilateral declarations by States may "constitute an undertaking possessing legal effect" when they are "made ... publicly and erga omnes ..." and "clear and ... addressed to the international community as a whole ..." (*I.C.J. Reports 1974,* p. 269).

A particular aspect is the fact of the corresponding declaration and confirmatory conduct by the neighbouring State of Norway. This has been equally clear and long-lasting.

A State may well be in the position to change its policy and withdraw its declaration, with reasonable notice so as to allow other States to take measures to protect their interests. But Denmark has not done so, in respect of the continental shelf. It has had several occasions to consider amendment or retractions of its declaration concerning the continental shelf, but has not done so.

Where the declarative element is involved, there should not be room for any additional condition that other parties, relying on the conduct of the other State, must prove damage to them, or advantages to the pronouncing State, as a result of its sudden turn-about.

The declarative element is less strong, but equally clear and unambiguous, in the case of Danish fisheries zones. Their own fisheries legislation empowers their Government to establish fisheries zones, and to determine the extent of such zones, but not beyond the median line in relation to other States. The Danish side has attempted to say that the clear words of their fisheries legislation do not mean what they say, and that the Government must be free to interpret its own legislative instruments. But that argument misses the whole point. The Danish fisheries legislation has a definite international aspect, and the international community must be able to rely on the Danish legislative declarations in accordance with their plain meaning.

The binding effect to be given to the declarative aspect in the Danish context, is a matter for consideration. In the submission of Norway, there is reason to conclude that such conduct is opposable to Denmark, whether or not it would also fall within the category of recognition or acquiescence in respect of the median line.

(b) In the further submission of Norway, the Danish conduct also

qualifies as an estoppel.

I shall not venture into the variants on the understanding of this legal concept, but a common requirement would seem to be what in the *Temple of Preah Vihear* case was termed a

> "clear and unequivocal representation ... made by it to another State, either expressly or impliedly, on which representation the other State was, in the circumstances, entitled to rely and in fact did rely ..." (*I.C.J. Reports 1962*, pp. 143-144, dissenting opinion of Sir Percy SDpender.).

There can be no doubt that the Danish representation of its position in respect of continental shelf and fisheries zone delimitation has always been clear and unequivocal. The message reads that, in the absence of agreement, the median line shall apply.

Nor can there be any doubt that Norway has understood the Danish position and relied upon it in Norway's own considerations. For a period of almost 17 years Denmark maintained and affirmed

its position, until it rather abruptly made a turn-about in the case of Jan Mayen.

Denmark has questioned whether Norway has relied on the Danish position to its own detriment. Norway must answer this in the affirmative. Had Norway been aware that Denmark would be serious about setting aside existing treaty relations with Norway, as well as general international law on delimitation, Norway must state that it would obviously have handled matters differently in respect of Iceland. I have pointed out in another context that it is very much in Norway's general interest to clearly maintain the legal regimes and legal distinctions that are prevailing in the field of maritime delimitation.

Nor would Norway so readily have entered into the agreement with Denmark concerning the Faroe Islands, had it been understood that Denmark would take such a novel and extreme position in the case of Jan Mayen.

The Danish side has tried to invoke signals and messages sent on the political level at meetings of ministers. Denmark has kindly admitted that the Norwegian Minister was genuinely surprised when Denmark first presented its idea concerning Jan Mayen (Memorial, Ann. 4, at p. 13). May I remind the Court that a "ballon d'essai" is nothing new in political exchanges. May I also mention that the proposals were cast in the framework of a "most-favoured nation" approach. Nobody would take that seriously. Even Denmark now seeks to deny that it was the favourable treatment of Iceland which inspired Denmark to ask the same favours.

In short, there was a continued reliance on the long-standing position in law maintained by Denmark, until it made its claim a reality, even to the extent of bringing the case to this Court.

Thus, Norway contends that the requirements of estoppel in international law have been fulfilled.

Thank you, Mr. President and distinguished Members of the Court for your attention.

The PRESIDENT: Thank you very much Mr. Haug. We will meet again tomorrow morning at 10 o'clock for the argument of Professor Brownlie. Thank you.

The Court rose at 12.55 p.m.