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Public sitting

held on Wednesday 20 January 1993, at 10 a.m., at the Peace Palace,

President Sir Robert Jennings presiding

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

(Denmark v. Norway)

VERBATIM RECORD

ANNEE 1993

Audience publique

tenue le mercredi 22 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
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M. Fischer, juge *ad hoc*

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The PRESIDENT: Professor Brownlie.

Mr. BROWNLIE: Thank you.

Denmark's Claim in the Light of General International Law

Introduction

Mr President, distinguished Members of the Court, it is my task to address certain questions of general international law as they arise in the pleadings.

The position of Norway is that the validity of the median line boundary receives independent support and confirmation from the equitable principles which form part of general international law. This position is without prejudice to the principle of consent based upon the Continental Shelf Convention of 1958, the Agreement of 1965, and the conduct of the parties.

The principle of consent necessarily stands in front of, and has priority over, general international law, whilst at the same time being compatible with the relevant concepts of general international law. When all is said and done the consent of the parties is an obvious expression of equity.

The Norwegian position on delimitation, explained in schematic terms, involves three alternatives.

First, the position is governed by the provisions of the 1965 Convention as a treaty in force.

Secondly, if, which is not admitted, the 1965 Convention is not applicable, then Article 6 of the 1958 Convention applies. This provides a necessary reference to a median line boundary "unless another boundary is justified by special circumstances", and in this context also in our contention the equitable result is an unmodified median line.

The significance of Article 6 has after all been well recognized in the delimitation practice of Denmark. The Danish delimitation agreements with Canada in 1973 (Counter-Memorial, Ann. 55) and with Sweden in 1984 (*ibid.*, Ann. 74) contain express preambular references to the Continental Shelf Convention of 1958.

And then, in the third alternative, but essentially confirming the delimitation based upon

agreement, there is the median line as the equitable solution dictated by the principles of general international law.

The substantial interest of Norway

Before I approach the equitable principles of general international law overall, it is convenient to deal with two elements which have figured much in the written pleadings, namely, the substantial interest of Norway in the Jan Mayen maritime region, and the legal relevance of the factor of population.

The elements forming Norway's interest in the region are the long-established exploitation patterns in relation to sealing and whaling, fisheries, navigational and security considerations, resource potential, and maritime research and development. The precise nature of these interests has been expanded upon in the speeches of the Agents and also in the written pleadings (Counter-Memorial, pp. 164-170, paras. 567-596; Rejoinder, pp. 158-162, paras. 532-546).

My present purpose is to underline a particular aspect of this type of relevant circumstance, that is, the symbiotic relationship between the land territory and the interest of the coastal State in *the maritime areas*.

The usual reference in this context is to the Decision of the Court of Arbitration in the *Anglo-French* case which adverted to the respective "navigational, defence and security interests" of the Parties in the region. Having done so, the Court stated that such considerations "tend to evidence the predominant interest of the French Republic in the southern areas of the English Channel, a predominance which is also strongly indicated by its position as a riparian State along the whole of the Channel's south coast" (*UNRIAA*, XVIII, p. 90, para. 188 *in fine*).

The epithet "predominant" was no doubt more appropriate to the situation in the *Channel Islands* region but strictly speaking it is otiose. Any substantial interest would acquire the status of relevant circumstance, whether or not it could be described as predominant.

A similar argument was deployed by the United States in the *Gulf of Maine* case, where the *Reply* included this submission:

> "3. That the relevant circumstances in the area relating to the predominant interest of the United States as evidenced by the activities of the Parties and their nationals include:

(a) the longer and larger extent of fishing by United States fishermen since before the United States became an independent country;

(b) the sole development, and, until recently, the almost exclusive domination of the Georges Bank fisheries by United States fishermen; and

(c) the exercise by the United States and its nationals for more than 200 years of the responsibility for aids to navigation, search and rescue, defense, scientific research and fisheries conservation and management."

It is worth recalling that the Chamber did not reject this contention *tout court* as being unfounded in law but on grounds of relevance in the context of fisheries (Judgment, *I.C.J. Reports 1984*, pp. 340-342, paras. 233-237).

The point which I would emphasize is that this type of relevant circumstance is characterized as one relating to maritime areas *as such*. And this is significant when the question of title is considered. The land territory, and the coasts thereof, generate title, and that is a legal datum. When the interests of the coastal State in the maritime areas are taken into account, it is seen that there is a necessary inter-dependence and to a certain extent it is the nature of the maritime areas and their resources which confers a value upon the land territory.

To this may be added the coastal State's protective interest.

The Truman Proclamation referred specifically, in its Preamble, to the fact that "the effectiveness of measures to utilize or conserve these resources [of the subsoil and sea-bed of the continental shelf] would be contingent upon co-operation and protection from the shore", and further that "self-protection compels the coastal nation to keep close watch over activities off its shores which are of the nature necessary for utilization of these resources".

In this connection there is a consideration of maintaining a balance, which is reflected in the jurisprudence. Thus in the Award in the *Guinea/Guinea-Bissau* case it was stated:

> "To the economic circumstances, the Parties linked a circumstance concerned with security. This is not without interest, but it must be emphasized that neither the exclusive economic zone nor the continental shelf are zones of sovereignty. However, the implications that this circumstance might have had were avoided by the fact that, in its proposed solution, the Tribunal has taken care to ensure that each State controls the maritime territories situated opposite its coasts and in the vicinity. The Tribunal has constantly been guided by its concern to find an equitable solution. Its prime objective has been to avoid that either Party, for one reason or another, should see rights exercised opposite its coast or in the immediate vicinity thereof, which could prevent the exercise of its own right to development or compromise its security." (*International Law Reports*, Ed. E. Lauterpacht, Vol. 77, p. 689, para. 124.)

The actual circumstances of Jan Mayen and the contiguous maritime areas illustrate the symbiotic relationship involved. The existence of major communications and rescue facilities on Jan Mayen provides the means of assisting fishery and other vessels, and ensuring the evacuation of sick and injured crew members.

Thus in a general way Norway has a substantial interest in the maritime region contiguous to Jan Mayen and this is complemented in the most logical way by the protective interest which a coastal State naturally has.

Jan Mayen provides the basis of title to Norway's entitlements and is the axis of Norwegian interests in the region.

In concluding my remarks about the substantial interest of Norway, I shall respond to the arguments made by Denmark about fisheries. My response consists of a single point. The position of Norway is based upon considerations of law, both in the form of a boundary based upon treaty and in the form of principles of general international law. Norway's position involves invoking her substantial interest in Jan Mayen and the surrounding areas as a relevant circumstance, which may confirm her legal position.

In contrast Denmark is using the factor of the economic interests of Greenland as the basis for an absurd and ambitious claim. Norway is seeking to maintain a normal entitlement. Denmark is seeking to use a potential interest in fisheries to subvert the normal interest of the coastal State, Norway. In our submission this is a misuse of the concept of relevant circumstances and the misuse arises because proportionality cannot be used as a basis of delimitation - that is beyond argument - and the Danish 200-mile claim needs a façade of legitimacy.

And in any case the economic interests invoked by Denmark cannot affect the equitable solution in relation to continental shelf areas.

I now turn to the factor of population.

The population factor

In its written pleadings Denmark has made persistent references to the factor of population. These references are perfunctory and in most cases free of either legal reasoning or authority (Reply, pp. 156-157, para. 429; p. 158, para. 435; p. 159, para. 436; p. 163, para. 445; p. 165, paras. 452-453; p. 169, para. 463).

The only exception, in which some legal authority is proposed, involves a reference to the Decision in the *Anglo-French* case (Memorial, p. 98, para. 303).

That Decision makes a reference to "the size and importance of the *Channel Islands*" in a context in which this assessment may, by implication, include reference to population (Decision, para 187). But the Court gave only a modest level of relevance to "the size and importance" element. In the words of the Court of Arbitration:

> "The legal framework within which the Court must decide the course of the boundary (or boundaries) in the *Channel Islands* region is, therefore, that of two opposite States one of which possesses island territories close to the coast of the other State. To state this conclusion is not, however, to deny all relevance to the size and importance of the *Channel Islands* which, on the contrary, may properly be taken into account in balancing the equities in this region ..."

Mr. President, the result of giving "a certain weight" to the British arguments based on political and economic importance of the *Channel Islands* was an enclaving on a 12-mile as opposed to a six-mile basis (Decision, para. 198), which is not perhaps a major outcome.

The Court will also recall that in deciding not to ignore Seal Island entirely the Chamber in the *Gulf of Maine* case referred to various factors of which one, was that it is "inhabited all the year round" (*I.C.J. Reports 1984*, pp. 336-337, para. 222).

At this point, Mr. President, the inquiry leads to two interim conclusions. The first is that references to population are fairly unusual. And the second is that when population is invoked this is not as a necessary condition of significance but as a subsidiary element in a generalized assessment of the importance of a feature.

In the case of the *Channel Islands* they were essentially discounted in spite of their "size and importance" because of their geographical situation. In the case of Seal Island its significance depended to a great extent on its geographical position: had it been situated elsewhere it would have had no significance for delimitation whatever its population.

Moreover, in the few instances in which population has been treated as relevant, this was at a very late stage of the process of delimitation. Thus the reference comes at the stage of fine-tuning in situations in which the critical decisions have already been taken without any reference to population.

The *Channel Islands* and Seal Island references occur precisely at the stage of fine-tuning. Thus, in the case of the *Channel Islands* the Court tested the decision to enclave on other grounds and the reasoning on which Denmark relies relates exclusively to the issue of an enclave of six miles or 12 miles (Decision, paras. 195-202).

The result, Mr. President, is that population plays a role only if certain contingencies arise and at a late stage in a long sequence of operations. In our submission it is the ultimate subordinate.

When it is a question of the critical elements in delimitation, the factor of population not only has no significant role in practice, but is irrelevant as a matter of principle.

The irrelevance, as a matter of principle, of the factor of comparative population is indicated by the following considerations.

First, population is unrelated to the basis of entitlement of the coastal State, which is the possession of a territory with coasts - not with populated coasts, with coasts. This was emphasized by the Court in the *Libya/Malta* case. The Court was referring to economic considerations but the reasoning is obviously applicable to the factor of comparative population. In the words of the Court:

> "The Court does not however consider that a delimitation should be influenced by the relative economic position of the two States in question, in such a way that the area of continental shelf regarded as appertaining to the less rich of the two States would be somewhat increased in order to compensate for its inferiority in economic resources. Such considerations are totally unrelated to the underlying intention of the applicable rules of international law. It is clear that neither the rules determining the validity of legal entitlement to the continental shelf, nor those concerning delimitation between neighbouring countries, leave room for any considerations of economic development of the States in question." (*I.C.J. Reports 1985*, p. 41, para. 50.)

Secondly, the population factor is not a consideration which is pertinent to the institution of the continental shelf as it has developed within the law. Nor is it pertinent to the application of the equitable principles. The Court will recall that this limitation upon relevant considerations to be taken into account was given firm expression in the Judgment in the *Libya/Malta* case (*I.C.J.*

Reports 1985, p. 40, para. 50). The rules determining the validity of legal entitlements and the rules concerning delimitation must bear upon the resources of the sea-bed or maritime areas in question.

The Court was here responding to a Libyan argument based on comparative landmass which had been pursued with great persistence.

The reasons for its rejection were stated by the Court as follows:

> "It was argued by Libya that the relevant geographical considerations include the landmass behind the coast, in the sense that that landmass provides in Libya's view the factual basis and legal justification for the State's entitlement to continental shelf rights, a State with a greater landmass having a more intense natural prolongation. The Court is unable to accept this as a relevant consideration. Landmass has never been regarded as a basis of entitlement to continental shelf rights, and such a proposition finds no support in the practice of States, in the jurisprudence, in doctrine, or indeed in the work of the Third United Nations Conference on the Law of the Sea. It would radically change the part played by the relationship between coast and continental shelf. The capacity to engender continental shelf rights derives not from the landmass, but from sovereignty over the landmass; and it is by means of the maritime front of this landmass, in other words by its coastal opening, that this territorial sovereignty brings its continental shelf rights into effect. What distinguishes a coastal State with continental shelf rights from a landlocked State which has none, is certainly not the landmass, which both possess, but the existence of a maritime front in one State and its absence in the other. The juridical link between the State's territorial sovereignty and its rights to certain adjacent maritime expanses is established by means of its coast. The concept of adjacency measured by distance is based entirely on that of the coastline, and not on that of the landmass." (*I.C.J. Reports 1985*, pp. 40-41, para. 49.)

In our submission it is reasonably clear that that reasoning applies cogently to the factor of population and in a similar way disqualifies it as a relevant consideration.

In the light of the *Libya/Malta* Judgment, it is reasonable to suppose that the tendency of earlier decisions to make occasional reference to population is to be regarded with reserve, because it was not until the *Libya/Malta* case that a qualification had been placed upon the more liberal policy adopted in the *North Sea* cases, where it had been said that:

> "In fact, there is no legal limit to the considerations which States may take account of for the purpose of making sure that they apply equitable procedures." (*I.C.J. Reports 1969*, p. 50, para. 93.)

The third consideration is the unpredictability of the population factor. It was on this basis that the Court in the *Tunisia/Libya* case rejected the relevance of economic considerations. In the words of the Judgment:

> "The Court is, however, of the view that these economic considerations cannot be taken into account for the delimitation of the continental shelf areas appertaining to each Party.

> They are virtually extraneous factors since they are variables which unpredictable national fortune or calamity, as the case may be, might at any time cause to tilt the scale one way or the other. A country might be poor today and become rich tomorrow as a result of an event such as the discovery of a valuable economic resource." (*I.C.J. Reports 1982,* p. 77 para. 107.)

The fourth consideration is that the factor of population has no capacity to indicate a boundary, either provisionally or otherwise. It must follow that, when it comes to establishing the geographical framework within which the process of delimitation will go forward, population is completely irrelevant. It is absolutely clear that, when a tribunal is assessing the geographical relationships and the implications of coastal geography, population and similar factors are carefully ignored.

These considerations of principle receive strong support from the practice of States. There is no evidence in the practice of States that the population factor plays any role in delimitation, either in the major features of delimitation or in the selection of basepoints. This is evident in the practice of the Parties to these proceedings.

Mr. President, I have dealt with the legal aspects of the population factor and I turn now to the factual data relating to population.

The Danish Memorial, if I could remind the Court, presents the following picture:

> "Greenland has approximately 55,000 inhabitants, six per cent of them living on the east coast. Greenland has been inhabited for several thousand years. Jan Mayen has no settled population at all and has never had any." (Memorial, p. 110, para. 351; emphasis in the original.)

The Court will not be surprised to hear that the Norwegian Government sees a significantly different picture.

The broad comparison must involve density of population. The figure for Jan Mayen, with a population of 25, involves a density of one person per 15 square kilometres. Greenland has a density of one person per 40 square kilometres.

If a regional comparison be made, the Greenland element is even less impressive. Only a small proportion of the population of Greenland lives at the same latitudes as Jan Mayen. Moreover, East Greenland contains only 6 per cent of the population of Greenland as the Danish Memorial indicates (Memorial, p. 36, para. 148).

In the region of East Greenland abutting upon the area in dispute, the only settlement is Scoresbysund, which had a population of 538 in 1992 (*Grønland 1991: Kalaallit Nunaat*, Atuakkiorfik, 1992, p. 352).

I come now to the character of such a population in the Arctic region. East Greenland is no less desolate and isolated than Jan Mayen. Indeed, Scoresbysund is inaccessible from the sea for more than nine months every year. The only scheduled air service is from Iceland.

In such conditions, the distinction between a population of normal urban development and a population based on a subsidized infrastructure and maintained for collateral reasons of State becomes impossible to maintain.

And Scoresbysund has an essentially political rather than an economic role. As Norway had occasion to point out in the Rejoinder (pp. 17-18, para. 55), the Scoresbysund area was unpopulated until 1925 and the direct cause of its creation was the dispute over sovereignty between Norway and Denmark in that period.

Moreover, the community of Scoresbysund is overwhelmingly dependent on outside supplies and public support. Since the end of the 1960s, the local economy has suffered increasingly as a result of a deteriorating market for seal furs. It has not been possible to establish commercial fisheries in the area to compensate for the loss of income. Today, catch activities represent only 5 per cent of the local income, and the municipality is the poorest in Greenland. It was the port of registration for a single seagoing fishing vessel, but this no longer exists. At the end of the 1970s, the Greenland Council even discussed the possibility of dismantling the whole community, but recent prospecting for oil has so far halted such a development. In 1990, however, the oil companies involved relinquished their concession.

And so, the experience of more than 65 years illustrates that settlement in these areas of the Arctic is highly dependent on outside support and may undergo drastic changes in short time spans, even in times of modern technology. There is no sharp distinction between those settlements which may be characterized as "permanent" or "natural", and those which are maintained for administrative, scientific or other specialized purposes.

In 1974, a national park was established in northeastern Greenland to the north of Scoresbysund and covering large areas of the northeastern and northern coasts (see the sketch-map in the Rejoinder, p. 19). According to the *Greenland Yearbook* for 1988 (Copenhagen, 1989, p. 94), the national park is inhabited only by the crew of the three manned meteorological and scientific stations (Station Nord, Danmarkshavn and Daneborg). These settlements are of the same character as the station at Jan Mayen. All visits to the area require a permit from the Greenland Home Rule Authority.

Mr. President, that concludes my examination of the factual data concerning population. In my submission, the facts demonstrate that the conditions applicable in East Greenland are not significantly different from those affecting Jan Mayen.

Delimitation in the context of general international law

Introduction

My next task, and my principal task, is to examine the Norwegian position in the context of the rules and principles of general international law concerning maritime delimitation.

Three questions call for treatment by way of introduction: the legal status of the Danish position on delimitation, the importance of title, and the geographical setting.

The Danish position on delimitation

The Danish position is stated in clear language in the Reply as follows:

> "The Danish contention is that an equitable boundary line [that is the phrase used, "an equitable boundary line"] in the waters between Greenland and Jan Mayen 'should be drawn along the outer limit' of Greenland's fishery zone - to borrow the term used by Norway in describing the delimitation line between Iceland and Jan Mayen, see the Counter-Memorial, page 159, paragraph 551." (Reply, p. 152, para. 414.)

This, Mr President, is the Danish "outer limit of the 200-mile zone" principle of delimitation.

In this and other passages, the Danish Government has invoked the 200-mile outer limit as the basis of delimitation, as the passage just quoted has it: "an equitable boundary line ..."

Mr. President, this criterion is completely unrelated to delimitation according to the pertinent rules and principles of general international law and is equally unrelated to the jurisprudence of

international tribunals.

It is not simply that there is no authority to support the principle: it may be admitted that some sound principles have surfaced without having the benefit of citations. The critical point is that, as a matter of essence, the criterion is incompatible with the concept of delimitation. In fact the Danish Reply is helpfully candid on this subject when it explains the premises of the argument:

> "Denmark bases its legal position in the present maritime delimitation dispute on the premise that an island with the characteristics of Jan Mayen may have title to a zone, but as regards the extent of that zone cannot generate a maritime zone which impinges on that of Greenland. A claim of that kind by Norway could not produce an equitable solution as required by the governing international norm for deciding maritime delimitation issues. Consequently, the delimitation in this case must respect Greenland's 200-mile zone, notwithstanding that Denmark/Greenland, for its part, does not question Jan Mayen's entitlement to a territorial sea of 12 miles and an additional maritime zone of no less than 32 miles up to the 200-mile limit measured from Greenland's baseline." (Reply, p. 153, para. 415.)

The reality is that the Danish Government has presented an argument based on *entitlement*, in the eccentric mode that the Danish entitlement has a status of absolute priority, as a position relating to *delimitation*.

As Norway has demonstrated in its Rejoinder, the Danish position involves the use of a logically prior criterion which is the alleged legal inconsequence of Jan Mayen as land territory (Rejoinder, pp. 113-116, paras. 386-395).

The importance of title

As a second preliminary issue, the Government of Norway would lay emphasis on the significance of title.

The basis of entitlement involves a rule of international law, not an equitable principle. When the Court in the *North Sea* cases rejected the German argument in favour of a system of apportionment, the reasons for so doing were as follows:

> "More important is the fact that the doctrine of the just and equitable share appears to be wholly at variance with what the Court entertains no doubt is the most fundamental of all the rules of law relating to the continental shelf, enshrined in Article 2 of the 1958 Geneva Convention, though quite independent of it, - namely that the rights of the coastal State in respect of the area of continental shelf that constitutes a natural prolongation of its land territory into and under the sea exist ipso facto and ab initio, by virtue of its sovereignty over the land, and as an extension of it in an exercise of sovereign rights for the purpose of exploring the seabed and exploiting its natural resources. In short, there is here an inherent right. In order to exercise it, no special legal process has to be gone through, nor have any

special legal acts to be performed." (*I.C.J. Reports 1969*, p. 22, para. 19.)

In the *Aegean Sea Continental Shelf* case the Court also emphasized that

> "it is solely by virtue of the coastal State's sovereignty over the land that rights of exploration and exploitation in the continental shelf can attach to it, ipso jure, under international law. In short, continental shelf rights are legally both an emanation from and an automatic adjunct of the territorial sovereignty of the coastal State." (*I.C.J. Reports 1978*, p. 36, para. 86.)

This principle has been recognized also by individual Members of this Court.

I would respectfully refer to the dissenting opinions of Judges Oda and Jennings, as they then were, in the *Italian Intervention* case.

In the words of Vice-President Oda :

> "The subject-matter of this case does not concern claims arising out of the alleged breach of any obligation which one party may have accepted in relation to the other, being thus a matter of concern only to the litigant States. No, what is really disputed between Libya and Malta relates to titles to submarine areas. The claims concerned are thus of a territorial nature and as such are made erga omnes. In other words, the titles established may well be asserted not only between Libya and Malta, but as regards all other States. It will be recalled that the essentially territorial nature of continental shelf disputes was confirmed by the Court in its Judgment on the *Aegean Sea Continental Shelf* case (*I.C.J. Reports 1978*, paras. 86-90) and indeed formed a main factor in that decision." (*I.C.J. Reports 1984*, p. 108, para. 37.)

And in the same case, Mr. President, you had occasion to make the following observation:

> "In any event, a decision 'only between the competing claims of Libya and Malta', is a somewhat novel concept of 'sovereign rights', and it is especially odd to see this enervating bilateralism sought to be applied in respect of continental shelf rights which this Court has stated, to 'exist ipso facto and *ab initio*, by virtue of [the State's] sovereignty over the land', and that 'there is here an inherent right' (*I.C.J. Reports 1969* at p. 22.)." (*Ibid*., p. 159, para. 32.)

In Norway's submission the basis of entitlement, the possession of land territory, has two related consequences.

First, the process of delimitation must not result in a substantial departure from the political and legal benefits of the possession of sovereignty in respect of the land territory.

Secondly, the question of entitlement is governed by principles of international law and the role of equitable principles is to avoid inequity rather than to supplant the relevant legal principles.

The Danish approach to entitlement is wholly at variance with the correct legal relationship between the rule of entitlement and the subsidiary process of delimitation.

No doubt the Court will suspect that this argument contains the usual elements of circularity

or at least leaves open the crucial question of balancing one element (entitlement *ipso facto*) with another (the need for equitable delimitation).

Thus it cannot be asserted that legal entitlement is per se equitable; this was indeed established in the *Tunisia/Libya* case (*I.C.J. Reports 1982*, p. 46, para. 44; p. 48, para. 48; p. 59, para. 70).

But it does not follow that the opposite is true and that equitable principles can be considered altogether in isolation, as you, Mr. President, noted in a study published in the *Annuaire Suisse* in 1986 (Vol. 42, 1986, p. 27 at p. 32).

This proposition (that equitable principles cannot be considered in isolation) is one of the major elements of legal principle emanating from the decision of 1969.

Referring to the *Tunisia/Libya* decision the President expressed the matter in the *Annuaire Suisse* as follows:

> "One can only sympathise with the Court in finding the concept of the natural prolongation unhelpful where there was in fact continuous shelf between the two States whose shelves were to be delimited. Yet the Court, in rejecting the Libyan identification of natural prolongation and equity, cannot have meant that it could consider equitable principles altogether in isolation. For that would have been in effect to reverse its decision in the 1969 Judgment that there could be no possible question of an equitable apportionment irrespective of legal entitlement; and indeed it would also have been to call in question its dictum in that case that, since the shelf belonged *ipso facto* and *ab initio*, the only area that equitable principles could be concerned with was the 'disputed marginal or fringe area' between legal entitlements (para. 20)." (*Loc. cit.*)

In my submission what emerges is the requirement that any process of delimitation must give full faith and credit to the basis of title. And this requirement is reinforced when the coasts involved form part of the geographical framework and do not relate to incidental special features.

The Geographical Setting

I can now move to the final part of my preliminary agenda, the geographical setting.

The Court may find it convenient to refer to the first Figure in the dossier (Figure 9).

Jan Mayen is situated in the oceanic expanses east of Greenland, in an oceanic region forming a vast portal between the Atlantic and the Arctic Oceans. There is no single toponym for this oceanic area but it includes three seas: the Norwegian Sea, the Greenland Sea and the Barents Sea - the Norwegian Sea is over here on this side of Jan Mayen, the Barents Sea is well up here, and the

Greenland Sea is up there - but there is no substantial mainland near Jan Mayen. So we have a series of seas - the Norwegian Sea, the Greenland Sea up here and the Barents Sea, which is well over to the east of Svalbard. Then there are extensive sea areas here with no particular designation, in, for example, the areas east of Jan Mayen.

As Denmark has pointed out in the written pleadings, Jan Mayen is geographically isolated. It is 254 nautical miles from the nearest Greenland coast, 300 nautical miles from Iceland and 550 nautical miles from the nearest Norwegian coast.

To the east of Jan Mayen there is a substantial sector of ocean lying well outside the 200-mile radius from any coast.

The key features of the region are its openness and the absence of occluding features. The links with the Atlantic and Arctic Oceans do not take the form of narrow passages but substantial maritime lobbies larger than the North Sea. Thus the link with the Arctic Ocean is the Fram Strait, 300 nautical miles in breadth. The links with the Atlantic Ocean take the form of the Denmark Strait, 250 nautical miles in breadth, and the sea area between Iceland and the Faroes which has no particular designation.

The sea area within a radius of, say, 300 miles around Jan Mayen has absolutely no occluding features of any kind. The geographical setting is extrovert. There is in simple terms a juxtaposition of two features, Jan Mayen and East Greenland, which stand independently. In particular, it cannot be said that they form part of a geographical context the existence of which creates a significant interaction between the two features. There is thus, in our submission, no similarity whatsoever with the situation in the Central Mediterranean as seen by the Court in the *Libya/Malta* case (*I.C.J. Reports 1985*, p. 50, para. 69).

In so far as there is a geographical framework, the essential elements comprise the coast of East Greenland and the coast of Jan Mayen.

Norway's position on delimitation in the context of general international law

That completes my examination of preliminary issues and I shall now outline Norway's

position on delimitation in the context of general international law.

The first task is to indicate the legal and geographical framework. This involves deciding which is "the geographical area directly concerned" in the delimitation. This was the formula favoured by the Chamber in the *Gulf of Maine* case (*I.C.J. Reports 1984*, p. 268, para. 28; and see also p. 272, para. 41).

Similarly, in the Anglo-French case the Court of Arbitration stated that "the method of delimitation which it adopts for the Atlantic region must be one that has relation to the coasts of the Parties *actually abutting on the continental shelf of that region*" (Decision, para. 248; emphasis added).

On this basis the key geographical relationship of the present dispute consists of the opposite-facing frontages of Greenland and Jan Mayen.

In Norway's submission there is no geographical intimacy involved and the relationship consists of the neutral elements of distance and juxtaposition.

Jan Mayen, with a western facing façade 53.6 kilometres in length, is 254 nautical miles from Greenland. Its northern, eastern and southern coastlines also front upon extensive areas of high seas.

It is normal for tribunals to establish a provisional or primary boundary which reflects the primary geographical relationship and which may be subject to a process of modification in appropriate circumstances.

This method was applied in the *Anglo-French* case (Decision, paras. 87 and 103), by the Chamber in the *Gulf of Maine* case, (paras. 216-223) and by the full Court in the *Libya/Malta* case (para. 60). It is perhaps obvious that it is particularly suited to coastal configurations with elements of oppositeness.

In passing I would refer to Professor Bowett's contention that in the *Libya/Malta* case "the provisional median line, used by the Court in that case, was never used as a provisional boundary" (CR 93/4, p. 11). In my submission, this appears to be a distinction without a real difference. In explaining its approach the Court stated:

> "In applying the equitable principles thus elicited, within the limits defined above, and in the light of the relevant circumstances, the Court intends to proceed by stages; thus, it will first make a provisional delimitation by using a criterion and a method both of which are

> clearly destined to play an important role in producing the final result; it will then examine this provisional solution in the light of the requirements derived from other criteria, which may call for a correction of this initial result." (*I.C.J. Reports 1985*, p. 46, para. 60.)

This seems sufficiently clear and I shall resume my theme. In the *Libya/Malta* case the Court drew a provisional median line boundary and in doing so referred to the principle of equal division (*ibid.* paras. 62-63).

In the case of opposite States equal division is the appropriate method of delimitation, and this was recognized in clear terms in the Judgments in the *North Sea* cases.

In the words of the Court:

> "Before going further it will be convenient to deal briefly with two subsidiary matters. Most of the difficulties felt in the International Law Commission related, as here, to the case of the lateral boundary between adjacent States. Less difficulty was felt over that of the median line boundary between opposite States, although it too is an equidistance line. For this there seems to the Court to be good reason. The continental shelf area off, and dividing, opposite States, can be claimed by each of them to be a natural prolongation of its territory. These prolongations meet and overlap, and can therefore only be delimited by means of a median line; and, ignoring the presence of islets, rocks and minor coastal projections, the disproportionally distorting effect of which can be eliminated by other means, such a line must effect an equal division of the particular area involved." (*I.C.J. Reports 1969*, p. 36, para. 57.)

This principle of equal division was also recognized by the Court in the *Libya/Malta* case (*I.C.J. Reports 1985*, p. 47, para. 62; and the Court quoted the passage from the *North Sea* cases).

In the *Gulf of Maine* case the Chamber gave great prominence to the principle of equal division in a dispute in which the legal interest in the water column had special significance. In the words of the Chamber:

> "To return to the immediate concerns of the Chamber, it is, accordingly, towards an application to the present case of criteria more especially derived from geography that it feels bound to turn. What is here understood by geography is of course mainly the geography of coasts, which has primarily a physical aspect, to which may be added, in the second place, a political aspect. Within this framework, it is inevitable that the Chamber's basic choice should favour a criterion long held to be as equitable as it is simple, namely that in principle, while having regard to the special circumstances of the case, one should aim at an equal division of areas where the maritime projections of the coasts of the States between which delimitation is to be effected converge and overlap." (*I.C.J. Reports 1984*, p. 327, para. 195.)

The principle or criterion of equal division is referred to in nine other passages in the Judgment of the Chamber in the *Gulf of Maine* case (*I.C.J. Reports 1984*, pp. 300-301, para. 115; pp. 312-313, para. 157; p. 328, para. 197; pp. 329-33-, para. 201; pp. 331-332, para. 209;

p. 332, para. 210; pp. 332-333, para. 212; p. 333, para. 213; p. 334, para. 217.)

As the jurisprudence always insists, it is geography which prescribes the mode of delimitation and, in the present case, the result is to confirm the median line division already ordained by the agreement of the Parties.

The *modus operandi* which involves the establishment of a primary boundary and the application of the principle of equal division includes the condition that the median line may be subject to a process of modification or correction to take into account any sources of inequity.

In the submission of Norway, there are no legal grounds which would sanction the modification of the median line in this case.

And in the alternative, it is submitted that any process of modification must, in any case, be compatible with the legal basis of entitlement, which is governed by a principle of international law which cannot be nudged aside by the operation of equitable principles. Any lawful modification has, in consequence, to be limited in scale.

But it is Norway's primary submission that there is no legal basis for modification, of any kind, of the median line and, with your permission, Mr. President, I shall elaborate on this submission.

It is Norway's contention that the procedure of modification is compatible with legal principle only in three types of situation, none of which relates to the case of Jan Mayen.

First, the procedure of modification may apply when there are:
(a) *Incidental special features within a geographical situation of quasi-equality*

The passage from the Judgment in the *North Sea* cases states very clearly that the abating of the effects of an "incidental special feature" can take place only if there is "a geographical situation of quasi-equality as between a number of States". Thus there could be no question "of rendering the situation of a State with an extensive coastline similar to that of a State with a restricted coastline". The Court explains further: "Equality is to be reckoned within the same plane, and it is not such natural inequalities as these that equity could remedy".

In accordance with this approach international tribunals have, when the facts allowed,

determined the existence of geographical situations of quasi-equality. In the *North Sea* cases, the quasi-equality took the form of "three States whose *North Sea* coastlines are in fact comparable in length and which, therefore, have been given broadly equal treatment by nature..." (*I.C.J. Reports 1969*, pp. 49-50, para. 91).

In the geographical circumstances of the present case there is no "geographical situation of quasi-equality as between a number of States". Jan Mayen is an independent feature 254 nautical miles east of Greenland and surrounded by extensive areas of high seas. There is no geographical norm of quasi-equality, but merely a relationship of juxtaposition and distance. There is geography but there are no "incidental special features".

Jan Mayen and Greenland are two islands whose relative locations are characterized by a relationship of pure juxtaposition and distance. There is no complicated geography; there are no external features in relation to which Jan Mayen is incidental. Jan Mayen itself constitutes one of the two main features which constitute the geographical setting.

Second, modification may take place if account can be taken of:

(b) *The general geographical context*

In the *Libya/Malta* case, the Court gave a certain weight to the position of Malta as a group of islands "in the wider geographical context, particularly their position in a semi-enclosed sea" (*I.C.J. Reports 1985*, p. 42, para. 53). This consideration was later elucidated in the following passage from the Judgment:

> "In the present case, the Court has also to look beyond the area concerned in the case, and consider the general geographical context in which the delimitation will have to be effected. The Court observes that delimitation, although it relates only to the continental shelf appertaining to two States, is also a delimitation between a portion of the southern littoral and a portion of the northern littoral of the Central Mediterranean. If account is taken of that setting, the Maltese islands appear as a minor feature of the northern seaboard of the region in question, located substantially to the south of the general direction of that seaboard, and themselves comprising a very limited coastal segment. From the viewpoint of the general geography of the region, this southward location of the coasts of the Maltese islands constitutes a geographical feature which should be taken into account as a pertinent circumstance; its influence on the delimitation line must be weighed in order to arrive at an equitable result." (*I.C.J. Reports 1985*, p. 50, para. 69.)

The emphasis is upon the particular character of "the general geographical context", which locution appears also in paragraph 73 of the Judgment, and especially upon the position of Malta in

a semi-enclosed sea (*ibid*.). The emphasis, therefore, is upon that particular character of "the general geographical context".

The situation of Jan Mayen is the polar opposite. The political claustrophobia of the Central Mediterranean is completely unlike the situation of Jan Mayen in a general context characterized by unconfined oceanic expanses and by openness rather than semi-enclosure.

(c) *The presence of small islands close to the median line or located in such a way as to cause distortion*

The third category of case in which modification may be justified consists of cases in which islands not forming part of the primary geographical relationships lie near the median line or are otherwise located in such a way as to cause distortion of the primary boundary.

When an island is located in such a way that allowing it to have full effect would cause an unreasonable distortion of the primary boundary dictated by the dominant geographical relationships, then such an island will be given special treatment. This is exemplified, in the case of continental shelf delimitation, by the treatment of the Scilly Islands in the Decision of the Court of Arbitration in the Anglo/French case (paras. 248-251). In the context of multi-purpose delimitation the practice is well illustrated by the treatment of Seal Island by the Chamber of the Court in the *Gulf of Maine* case (*I.C.J. Reports 1984*, p. 336, para. 222).

The treatment of the *Channel Islands* in the *Anglo-French* case is also essentially an example of this class of delimitation, because it was essentially their location in relation to the primary boundary which occasioned their disadvantage (see the Decision, paras. 187-201).

The legal sources envisage modification resulting from minor features within some larger context. The relevant passages in the *North Sea* cases refer to "the presence of islets, rocks and minor coastal projections" and to "an incidental special feature" (*I.C.J. Reports 1969*, p. 36, para. 57; pp. 49-50, para. 91; respectively).

In the present case Jan Mayen forms a necessary part of the geographical context within which delimitation takes place and it cannot, in legal terms, constitute an "incidental special feature".

The relevance of political factors

As the Chamber pointed out in its Judgment in the *Gulf of Maine* case the geography of coasts has a political as well as a physical aspect (*I.C.J. Reports 1985*, p. 327, para. 195). The principle of equal division thus has a political dimension and the origin of the equitable principles lies in the need to maintain the substance of equality of sovereign entitlements in face of geographical subtleties. In the *Anglo-French* case the Court of Arbitration referred compendiously to the conclusions "indicated by the geographical, political and legal circumstances of the region which the Court has identified" (Decision, para. 188).

In this connection it is obvious that Jan Mayen does not involve an intrusion into an area surrounded by the coasts of Greenland similar to the position of the *Channel Islands* within the Golfe Breton-Normand. In fact the median line boundary encompasses a zone comprising only 2.9 per cent of the Greenland 200-mile zone.

Other relevant factors

It is Norway's further submission that the equitable character of the median line is confirmed by other relevant factors, and in particular by the substantial interest which Norway has in the Jan Mayen maritime region and by the protective or security interest which Norway has in relation to the maritime areas and resources controlled and protected on the basis of Norway's sovereignty over Jan Mayen.

In this connection Norway would emphasize that the existence of such interests must create a strong presumption against a delimitation which produces an imbalance. The jurisprudence of international tribunals supports this view, and it is recognized that a coastal State should be permitted to control the maritime territory adjacent to its coasts. Nowhere is the concept of equality more potent than in the context of the security interest of the coastal State.

The conduct of the Parties

A further important element relevant to equitable delimitation is the consistent conduct of the Parties. The learned Agent of Norway, Mr. Haug, has already addressed the Court on those aspects of conduct which provide a consensual basis for a delimitation based upon the median line, with

particular reference to recognition and acquiescence.

My present purpose is to invoke the conduct of the Parties as a relevant circumstance for the purpose of delimitation in accordance with general international law. It is well-recognized that the conduct of the parties to a dispute may be taken into account in achieving an equitable solution. In the Judgment in the *Tunisia/Libya* case the Court observed:

> "and it is evident that the Court must take into account whatever indicia are available of the line or lines which the Parties themselves may have considered equitable or acted upon as such - if only as an interim solution affecting part only of the area to be delimited" (*I.C.J. Reports 1982*, p. 84, para. 118).

This principle is surely no less significant in a case brought by unilateral application.

The evidence of the consistent conduct of the Parties has been reviewed elsewhere in the pleadings (Counter-Memorial, paras. 528-560; Rejoinder, paras. 270-338) and it is necessary only to point to certain salient questions.

Denmark, like Norway, recognized in its national legislation that, in the absence of agreement, the boundary of the continental shelf in relation to other States abutting on the same shelf is the median line.

This solution was adopted in the Danish Royal Decree of 7 June 1963 (Norwegian Annex 22), and was maintained both in Danish and Norwegian legislation until 1980 in relation both to shelf and to fisheries zone legislation.

Two features are particularly striking. In the first place, the provisions of the Danish Decree of 1963 adopted the legal principles set forth in the Continental Shelf Convention of 1958, Article 6. They were adopted as principles and without qualification. The declaratory nature of the Decree was recognized and confirmed by the Danish Government in its Counter-Memorial in the *North Sea Continental Shelf* cases (*I.C.J. Pleadings, North Sea Continental Shelf*, Vol. I, pp. 161-162; quoted in Rejoinder, para. 290).

In the Counter-Memorial prepared in 1968 it is stated that: "The Decree comprises the continental shelf around Denmark proper as well as around Greenland and the Faroe Islands."

The second feature is the consistency of the Danish position over a period of 17 years and the fact that this position only began to change at the stage when the dispute was crystallizing, and then

only in relation to Jan Mayen.

In his intervention on behalf of Denmark, Mr. Magid did not contradict the picture presented in Norway's written pleadings. According to Mr. Magid it was only in March 1979 that the first doubts emerged (CR 93/3, pp. 22, 24-25).

The relevant document is the Note dated 3 July 1979 from the Danish Foreign Minister to Mr. Frydenlund, the Norwegian Foreign Minister (Memorial, Ann. 3). In this Note the Danish Minister states:

> "As you will know, the extension of the Danish fishing territory as of 1 January 1977 did not include the area north of latitude 67° N off the east coast of Greenland. One of the reasons for this was that Denmark did not want to bring into focus of attention some legal problems with regard to the delimitation of the maritime zones between Greenland and Iceland (Kolbeinsey).
>
> Moreover we found that since Norway had not at that time established an economic zone around Jan Mayen, the question of delimitation between that Island and Greenland was not either of immediate concern. However, you will recall that during the Meeting of the Nordic Foreign Ministers at Copenhagen in March of this year we informed your delegation confidentially that Denmark would make reservations if Norway established for Jan Mayen an economic zone delimited by a median line in relation to Greenland."

There is a final paragraph which is not material for present purposes.

This document refers only in general terms to the possibility that Denmark "would make reservations". Moreover, there is no reference to a Danish claim or a possibility of a Danish claim based upon an outer limit of 200 miles. The final paragraph confirms that the Danish Government had no expectation that the negotiations between Iceland and Norway would produce a settlement based upon the 200-mile outer limit. This alleged principle of delimitation was only offered by Denmark when the Memorial was presented in July 1989.

Of special significance in this connection is the Danish Executive Order of 14 May 1980 concerning the "fishing territory in the waters surrounding Greenland" (Norwegian Annex 38). In respect of the position between Jan Mayen and Greenland the Executive Order provides (Section 1 (4)) that "jurisdiction of fisheries shall not, until further notice, be exercised" beyond the median line. No doubt the wording indicates an interim régime, but even as such it contradicts the 200-mile principle appearing nine years later in Denmark's written pleadings. And it is necessary to recall the statement of the Court in the *Libya/Tunisia* case that the Court must take into account

whatever indicia are available "of the line or lines which the Parties themselves may have considered equitable or acted upon as such if only as an interim solution affecting part only of the area to be delimited".

Naturally Norway does not accept that the median line only had the status of an interim régime.

The significance of islands as a category

In completing my exposition of the Norwegian position in relation to general international law, I would respectfully remind the Court of the difference emerging from the written pleadings in respect of the significance of islands as a discrete legal category in maritime delimitation. The Norwegian position has been set forth sufficiently in the written pleadings (Counter-Memorial, pp. 133-137; Rejoinder, pp. 121-139).

At this stage I would indicate only three significant points.

The first is this. The Danish approach asserts that islands as such suffer from a categorical legal disability. The reality is that it is the geographical features as an *ensemble* in any situation which are decisive and not merely the presence of one or more islands.

The second point is that the critical factor for legal purposes is whether or not the island forms a part of the primary geographical relationships involved.

The third significant point is that it is only islands which do not constitute main elements in the geographical relationship which are accorded special treatment in the jurisprudence and in the practice of States.

The special treatment given to islands which do not form part of the main geographical elements is not evidence - as Denmark tends to assume - of the status of islands as second class elements in the delimitation picture. Even when islands form incidental features the effect they are given is still *relatively speaking* significant rather than insignificant. Thus in the *Gulf of Maine* case, the effect given to Seal Island was only "half effect", but in reality this had a major impact on the incidence of the second and third sectors of the line established by the Chamber - as the Court appreciates, the most important elements (*I.C.J. Reports 1984*, pp. 336-337, para. 222). The

importance of Seal Island was based on its "commanding position in the entry to the Gulf"; and the outcome of that reference was a transverse displacement of the central segment of the delimitation, surely a highly significant effect.

Mr. President, it would help me if we could break there, if that is convenient.

The PRESIDENT: Thank you, Professor Brownlie, we will take our break now. Thank you.

The Court adjourned from 11.15 to 11.30 a.m.

The PRESIDENT: Professor Brownlie.

Mr. BROWNLIE:

The problem of equality in maritime delimitation and the lengths of coasts question

I have completed my exposition of the overall Norwegian position in the context of general international law.

What I have said so far very much reflects the argument as presented in the written pleadings, and my intention now, Mr. President, is to rework that argument from two points of view.

The first aspect will be the problem of equality in maritime delimitation and the second will be the construction of the relevant State practice.

And thus the first task is to examine the concept of equality in maritime delimitation with particular reference to the relevance of lengths of coasts.

By way of introduction, I have to indicate that, whilst much of what I shall say relates to continental shelf delimitation, the argument will be applicable also to the delimitation of adjoining fisheries zones.

My purpose will be not to ask the Court to change the foundations of the existing law but to suggest respectfully that the existing foundations leave certain matters less than fully resolved.

In short, it is still necessary to enquire as to the real content of the equitable principles which are so often applied without very much elaboration.

It is true that the Court and various Arbitral Tribunals have evolved an impressive jurisprudence of maritime delimitation. But candour requires recognition of the obscurity in which the concept of equality remains in spite of the decisions.

The decisions after all frequently show a reluctance to probe behind the phraseology of "equitable criteria" or "equitable principles". In the *Gulf of Maine* case the Chamber insisted on retaining a very high degree of flexibility.

In one passage, for example, the Chamber stated:

> "The Chamber is, furthermore, convinced that for the purposes of such a delimitation operation as is here required, international law, as will be shown below, does no more than lay down in general that equitable criteria are to be applied, criteria which are not spelled out but which are essentially to be determined in relation to what may be properly called the geographical features of the area." (*I.C.J. Reports 1984*, p. 278, para. 59.)

And later on the Chamber appears to go further when it states:

> "Each Party's reasoning is in fact based on a false premise. The error lies precisely in searching general international law for, as it were, a set of rules which are not there." (*Ibid.*, p. 298, para. 110.)

With all due respect the pronouncements of the full Court in the *Libya/Malta* case also show a tendency to reproduce familiar formulations about "equitable principles" which, though familiar, are more than a little opaque and question-begging (see especially *I.C.J. Reports 1985*, pp. 38-40, paras. 45-48.

Moreover, the Judgment in the *Libya/Malta* case may be thought to contain certain elements which indicate a need for caution in translating the modus operandi adopted in the decision to other geographical situations.

First, the "general geographical context" was taken into account, this involving the view that "the Maltese islands appear as a minor feature of the northern seaboard of the region in question" (*I.C.J. Reports 1985*, p. 50, para. 69; and see also p. 42, para. 53).

The second element is the rejection of Libya's reliance upon the greater landmass argument (*I.C.J. Reports 1985*, pp. 40-41, para. 49). This had been a major Libyan argument and its rejection thus may be said to have considerable weight.

But the peculiarity in the Judgment is the co-existence of the rejection of the landmass argument and the acceptance of other factors which reduced Malta's entitlement by 18 nautical miles.

These other factors, in our submission, involve landmass thinking. The first such factor, already referred to, was the appearance of the Maltese islands as "a minor feature of the northern seaboard of the region in question" (*I.C.J. Reports 1985*, p. 50, para. 69).

The second factor was the disparity in the lengths of coasts treated as a relevant circumstance

(*I.C.J. Reports 1985*, pp. 48-50, paras. 66-68). With great respect, this factor appears to be a close relative of the landmass argument. As I hope to demonstrate in due course, the comparative lengths of coasts is irrelevant to the achievement of equality of treatment of the parties in delimitation, and indeed reference thereto may create substantial inequality.

Against this background, it is necessary to look again at the concept of equality in the context of delimitation.

It is the concept of equality which should be the focus, because the so-called equitable principles are surely intended to achieve a régime of equality.

The term "equality" calls for clarification and this can be found without too much trouble.

In the *North Sea* cases, the Court's reasoning implies the objective of equality though it is obscured somewhat by the greater emphasis on natural prolongation and the principle of non-encroachment (*Dispositif*, para. 101(C) (1) and (2)).

At any rate it is reasonably clear that the purpose of the application of "equitable principles" is a result which is "just, and therefore in that sense equitable" (*I.C.J. Reports 1969*, p. 48, para. 88). As the Court in the *North Sea* cases also states: "The delimitation itself must indeed be equitably effected" (*ibid.*, p. 22, para. 20).

And by way of parenthesis, it can now be assumed that it will only be in very exceptional circumstances that the geological or geomorphological characteristics of sea-bed areas will be relevant to continental shelf delimitation.

In general, however, the decisions provide no precise guidance on the content of equality.

The indicators which have emerged from the jurisprudence tend to be purely negative. Thus, the principle of equidistance does not and was never intended to produce an equal division of area except in the exceptional case in which two opposite coasts have exactly similar configurations.

Otherwise, there are the familiar statements of the need to remedy:

> "the disproportionality and inequitable effects produced by particular geographical configurations or features in situations where otherwise the appurtenance of roughly comparable attributions of continental shelf to each State would be indicated by the geographical facts" (*Anglo-French* case, Decision, para. 101.)

Another source of assistance, in our view, may be seen in the relation between the basis of title and delimitation.

On behalf of Norway, I have already argued the importance of title. It would not only be an affront to the principle of equality but to ordinary logic, if the process of delimitation could result in a substantial departure from the normal entitlement to maritime areas appurtenant to land territory.

One of the fundamental propositions in the Judgment in the *North Sea* cases was that there could be no question of an equitable apportionment irrespective of legal entitlement.

The relevant passage is as follows:

> "It follows that even in such a situation as that of the North Sea, the notion of apportioning an as yet undelimited area, considered as a whole (which underlies the doctrine of the just and equitable share), is quite foreign to, and inconsistent with, the basic concept of continental shelf entitlement, according to which the process of delimitation is essentially one of drawing a boundary line between areas which already appertain to one or other of the States affected. The delimitation itself must indeed be equitably effected, but it cannot have as its object the awarding of an equitable share, or indeed of a share, as such, at all - for the fundamental concept involved does not admit of there being anything undivided to share out. Evidently any dispute about boundaries must involve that there is a disputed marginal or fringe area, to which both parties are laying claim, so that any delimitation of it which does not leave it wholly to one of the parties will in practice divide it between them in certain shares, or operate as if such a division had been made." (*I.C.J. Reports 1969*, P. 22, para. 20.)

This logic is especially compelling in the context of shelf rights where there is "an inherent right" as the *North Sea* cases Judgment indicates in an adjacent paragraph (*I.C.J. Reports 1969*, p. 22, para. 19).

It is to be recalled that in the *Libya/Malta* case the Court recognized the significance of the relation between title and delimitation when it observed that there was no reason "why a factor which has no part to play in the establishment of title should be taken into account as a relevant circumstance for the purpose of delimitation" (*I.C.J. Reports 1985*, p. 35, para. 40).

This passage related to the relevance of geophysical characteristics.

The Court returned to the theme in relation to the greater landmass argument and, rejecting this argument the Court observed:

> "It was argued by Libya that the relevant geographical considerations include the landmass behind the coast, in the sense that that landmass provides in Libya's view the factual basis and legal justification for the State's entitlement to continental shelf rights, a State with a greater landmass having a more intense natural prolongation. The Court is unable to accept this as a relevant consideration. Landmass has never been regarded as a basis of entitlement to continental shelf rights, and such a proposition finds no support in the practice of States, in

> the jurisprudence, in doctrine, or indeed in the work of the Third United Nations Conference on the Law of the Sea. It would radically change the part played by the relationship between coast and continental shelf. The capacity to engender continental shelf rights derives not from the landmass, but from sovereignty over the landmass; and it is by means of the maritime front of this landmass, in other words by its coastal opening, that this territorial sovereignty brings its continental shelf rights into effect. What distinguishes a coastal State with continental shelf rights from a landlocked State which has none, is certainly not the landmass, which both possess, but the existence of a maritime front in one State and its absence in the other. The juridical link between the State's territorial sovereignty and its rights to certain adjacent maritime expanses is established by means of its coast. The concept of adjacency measured by distance is based entirely on that of the coastline, and not on that of the landmass." (I.C.J. Reports, 1985, pp. 40-41, para. 49.)

The Court has had that passage before and, of course, the Court on *Libya/Malta* very carefully rejected the greater landmass argument.

There is in all this an abiding tension between entitlement and delimitation. It cannot be argued that entitlement is per se equitable: but, at the same time, it is, in principle, unacceptable that delimitation should result in a radical truncation of normal entitlements based upon adjacency. The principle of non-encroachment, itself always recognized as an equitable principle, is a reflection of this logic.

The basic concepts by which delimitation is governed

What, then, are the operational elements lying behind the delimitation process?

The basic concepts appear to be as follows:

Firstly, it is coasts which form the basis of title, both to areas of continental shelf and to fishery zones.

Secondly, there is the concept of a maritime boundary, of whatever type, as an alignment based upon legal principles, the application of which confirms the existence and extent of the coastal State's legal interest. In other words, a boundary is the spatial expression of the concept of title.

The legal framework

Thirdly, it is the relationship of coasts which establishes the geographical setting which constitutes the legal framework of the process of delimitation. All the decisions of international tribunals since the *North Sea* cases adopt this approach.

The legal framework may contain one or more of a variety of elements, as follows:

(a) The predominant features may vary considerably in geographical terms. Thus the framework of coasts may be introvert and relatively secluded, as in the case of the central Mediterranean, the North Sea, and the *Gulf of Maine*. Alternatively, the geography may be characterized mainly by "open" or extrovert features, as in the case of the sea areas north of Iceland.

(b) The geographical framework may include political elements which intimately affect the legal relevance of geography. The best-known example is the existence of a land frontier intersecting a coast or, as in the *North Sea* cases, the juxtaposition of a series of coastlines of different States.

(c) The relationship between the given coast and the appurtenant sea areas will vary. In the case of certain islands and island groups, the maritime areas may be of greater significance than the island, or coast, itself. Consequently, it is completely question-begging to discuss the economic or other significance of the island, or coast, as such. It is the interaction of coast and maritime areas, and that has been illustrated, in a legal context, by the well-reasoned decision in the *Anglo-Norwegian Fisheries* case, (*I.C.J. Reports 1951*, p. 116).

It must follow that, in the case of isolated groups of islands or island groups, reference to the length of coasts is a particularly inappropriate index of geographical significance.

The *fourth concept* is the broad policy behind the process of delimitation which is based on the *concept of equality or equitable delimitation*.

The logical consequence of this policy of equality is the use of the *principle of equal division* as the basis of delimitation.

The Chamber in the *Gulf of Maine* case adopted this principle as the "basic criterion" (para. 196). In the words of the Judgment:

> "To return to the immediate concerns of the Chamber, it is, accordingly, towards an application to the present case of criteria more especially derived from geography that it feels bound to turn. What is here understood by geography is of course mainly the geography of coasts, which has primarily a physical aspect, to which may be added, in the second place, a political aspect. Within this framework, it is inevitable that the Chamber's basic choice should favour a criterion long held to be as equitable as it is simple, namely that in principle, while having regard to the special circumstances of the case, one should aim at an equal division of

areas where the maritime projections of the coasts of the States between which delimitation is to be effected converge and overlap." (*I.C.J. Reports 1984*, p. 327, para. 195.)

No doubt this principle was to be applied flexibly (see *ibid*., para. 196) but equal division was the basic policy.

And equal division has its origin in the well-known passage in the Judgments in the *North Sea* cases:

"Before going further it will be convenient to deal briefly with two subsidiary matters. Most of the difficulties felt in the International Law Commission related, as here, to the case of the lateral boundary between adjacent States. Less difficulty was felt over that of the median line boundary between opposite States, although it too is an equidistance line. For this there seems to the Court to be good reason. The continental shelf area off, and dividing, opposite States, can be claimed by each of them to be a natural prolongation of its territory. These prolongations meet and overlap, and can therefore only be delimited by means of a median line; and, ignoring the presence of islets, rocks and minor coastal projections, the disproportionally distorting effect of which can be eliminated by other means, such a line must effect an equal division of the particular area involved..." (*I.C.J. Reports 1969*, p. 36, para. 57.)

That passage was itself cited with approval by the Chamber in the *Gulf of Maine* case (*I.C.J. Reports 1984*, pp. 329-30, para. 201), and was also adopted by the Decision of the Court of Arbitration in the *Anglo/French* case (para. 85; and see also para. 239).

The principle of equal division is very probably no more than a general principle aiming at a general legal equality. But if it be taken literally, it appears to assume that the principle of the median line is based on areas, whereas it is in truth based upon proximity.

As the President has had occasion to point out in an essay published in 1989 and with reference to the *Gulf of Maine* Judgment:

"Incidentally, this part of the Judgment unfortunately repeats the common fallacy that the median line method 'is an equal division of the areas of overlap of the continental shelves of the two litigant States'. This is of course to misapprehend what a median line is and how it is constructed. It has nothing to do with equal division of area (unless indeed the opposite coasts be mirror images of each other)." (*Festschrift für Karl Doehring*, Heidelberg, 1989, p. 408, fn. 25.)

The distinguished Vice-President has made the same point in his dissenting opinion in the *Tunisia/Libya* case (*I.C.J. Reports 1982*, p. 258, para. 161).

The same view is expressed in the ninth edition of *Oppenheim's International Law*. In relation to the passage in the *North Sea* cases, paragraph 57, the editors offer the following commentary:-

"In para. 57 of the Judgment is a passage in which the Court appears to be saying that,

> unlike a lateral boundary between adjacent States, there is less difficulty over a median line between 'opposite States' because, 'ignoring the presence of islets, rocks and minor coastal projections, the disproportionately distorting effect [on the course of a median line] of which can be eliminated by other means, such a line must effect an equal division of the particular area involved.' [And the editors continue] But of course, except in the unlikely case of exactly corresponding coastlines, a median line never does effect an equal division of areas, nor does it seek to do so. The principle of the median, as with any equidistance line, is not based on areas, but on proximity." (*Oppenheim's International Law*, Vol. I, p. 779, fn. 10.)

The criterion of distance or principle of adjacency

It is submitted that in the absence of any incidental features producing distorting effects, the criterion of distance has a commanding role and this was recognized, at least in principle, by the Court in the *Libya/Malta* case (*I.C.J. Reports 1985*, pp. 46-47, para. 61).

The relevant passages refer particular to the Court producing a provisional delimitation based on equal division and the median line.

In the words of the Court:

> "60. In applying the equitable principles thus elicited within the limits defined above, and in the light of the relevant circumstances, the Court intends to proceed by stages; thus, it will first make a provisional delimitation by using a criterion and a method both of which are clearly destined to play an important role in producing the final result; it will then examine this provisional solution in the light of the requirements derived from other criteria, which may call for a correction of this initial result.
>
> 61. The Court has little doubt which criterion and method it must employ at the outset in order to achieve a provisional position in the present dispute. The criterion is linked with the law relating to a State's legal title to the continental shelf. As the Court has found above, the law applicable to the present dispute, that is, to claims relating to continental shelves located less than 200 miles from the coasts of the States in question, is based not on geological or geomorphological criteria, but on a criterion of distance from the coast or, to use the traditional term, on the principle of adjacency as measured by distance. It therefore seems logical to the Court that the choice of the criterion and the method which it is to employ in the first place to arrive at a provisional result should be made in a manner consistent with the concepts underlying the attribution of legal title." (*I.C.J. Reports 1985*, pp. 46-47.)

The concepts of distance and adjacency, if they are to be taken seriously, are all expressions of the qualitative idea of equality. The median line and equidistance are, of course, expressions of the same idea.

These concepts of distance and adjacency are surely ideal tools for relating delimitation to geography and for avoiding both distributive justice and the vices of equidistance, or the assumed vices of equidistance.

The principle of non-encroachment

The principle of adjacency is reinforced by the principle of non-encroachment, which was given a significant role by the Court in the *North Sea* cases (*I.C.J. Reports 1969*, p. 31, para. 44; pp. 46-47, para. 85; p. 49, para. 89; p. 53, para. 101(C)).

With your permission, Mr. President, I would remind the Court of the classical formulation in the Dispositif of the Judgment in the *North Sea* cases. There, the first of the "principles and rules of international law" declared in the *Dispositif* to be applicable to shelf delimitation was prescribed by the Court in the following terms:

> "(1) delimitation is to be effected by agreement in accordance with equitable principles, and taking account of all the relevant circumstances, in such a way as to leave as much as possible to each Party all those parts of the continental shelf that constitute a natural prolongation of its land territory into and under the sea, without encroachment on the natural prolongation of the land territory of the other; ..."

Mr. President, the principle of non-encroachment obviously plays an important role in the *North Sea* cases and forms a leading element in the law of delimitation.

All this may seem obvious but in ten and half hours of interventions last week the Danish delegation omitted to make a single reference to that principle.

Mr. President, this is rather like describing Japan without referring to Kyoto, referring to Rome without describing the Coliseum, or describing Paris without any reference to the Eiffel Tower. And the omission is the less defensible when it was the Applicant State which has insisted that the only applicable law in this case is general international law.

It is clear that in the present case the Danish claim would produce a substantial encroachment or cut-off in relation to the entitlement of Jan Mayen.

In the case of opposite coasts the equidistance principle avoids the problem of cut-off with which the Court was preoccupied in the *North Sea* cases. If the equidistance principle is not to be applied in the case of opposite coasts the result would be bound to involve some degree of cut-off.

In the situation prevailing in the present case it is the equidistance method which most appropriately reflects the essential elements in the geographical situation.

The proper role of proportionality

My next task is to indicate what may be described as the proper or appropriate role of proportionality.

By way of introduction, I make two points.

First of all, the normative status of proportionality has always been acknowledged as one of subordination. In the *Dispositif* of the Judgment in the *North Sea* cases it appears in Section D classified as a "factor", whereas "the principles and rules of international law" applicable were given a priority in ranking, in Section C of the *Dispositif* (*I.C.J. Reports 1969*, pp. 53-54, para. 101). Moreover, in the body of the Judgment it is described as a "final factor" (*ibid.*, p. 52, para. 98).

Indeed, the modest status of proportionality as one of several factors to be taken into account was given full acknowledgement by the Court in the *Libya-Malta* case (*I.C.J. Reports 1985*, p. 44, para. 57).

One mode of expressing the status of proportionality is to say that whilst entitlement is subject to rules of international law, proportionality forms part of the optional elements in the penumbra of factors which are auxiliary to the equitable principles.

Proportionality is thus an instrument of equitable adjustment and not a rule of international law.

And this brings me to the second point. Proportionality is an auxiliary instrument for adjusting the results obtained by application of more senior principles and it must follow that the auxiliary instrument should not be allowed to subvert the higher principles.

This auxiliary role is accepted in the jurisprudence.

In the *Anglo-French* case the Court stated the position in this way:

> "In short, it is disproportion rather than any general principle of proportionality which is the relevant criterion or factor. The equitable delimitation of the continental shelf is not, as this Court has already emphasized in paragraph 78, a question of apportioning - sharing out - the continental shelf amongst the States abutting upon it. Nor is it a question of simply assigning to them areas of the shelf in proportion to the length of their coastlines: for to do this would be to substitute for the delimitation of boundaries a distributive apportionment of shares. Furthermore, the fundamental principle that the continental shelf appertains to a coastal State as being the natural prolongation of its territory places definite limits on recourse to the factor of proportionality. As was emphasized in the *North Sea Continental Shelf* cases (*I.C.J. Reports 1969*, para. 91), there can never be a question of completely refashioning nature, such as by rendering the situation of a State with an extensive coastline similar to that of a State with a restricted coastline; it is rather a question of remedying the disproportionality and inequitable effects produced by particular geographical configurations

> or features in situations where otherwise the appurtenance of roughly comparable attributions of continental shelf to each State would be indicated by the geographical facts. Proportionality, therefore is to be used as a criterion or factor relevant in evaluating the equities of certain geographical situations, not as a general principle providing an independent source of rights to areas of continental shelf." (Decision, para. 101; and see also para. 246.)

A similar statement of principle appears in the Award in the *Guinea/Guinea-Bissau* Arbitration (para. 120).

So much for the auxiliary nature of proportionality. I must now turn to the more specific question. What are the roles of proportionality?

A certain confusion arises from the fact that proportionality appears in several quite distinct forms and is not a generally applicable factor in any of its various personalities.

In the jurisprudence proportionality has been given three specific roles.

The first, and most generally accepted, specific role is as a factor for determining the equitable or inequitable effects of particular geographical features upon the course of an equidistance-line boundary (*Anglo-French* Decision, para. 100 in fine). In this mode, it is

> "a question of remedying the disproportionality and inequitable effects produced by particular geographical configurations or features in situations where otherwise the appurtenance of roughly comparable attributions of continental shelf to each State would be indicated by the geographical facts" (*ibid.*, para. 101).

In this context, the concept of proportionality has no relation to the comparison of lengths of coasts and is an auxiliary, if somewhat arbitrary, instrument for implementing the goal of equality in complex situations.

The second specific role is relevant as in the *North Se*a cases, in "a geographical situation of quasi-equality of a number of States" as described in paragraph 91 of the Judgment in the *North Sea* cases *(I.C.J. Reports 1969*, pp. 49-50).

It is not perhaps always sufficiently appreciated that the concept of proportionality was introduced by the Court in 1969 as a factor which was contingently relevant but not of general application.

This was explained by the Court of Arbitration in the *Anglo-French* case. (*Award*, paras. 98-99)

This point was also expressed trenchantly by Judge Oda in his dissenting opinion in the

Libya/Malta case. With reference to the concept of proportionality the Vice-President observed:

> "This concept was used by that Judgment for the verification of geographical equity in areas where the surrounding States faced an established median line and a central point in the oval of the North Sea. In other words, what the Court intended to say in 1969 was that in such specific circumstances, in which the States concerned were located as adjacent States in similar situations, but where the existence of a marked concave or convex coastline produced a somewhat distorting effect, the proportion of the length of the coast as rectified by its general direction - or, if I may call it, as I did in my argument in 1968, its 'coastal facade' - was in principle useful in the verification of geographical equity (see para. 69 below). The 1969 Judgment nowhere implied the possibility of generally applying the concept of proportionality in other cases, particularly in cases of delimitation between opposite States." (*I.C.J. Reports 1985*, pp. 134-135, para. 18.)

The third specific role of proportionality appeared in the Judgment in the *Libya/Malta* case, where for the first time an international tribunal applied the factor of proportionality to verify the equity of a delimitation between opposite coasts (*I.C.J. Reports 1985*, p. 53, para. 74).

The result, it will be recalled, was to confirm the equity of a northward shift of the provisional delimitation line by 18 minutes of latitude.

The rationale for this northward shift was the general geographical context as a relevant circumstance, together with the disparity in the lengths of coasts as a further relevant circumstance (*I.C.J. Reports 1985*, pp. 48-50, paras. 65-69).

Thus the Court was only concerned to employ proportionality as an ex post facto test of equity and the Court concluded in very general terms that "the requirements of the test of proportionality as an aspect of equity were satisfied" (para. 75).

In this context, it may be suggested that the relevance of proportionality was in several senses marginal. It was not simply that the line had been established by other means. As the Court itself emphasized, the relationship between the lengths of coasts of the Parties had already been taken into account in the adjustment of the median line (*ibid*., pp. 54-55, para. 75, and see further the earlier passage at page 50, paragraph 68).

In my submission it is precisely in a situation of opposite coasts that a test of proportionality will be otiose, since the concepts of distance and adjacency produce the legal equality of a median line and deal efficiently with the issue of non-encroachment.

And we are not here talking of a facile equality of areas but of a legal equality which in

general reflects the geography.

If I can quote a stimulating paragraph from Vice-President Oda's dissenting opinion in the *Libya/Malta* case. Referring to certain ratios for the possible division of the disputed area, Vice-President Oda observed:

> "Whether or not any one of these ratios - 1 to 3.8 (as a result of the division of the area by the delimitation line proposed by the Court) or 1 to 2.3 or 1 to 4 (as a consequence of the equidistance line in my hypothetical trapezium) - appears more or less equitable is a moot point. The Judgment, however, did not attempt to prove how the application of the equidistance method leading to such ratios would give an inequitable result. In this respect I must point out that the very concept of the median line in the case of opposite States implies a proportional ratio for the division of the area, instead of necessarily guaranteeing equality. It is for those who find this fact inconvenient to indicate what degree of coast-length disparity should trigger an adjustment, and why?" (*I.C.J. Reports 1985*, p. 134, para. 17.)

The irrelevance of comparative lengths of coasts

The roles of proportionality I have indicated to the Court are significantly distinct from the question whether the disparity of lengths of coasts as such is relevant to the process of delimitation.

In Norway's submission there are substantial and cumulative justifications for the view that the ratio of the lengths of coasts is irrelevant, and that inappropriate reference thereto generates positive inequality.

The practical significance of this submission depends upon two elements. The first is that if the Court insists, as it may do, that in view of the state of the case-law, the relevance of the lengths of coasts may not be denied, then there is the possibility that at least the Court might be persuaded to pursue a policy of restraint in that quarter.

And, secondly, there is the possibility that the reasoning in the *Libya/Malta* decision may be characterized as distinguishable on the basis that it depended upon a highly specialized geographical context.

As a matter of general principle the process of distinguishing is very well-recognized in the practice of this Court. Thus Judge Sir Hersch Lauterpacht recognized that:

> "The Court has not committed itself to the view that it is bound to follow its previous decisions even in cases in which it later disagrees with them."

Sir Hersch went on to state that the Court has adopted a policy of judicial consistency which

must co-exist with the process of "distinguishing". But he continued:

> "No legal rule or principle can bind the judge to a precedent which, in all the circumstances, he feels bound to disregard."

These passages appear in the first edition of the work *The Development of International Law by the International Court* by Hersch Lauterpacht and they appear again in the revised edition of 1958 (pp. 13-14).

Dr. Rosenne presents a similar picture and emphasizes the element of continuity and consistency in the work of the Court. He then continues:

> "Corresponding to this is the care evinced by the Court not formally to overrule earlier decisions but rather, where necessary, to try to explain away, usually on the ground of some factual particularity, an earlier decision which it feels unable to follow. The attitudes adopted in 1961 and 1964 in the *Temple of Preah Vihear* and the *Barcelona Traction* cases towards the 1959 decision in the *Aerial Incident* case are illustrative of this process and of the relative character of the requirement of consistency of jurisprudence (which is probably the guiding element in this aspect of the Court's work)." (*The Law and Practice of the International Court*, 2nd edition, revised and published in 1985, p. 613.)

And, Mr President, there can be little doubt that, if a certain process of distinguishing previous decisions is permissable, the removal of inconsistencies in the law is permissable *a fortiori*.

I turn now to the justifications for the view that the ratio of lengths of coasts is essentially irrelevant to delimitation.

On the basis that the principle of distance is the source of title, both in respect of shelf areas and fisheries zones, the fundamental question is the relation between distance and the actual geography of coasts.

Distance focuses upon the location of coasts and their relationship with other coasts. Ratios or comparisons of coastal lengths bear no logical relation either to location or to the relationships of coasts to each other.

The illogical and unattractive consequences of adopting a solution based upon the comparative lengths of opposite coasts can be demonstrated in several ways.

First, opposite coasts involve no problems of cut-off or encroachment.

Secondly, the process of selecting relevant coasts is highly artificial and can only be based on the prejudical premiss that a modification of the median line is a real possibility.

Thirdly, the lengths of coasts factor involves giving major consequences to irrelevant circumstances.

Thus, according to the logic of the Danish case, if Greenland, or any other long coast, were opposite a series of short coasts under the sovereignty of different States, the disparity of lengths of coasts would lead to the allocation to Denmark of a 200-mile limit or something similar in relation to each and every short coast State.

This would be the result in spite of the fact that in each case only a short sector of Greenland coast would (so to speak) be relevant in relation to the counterpart opposite short coasts.

And Norway has provided the Court with this particular very simple series of figures. We have first of all the simple case of two coasts of equal length and a median line between, we then have a long coast State F, opposite a long coast, with a series of short coasts States upon it, and finally we have a long coast State G, opposite a series of island States.

Now the position is that, if Denmark is right in its argument, then all the short coasts States, as it were, suffer from the disability of facing a long coast State and the long coast State gets *dédoublements fonctionnels*", gets, so to speak, several uses of its long coast and the result, in my submission, is highly unattractive.

On the other side, it will, of course, be said that this logic is entirely false because Norway is indulging in hypothetical geography. But the logic of the Danish argument based on the lengths of coasts, takes no account of how many States there are opposite, how many short coasts may be involved. The logic of the disparity in the lengths of coasts is irrelevant, it is unconnected with the possibility of other coasts existing. And, in our submission, that demonstrates the essential lack of logic, lack of equity, in the reference to a disparity in the lengths of coasts. The fact that Jan Mayen or any short coasts State exists, so to speak, by itself, should not make such a radical difference to the approach to delimitation.

In the practice of States, for example, in the Arabian Gulf, the long coast State, Iran in that case, has not been accorded any privilege in relation to the short coasts of various States on the

opposite side of the Gulf.

Moreover, in the *North Sea* cases, the outcome of the Court's reasoning and the delimitations which followed, was that the short coast of Germany was not only given considerable generative effect in terms of area but was recognized as having a right to shelf areas reaching to the midpoint of the North Sea. Given that the disputes did not involve opposite coastal relationships, the outcome of the *North Sea* settlement provides a strong indication of the legal significance of coasts. Germany's geographical situation was the basis for an entitlement which brought its shelf into median line contact with the United Kingdom as the opposite long coast State.

The equitable proportion resulting from a median line

In his substantial dissenting opinion in the *Libya/Malta* case, Vice-President Oda pointed to the fact that, in the case of opposite States, the very concept of the median line implies a proportional ratio for the division of the area (*I.C.J. Reports 1985*, p. 134, para. 17).

And Vice-President Oda stresses that there is no question of the median line "guaranteeing equality". The proportional ratio implied by the median line reflects the coastal differences and does not produce a source of inequity.

In this context, it is excusable to speculate that the decision in the *Libya/Malta* case is not a barrier to a reassessment of certain, at least, apparent tendencies in the jurisprudence.

I say "apparent", Mr. President, because the principles governing delimitation stand in need of further development. Moreover, the decision in the *Libya/Malta* case was not based directly upon the disparity in the lengths of coasts. The primary rationale for the northward shift of 18 minutes was the general geographical context, that is to say, the position of Malta in relation to the coasts of Italy. Further, as Judge Schwebel had occasion to point out in the same case (*I.C.J. Reports 1985*, pp. 182-184), the precise basis of the adjustment, that is, its incidence and its quantum, was not linked to the factor of lengths of coasts.

Unless the coasts of State A are to be given a privilege in comparison with the coasts of State B, the median line must represent the normal balance which is compatible with the principle of non-encroachment. Any resort to a criterion based upon a ratio of lengths of coasts must ineluctably

result in a certain encroachment in the case of opposite coasts. This would mean that an unrelated contingency is allowed to bring about a lateral adjustment. It is difficult to find an equitable consideration which could justify such an outcome.

This reasoning remains valid if the concepts of adjacency or proximity are taken as the doppelgangers of non-encroachment in the era when the concept of natural prolongation has less significance.

No doubt, as happened in the *Libya/Malta* case, the adjustment may be more or less modest in scale, but even a modest adjustment is difficult to reconcile with the basic principle of non-encroachment.

'Proportionality' is not an independent source of rights

The Judgment in the *Libya/Malta* case contains elements which indicate that the principles of equitable delimitation are still in a stage of development.

The Judgment affirms the view that proportionality, meaning here a reference to the ratio of coastal lengths, cannot be an independent source of rights. In the words of the Court:

> "to use the ratio of coastal lengths as of itself determinative of the seaward reach and area of continental shelf proper to each Party, is to go far beyond the use of proportionality as a test of equity, and as a corrective of the unjustifiable difference of treatment resulting from some method of drawing the boundary line. If such a use of proportionality were right, it is difficult indeed to see what room would be left for any other consideration; for it would be at once the principle of entitlement to continental shelf rights and also the method of putting that principle into operation. Its weakness as a basis of argument, however, is that the use of proportionality as a method in its own right is wanting of support in the practice of States, in the public expression of their views at (in particular) the Third United Nations Conference on the Law of the Sea, or in the jurisprudence. It is not possible for the Court to endorse a proposal at once so far reaching and so novel." (*I.C.J. Reports 1985*, p. 45, para. 58.)

This emphatic and very clear exposition of the status of proportionality constitutes a significant contribution to the jurisprudence of delimitation. There are, however, elements in the reasoning of the Court which suggest that the law still stands in need of further development and clarification.

Thus the Court gives a certain significance to the ratio of coastal lengths when the disparity of lengths of coasts is indicated as a relevant circumstance (*I.C.J. Reports 1985*, pp. 48-49, para. 66).

With respect, this part of the reasoning is not easily reconcilable with the determination I have

just indicated, according to which the ratio of coastal lengths cannot be "of itself determinative of the seaward reach and area of continental shelf proper to each party".

It is not unreasonable to see in these disparate elements in the reasoning of the Court a certain possibility of further constructive development in the law. In particular, the Court may see fit to confirm that the modest "final factor" of the dispositif in the *North Sea* cases does not involve, in some indirect form, a rule of law and a basis of entitlement.

The greater landmass argument in another form

It will be recalled that in the *Libya/Malta* case the Court refused to accept the Libyan argument based on landmass:

> "It was argued by Libya that the relevant geographical considerations include the landmass behind the coast, in the sense that that landmass provides in Libya's view the factual basis and legal justification for the State's entitlement to continental shelf rights, a State with a greater landmass having a more intense natural prolongation. The Court is unable to accept this as a relevant consideration. Landmass has never been regarded as a basis of entitlement to continental shelf rights, and such a proposition finds no support in the practice of States, in the jurisprudence, in doctrine, or indeed in the work of the Third United Nations Conference on the Law of the Sea. It would radically change the part played by the relationship between coast and continental shelf. The capacity to engender continental shelf rights derives not from the landmass, but from sovereignty over the landmass; and it is by means of the maritime front of this landmass, in other words by its coastal opening, that this territorial sovereignty brings its continental shelf rights into effect. What distinguishes a coastal State with continental shelf rights from a landlocked State which has none, is certainly not the landmass, which both possess, but the existence of a maritime front in one State and its absence in the other. The juridical link between the State's territorial sovereignty and its rights to certain adjacent maritime expanses is established by means of its coast. The concept of adjacency measured by distance is based entirely on that of the coastline, and not on that of the landmass." (*I.C.J. Reports 1985*, pp. 40-41, para. 49.)

This aspect of the Decision attracted no adverse comment from individual Members of the Court and no criticism from outside the Court.

And thus, the Court confirms the previously understood position that landmass is not a basis of entitlement.

But, of course, the Court may be thought to permit landmass philosophy to reappear through other doors. And, in our submission, the relevance of lengths of coasts is clearly a form of reference to greater landmass.

And there is a second indirect reference in relation to the general geographical contexte as a

relevant circunstance. In this connection the "Maltese Islands", as they were called, were characterised as "a minor feature of the northern seaboard of the region in question" (*I.C.J. Reports 1985,* p. 50, para. 69). And later on in the Judgment (p. 52, para. 73) there is a reference to "the general geographical context in which the islands of Malta appear as a relatively small feature in a semi-enclosed sea". In our submission this reasoning also appears to contain elements of thinking related to landmass.

The concept of the relevant area

The ratio of coastal lengths is a criterion which presens very considerable operation difficulties. The question becomes: the ratio of the lengths of which coasts?

But the question posed in these terms is no longer concerned with geographical configurations as such. It now becomes difficult to keep separate the question, which coasts are "relevant" (objectively) and which coastal sectors will be taken into account in order to justify some pre-ordained result which is supposed to be equitable.

This need to seek to provide an apparently objective basis for the criterion based on costal lengths may lead to a certain articiciality of reasoning.

Such artificiality was apparent in the reasoning of the Court in the *Libya/Malta* case and was subjected to a trenchant and candid analysis by Vice-President Oda (*I.C.J. Reports 1985,* pp. 129-134, paras. 8-16) and by Judge Schwebel (*ibid.*, pp. 181-182, 186).

There must always remain a certain suspicion that the selection of relevant coasts and the construction of the relevant area is an a priori process the purpose of which is to lend an apparent legitimacy to a division of shelf areas determined by other criteria.

Certainly in the geographical circumstances of the *Libya/Malta* case the reference to the actual disparity of coastal lengths remains unelaborated.

Thus in relation to the disparity of lengths as a relevant circumstance the Court does not undertake a specific examination of which coastal lengths should be taken into account, and simply observes that an "adjustment of the median line" is justified (*I.C.J. Reports 1985,* pp. 49-50, paras. 67-68).

The actual process of northward adjustment in quantative and specific terms depended on factors unrelated to lengths of coasts, as a careful reading of paragraphs 71 to 73 of the Judgment will reveal (*I.C.J. Reports 1985*, pp. 51-53). Indeed, a major factor was clearly the relationship of Malta with the coast of Sicily (see para. 72).

When the Court came to apply the test of proportionality it did so in very general terms and once again avoided any precise investigation of relevant coastal sectors (*I.C.J. Reports 1985*, pp. 53-55, paras. 74-75).

Whether in the context of disparity of lengths as a relevant circumstance or in relation to proportionality, the Court expressly avoided linking the justification of the principle of adjustment with the actual process of adjustment (see *I.C.J. Reports 1985*, p. 50, para. 68 in fine).

But there is a far more substantial objection to the concept of the relevant area. Like the reference to lengths of coasts, the modus operandi of relevant area and coasts is related to landmass thinking and macrogeographical philosophy.

The relevant area construct inevitably tends to transform the ratio of coastal lengths into an independent source of rights.

Consequently what is denied to proportionality as a simple test of equity is allowed under a logical flag of convenience, namely, the selection of a relevant area in relation to disparity of coasts as a relevant circumstance.

In the light of these considerations Norway sees no merit in the observations on the relevant area offered on behalf of Denmark by Mr. Thamsborg (CR 93/1, pp. 43-64). However, I would make two brief comments.

First, in approaching the presentation of Mr. Thamsborg the Members of the Court will no doubt bear in mind that in the series of Figures relating to his intervention (see Figures 12 to 15) the construction of the disputed area and the presentation of a so-called relevant area tend to be confused. The resulting construction, shaped like a kite, is a good illustration of the arbitrary nature of the concept of the relevant area.

Secondly, Mr. Thamsborg offered a definition of proportionality which was substantially

flawed. He said:

> "As we all know, proportionality aims at the approximate congruence between the ratio of the lengths of the Parties' relevant coastlines and the ratio of the areas of shelf attributed to each Party by a given boundary line, all within the geographical frame of the relevant area." (CR 93/1, p. 45.)

This definition does not reflect the jurisprudence and its lack of accuracy indicates that Mr. Thamsborg did not appreciate the significance in legal terms of the exercise in which he was engaged.

It is clear that the lengths of coasts and the calculation of ratios based on lengths of coasts constitute an unreliable basis for delimitation. Proportionality in this form cannot produce a boundary as such, because it is concerned with areas and not with the location of lines of division. And therefore a State relying upon arguments related to proportionality must assert that the alignment claimed, which cannot as such be based upon proportionality, has some independent basis. Thus in the *Libya/Malta* case Libya argued for a geological boundary, the axis of the Rift zone south of Malta. This line, it was said on behalf of Libya, matched the proportionality calculation based on the ratio of lengths of coasts. In the present case Denmark claims an alignment based upon the 200-mile outer limit of her entitlement, a principle completely unrelated to coastal lengths, and then is forced to assert that this conforms with calculations based upon lengths of coasts and that it is connected logically thereto.

The *ex post facto* and opportunist character of these calculations of ratios based on coastal lengths is self-evident. Both in the *Libya/Malta* case and in the present case the State relying on proportionality needs to be cautious, and it needs to be cautious because if it is not careful a reductio ad absurdum emerges.

If the coastal ratio is based on too much of the opposite long coast, then the only line that emerges will prove to be practically on the coasts of the other State and possibly on the far side of it.

The Danish Memorial contains a most helpful illustration of this difficulty (at pp. 119-120), involving a line even beyond the 200-mile claim and my friend Professor Weil will refert to this in due course.

No doubt Mr. Bernhard produced a milder version of proportionality thinking in his oral argument (CR 93/4, pp. 41-52) but in my submission the essential problems of the logic remain. The ratio of lengths of coasts is flawed whether or not it is the basis of a "principle" (as in the Danish Memorial, p. 119), or is offered as a relevant circumstance, or is offered as a test of equity to be applied ex post facto (see Mr. Bernhard, CR 93/4, pp. 41-52).

Concluding points relating to the problem of equality and the lengths of coasts

This concludes my examination of the role of comparative lengths of coasts in delimitation. In my submission the key points which emerge are as follows:

First: reference to ratios of lengths of coasts involves elements of landmass reasoning and is therefore inappropriate in principle.

Secondly: in the context of opposite coasts reference to lengths of coasts will inevitably generate a significant element of inequality.

Thirdly: reference to lengths of coasts contradicts the principle that proportionality is not an independent source of rights.

Fourthly: in the *North Sea* cases Judgment and Dispositif the factor of proportionality was given a distinctly subordinate role and was not presented as a concept of general application.

Fifthly: there are no grounds for regarding the factor of proportionality as relevant in the present case even as a subordinate norm.

A final consideration is this. Norway's legal interest includes a fisheries zone and it is obvious that landmass related concepts are particularly inappropriate in delimitation affecting fisheries and legal interests in the water column.

It is ultimately geographical configurations which count and the Judgment in the *North Sea* cases, like the *Libya/Malta* Judgment, clearly accepts that equidistance is in accordance with equity in certain situations. The median line produces the proportional ratio for the equitable division of the area between Jan Mayen and East Greenland.

State practice

Mr. President, my final task is to examine the relevance of State practice in geographically similar situations.

As counsel for Denmark has accepted, the Court has "recognized the importance of State practice, as illustrating how States regarded an equitable result might be achieved in particular situations" (CR 93/4, p. 30).

However, I would respectfully remind the Court that the relevance of State practice extends further. Thus in its Judgment in the *Libya/Malta* case the Court referred to the Libyan argument that a greater landmass was relevant to delimitation. The Court, in response, observed:

> "The Court is unable to accept this as a relevant consideration. Landmass has never been regarded as a basis of entitlement to continental shelf rights, and such a proposition finds no support in the practice of States, in the jurisprudence, in doctrine, or indeed in the work of the Third United Nations Conference on the Law of the Sea." (*I.C.J. Reports 1985*, pp. 40-41, para. 49.)

And so the Court invoked State practice as the first of the sources of evidence of the position in general international law - out of a list of four sources, it came first.

I have four propositions to offer to the Court.

First: the Applicant State is afraid of State practice and this apprehension leads Denmark to make the facile assertion that the present case is unique.

Secondly: general international law does not recognize the 200-mile outer limit principle and the State practice endorses this view.

Thirdly: the State practice gives no support for the Danish assertion that the population factor is relevant to delimitation.

And fourthly: State practice in similar geographical situations confirms the adoption of a median line as an equitable solution in the present case.

If I can return to my first proposition. On behalf of Denmark it is argued by Professor Bowett that "there are very few examples of State practice that can offer any real analogy" (CR 93/4, p. 31). In fact Norway has presented 17 cases and, as I shall demonstrate, Denmark's very abbreviated dismissal of their relevance lacks any power of conviction. Mr. Bernhard also asserted that the case

was "unique in the judicial history of maritime delimitation" (CR 93/4, p. 41).

In Norway's view, the weakest form of argument is the assertion that the particular case is unique and that therefore inconvenient evidence must be set aside as irrelevant.

My second proposition is that general international law does not recognize the 200-mile outer limit principle invented by Denmark in the course of drafting its Memorial in 1989.

The Danish Memorial (pp. 117-118, paras. 365-366) alleges that State practice supports the Danish method of delimitation but the reference to practice is limited to the arrangements between Norway and Iceland which, as Norway has explained, depended upon special considerations of a political character. As the Co-Agent of Norway, Mr. Tresselt, observed on Friday, the Agreement of 28 May 1980 between Norway and Iceland was not considered to preclude the question of delimitation in relation to Greenland (CR 93/5, pp. 46-51).

In general it has to be said that the basis of the Danish claim is so very eccentric that it is hardly surprising that no State practice can be found to support it.

And so I can move on to my third proposition, which is that State practice contradicts the Danish assertion that the population factor is relevant to delimitation. Indeed, the various passages referring to population in the Danish Reply make no attempt to invoke a single item of State practice (pp. 156-157, para. 429; p. 158, para. 435; p. 159, para. 436; p. 163, para. 445; p. 165, paras. 452-453; p. 169, para. 463). This silence has been maintained by Mr. Lehmann and Professor Bowett during the oral argument, always with the exception of the arrangements with Iceland.

It may be safely assumed that, as in the case of the factor of greater landmass considered by the Court in the *Libya/Malta* case, an international tribunal would find the absence of State practice of significance in relation to the population factor.

Like landmass, population has no relevance to entitlement which depends on the existence of a maritime front. And this was emphasized by the Court in its Judgment in the *Libya/Malta* case (*I.C.J. Reports 1985*, pp. 40-41, para. 49).

So much for the so-called population factor. I shall now flesh out my fourth proposition

which is, that State practice in similar geographical situations confirms that a median line solution is equitable in the present case.

Counsel for Denmark found Norway's examples to be "irrelevant" (CR 93/4, pp. 31-32).

Norway reaffirms the relevance of the State practice it has invoked and the Court is invited to inspect the dossier of sketch-maps provided for this session.

Norway has presented 17 examples of State practice which have geographical characteristics essentially similar to those of the relationships of Greenland and Jan Mayen.

No doubt the Court will form its own view of the relevance of these cases, and I shall present them in chronological order. They are grouped together under letter references in Figure A in the dossier provided to the Court and they correspond to sketch-maps which appeared originally in the Annexes.

The first is the Phase 1, the delimitation between the United Kingdom and Norway in 1965, and my friend Commander Beazley will help with the demonstration.

1. The United Kingdom-Norway (Phase I) (1965)
(Figure 11/A) (Counter-Memorial, Ann. 44)

The Governments of Norway and the United Kingdom signed an Agreement delimiting the continental shelf boundary between the two States on 10 March 1965 (Ann. 44). Article 1 of the Agreement provides that 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".

Thus the principle of equidistance was employed for the entire alignment of 359 nautical miles. Full effect was given to the Shetland Islands. The final three sectors of the boundary, totalling 150 nautical miles, used four basepoints on the eastern side of the Shetland group. The distance between the relevant coasts in these three northernmost sectors ranges from approximately 164 to 196 nautical miles.

The length of the Shetland Islands is approximately 113 kilometres and the greatest breadth is 58 kilometres.

2. Japan-Republic of Korea
(Figure 11/B) (Counter-Memorial, Ann. 56)

Japan and the Republic of Korea signed a continental shelf boundary Agreement on 30 January 1974 (Ann. 56). The boundary thus established gives full effect to the Japanese islands of Tsushima, situated about 45 nautical miles from the nearest large Japanese island of Kyushu.

The Tsushima islands are approximately 70 kilometres in length and 16 kilometres in width. According to the United States Department of State publication, Limits in the Seas: "The majority of the turning points are very close of being equidistant from one point on each country's baseline" (No. 75, p. 6).

3. India-Indonesia (Phase I) (1974)
(Figure 11/C) (Counter-Memorial, Ann. 57)

India and Indonesia signed the relevant Agreement on 8 August 1974 (Ann. 57). The Agreement established three straight line sectors as the boundary between Great Nicobar (India) and Sumatra, with a total length of 47.9 nautical miles. The alignment represents a modified median line and the consequence is that the Indian island of Great Nicobar is given full effect.

The coasts of Great Nicobar which may be said to abut directly upon the area in question consist of the whole east coast of Great Nicobar, a distance of 29 nautical miles. If the island fronts are taken, ignoring the gap between Little Nicobar and Nancowry, the distance is 82 miles. On the Indonesian side the relevant fronts total 325 miles from Kepulan Kokos on the west coast of Sumatra to Northwest Island and to Ujong Jambo Aje on the east coast.

This disparity in the coastal frontages will become more apparent when we move later to Phase 2 of this delimitation.

4. Panama-Colombia (1976)
(Figure 11/D) (Counter-Memorial, Ann. 58)

On 20 November 1976, Panama and Colombia signed an Agreement delimiting maritime boundaries in the Caribbean Sea and the Pacific Ocean (Ann. 58). Article 1 of the Agreement expressly adopts the principle of equidistance.

Whilst the median line in the Caribbean is constructed as a step-like configuration for the sake of convenience, the principle of equidistance has been applied throughout with only minor deviations. The result is that the very small islands and cays on which Colombian entitlement is based have been given full effect.

(5) India-The Maldives (1976)
(Figure 11/E) (Counter-Memorial, Ann. 59)

The Governments of the Republic of India and the Republic of the Maldives signed a maritime boundary Agreement in 1976 (Ann. 59) and, according to Limits in the Seas, "the boundary closely approximates an equidistance line" (p. 7).

The delimitation has two principal features. In the first place, as between the mainland of India and the Maldive Islands, in general the Maldives are given full effect. However, the east-west trending segment of the delimitation involves allowing the modest and isolated Indian island of Minicoy full effect as against the northernmost atoll of the Maldives. Minicoy is located 110 nautical miles from the nearest of the Laccadive Islands, to the north, (which are Indian) and 210 nautical miles from the Indian mainland. Overall, the arrangements provide no evidence of discrimination against offshore islands. The Maldives are some 230 nautical miles from the coast of India.

(6) India-Indonesia (Phase 2) (1977)
(Figure 11/F) (Counter-Memorial, Ann. 60)

This confirmed and extended the delimitation of 1974 between Great Nicobar, belonging to India and Sumatra and the Agreement was signed in 1977 (Ann. 60). This extended the boundary of 1974 between the two countries in the Andaman Sea and the Indian Ocean in areas not covered by the previous Agreement.

(7) Costa Rica-Colombia (1977)
(Figure 11/G) (Counter-Memorial, Ann. 61)

This was an Agreement signed in 1977 but it has not yet been ratified (Ann. 61). Although

the Agreement does not adhere to any particular principle of delimitation, the actual boundary established gives more or less full effect to the small islands and cays in the Caribbean which form the basis of Colombian entitlement.

(8) The Netherlands-Venezuela (1978)
(Figure 11/H) (Counter-Memorial, Ann. 64
(Sketch Map A)).

Delimitation between the Netherlands and Venezuela in a maritime boundary Agreement concluded in 1978 (Ann. 64). The alignment is not expressly based on any particular principle of delimitation and consists of a series of geodetic lines, which is, of course, perfectly normal. Sector B of the boundary lies between the islands of the Netherlands Antilles (Aruba, Bonaire, Curaçao) and the coast of Venezuela. In the result the delimitation gives full effect to the offshore islands.

(9) United States-Mexico (1978)
(Figure 11/I) (Counter-Memorial, Ann. 65
(Sketch Map A))

This was based on a maritime boundary Agreement in 1978 which has not yet been ratified (Ann. 65). The Agreement does not refer to any particular method, again, of delimitation and uses geodetic lines. But, in doing so it gives full effect to three very small insular features some distance off the coast of Yucatan: Arenas Cay, Isla Desterrada, and Arrecife Alacran.

(10) India-Thailand (1978)
(Figure 11/J) (Counter-Memorial, Ann. 66)

Here the resulting delimitation accords almost full effect to the Nicobar Islands, the only qualification arising from the fact that certain small islands offshore Thailand appear to have been employed as basepoints.

(11) United Kingdom-Norway (Phase 2) (1978)
(Also Figure 11/A) (Counter-Memorial, Ann. 67)

On 22 December 1978 Norway and the United Kingdom signed a Protocol Supplementary to the Continental Shelf Boundary Agreement of 1965 (Ann. 67). This continued the alignment further north, thus confirming the full weight accorded to the Shetland Islands. The Preamble to the

Protocol reiterates the provisions of Article 1 of the Agreement of 1965, which relied, of course on the basis of equidistance.

(12) Dominican Republic-Venezuela (1979)
(Figure 11/K) (Counter-Memorial, Ann. 68)

The Dominican Republic and Venezuela signed a maritime boundary Agreement in 1979 (Ann. 68).

This describes the alignment as an equidistant line between the Dominican Republic and the Netherlands Antilles islands of Aruba, Curaçao and Bonaire. These are, respectively, 15, 35 and 48 nautical miles from the Venezuelan mainland. The lengths of these three islands are, respectively, 30 kilometres, 60 kilometres, and 35 kilometres. And thus the Agreement gives full effect to the islands of the Netherlands Antilles.

(13) Denmark-Norway (1979)
(Figure 11/L) (Counter-Memorial, Ann. 69)

On 15 June 1979, Norway and Denmark signed an Agreement demarcating the continental shelf boundary between the Faroes and Norway, and applying it for other jurisdictional zones (Ann. 69). This gives full effect to the Faroe Islands. These islands are 308 nautical miles from the mainland of Norway and stretch 63 miles from north to south.

(14) France-Australia
(Figure 11/M) (Counter-Memorial, Ann. 73)

The Governments of France and Australia signed a maritime boundary Agreement on 4 January 1982 (Ann. 73).

Article 2 of this Agreement establishes a boundary between the French possessions of the Kerguelen Islands, on the one hand, and the Australian Heard and McDonald Islands, on the other. These possessions are approximately 200 nautical miles apart. The Kerguelens have an area of about 7,000 square kilometres and the Australian islands about 378 square kilometres. The Kerguelen Islands have a frontage of over 70 miles. In contrast, the Australian islands have very limited coasts abutting upon the delimitation area. The equidistance line delimitation agreed upon

gives equal effect to the relatively small Australian islands.

(15) India-Myanmar (1986)
(Figure 11/N) (Counter-Memorial, Ann. 75)

The Agreement establishes a maritime boundary between the Andaman and Nicobar Islands, dependencies of India, and the coasts of Myanmar. The Andaman Islands lie about 540 nautical miles from the mainland of India, and the Nicobar Islands (lying some 80 nautical miles further south) are even farther from India. The two chains of islands lie approximately 300 nautical miles west of the coast of Myanmar.

The delimitation established clearly accords full weight to the Andaman and Nicobar groups in relation to Myanmar, in spite of the remoteness of the mainland of India. In essence, the Andaman Islands are treated as mainland for the purpose of creating an equidistance boundary.

There are three other delimitations which are very relevant and which all involved Isla Aves under the sovereignty of Venezuela.

16. United States-Venezuela (1978), Venezuela-France (1980) and Netherlands-Venezuela (1978)
(Figures 11/O, 11/P, and 11/Q) (Counter-Memorial, Anns. 63, 71, 64; (Sketch Map B))

All the agreements involved the Venezuelan Isla Aves situated 300 nautical miles from the Venezuelan mainland.

Isla Aves is really no more than an islet. Its only 580 metres in length, 150 metres wide at its maximum. At its minimum its 50 metres and its height is never more than 3 metres. It has no indigenous population, but it has a small military and scientific establishment housed on an offshore platform constructed close to the beach and connected with it by a walkway. Although the island was exploited for guano in the 19th century it now has no economic life of its own, and is a wildlife sanctuary.

The boundary between Venezuela and the United States (Figure 11/O), is an equidistant line between Isla Aves and the Island of St. Croix with a coastal front of about 36 kilometres and some

135 nm distant from Isla/Aves.

And there is then a delimitation between Venezuela and France involving Aves Island (Figure 11/P).

In the case of the French islands of Guadeloupe (coastal front 50 kilometres) and Martinique (coastal front 60 kilometres), lying 100 nm and 140 nm respectively from Isla Aves, the boundary is a meridian of longitude which accords Venezuela full effect in the case of Martinique, and about 80 per cent effect in the case of Guadeloupe.

And lastly there is the delimitation between Venezuela and The Netherlands involving the small Netherlands islands of Saba and St. Eustatius. And here also there is a median line boundary. Saba and St. Eustatius, about 120 nm and 174 nm respectively from Aves Island, are admittedly small islands - Saba's coastal front being only about 5 kilometres and that of St. Eustatius about 8 kilometres - but they are still many times bigger than Isla Aves.

The practice surveyed is not, of course, conclusive of the issue of delimitation, but in its totality it provides a reliable pattern which, in Norway's submission, is of assistance to the Court. Not only does the evidence support the median line solution but it indicates the eccentricity of the Danish claim in this case.

Counsel for Denmark made a somewhat half-hearted effort to establish the irrelevance of the practice offered in Norway's written pleadings.

In the first place Professor Bowett argued that practice did not count "where the island's entitlement is linked to the entitlement of a larger mainland" (CR 93/4, p. 32). It is not clear that this element has the result of irrelevance asserted by Denmark. The distinction between an island, which is said to be unimportant, and a "mainland", which is said to be important, appears to be an extension of Denmark's wishful thinking about Jan Mayen projected onto the State practice.

Professor Bowett has objected to Norway's reference to Aves Island on the basis that it is "not ... an isolated island" but is "part of the entitlement of Venezuela itself, and both island and mainland share a common maritime zone" (*ibid.*).

This reasoning is unimpressive. Aves Island lies nearly 300 nm from the mainland of

Venezuela and about 230 nm from the nearest Venezuelan island, the small and relatively isolated Isla de Blanquilla, which has a diameter of only about 10 kilometres.

Counsel for Denmark also criticized Norway's reference to the France/Australia Agreement of 1982, of which he said: "balancing small groups of islands in the Coral Sea, tells us nothing" (CR 93/4, p. 32).

But, the practice invoked by Norway (Counter-Memorial, p. 181, paras. 644-645) did not relate to the Coral Sea, but to the relation between the Kerguelen Islands, with an area of 7,000 square kilometres and two Australian islands with an area of about 378 square kilometres (see Counter-Memorial, Ann. 73). The delimitation invoked by Norway refers to the Indian Ocean, not to the Coral Sea.

Denmark's Counsel asserted in addition that

> "there can be no real analogy with cases where there is a large island group with a long coastal façade and an important population and economy. Thus, the various agreements concluded by India concerning the Nicobars and Andaman Islands - agreements with Indonesia (Anns. 57 and 60), with Thailand (Ann. 66), and with Myanmar (Ann. 75) - offer no real analogy. For the Indian groups of islands are large, well-populated, and have a coastal façade of a length matching that of its neighbour." (CR 93/4, p. 32.)

This criticism, which is related to several other examples, entirely begs the question. Norway offers geographically similar cases, the similarity resting upon coastal configurations and relationships. Moreover, Denmark has not attempted to produce evidence that the population factor affected any of the delimitations in question. Counsel for Denmark made no serious attempt to produce examples of practice which contradict the evidence adduced by Norway.

The example of the Sweden/USSR Agreement of 1988 (Memorial, Ann. 29) is unhelpful, given the obvious difference in the geographical context.

In any event - this is the exercise involving the island of Gotland - the exercise involved a political negotiation which resulted in the adoption of a method involving the transfer of areas. The precise outcome in terms of delimitation was a boundary which deviates only 8 nm from the median line between the two mainland coasts of the Baltic Sea.

Conclusions

Mr. President, I have now completed my remarks concerning State practice and on behalf of Norway I shall present some conclusions.

I have already offered the conclusion that there are no grounds for regarding the factor of proportionality as relevant in the present case even as a subordinate norm.

The relevant practice of States provides respectable support for a median line solution in the geographical situation now presented to the Court.

There is no State practice supporting the Danish claim. No third State and no item in the literature has accepted the Norwegian arrangements with Iceland as constituting a precedent in relation to delimitation.

Mr. President, in closing I would like to underline the global significance of delimitation. This is a court of law and delimitation is a question of law. This is the more so when a claim is advanced which in real terms is incompatible with the entitlement of another State. Denmark has constantly tried to deny the legal consequences of Norway's sovereignty over Jan Mayen, for example, by the facile portrayal of Norway as a long-range fishing State in respect of Norwegian coasts.

Speaking on behalf of Denmark, Professor Bowett goes so far as to say that Norway "is not a coastal State for the purposes of this delimitation" (CR 93/4, p. 26). Counsel for Denmark postulated a wholly artificial contrast between "mainland Norway" and Jan Mayen, and even accused Norway of invoking rights in respect of Jan Mayen "simply because it is under Norwegian sovereignty" (*ibid*.).

This attempt to deprive title to coasts and islands of normal legal consequences constitutes a serious revisionism in terms of the existing legal order and in global terms represents a destabilising factor.

Many States rely upon island territories as the basis of entitlements to various legal interests, whether in the territorial sea, in fishery zones, shelf claims, or exclusive economic zones. The Danish approach is based upon general international law, not treaty, general international law, and any encouragement to territorial revisionism would simply complicate the process of dispute settlement and cast a shadow over existing settlements.

The Court will no doubt bear in mind that there is a substantial agenda of delimitations yet to be effected relating to small islands juxtaposed to long coasts. I could give some examples among others, these cases include the Cayman Islands and Cuba, the Spratly Islands and other groups in the South China Sea in relation to neighbouring coasts, certain Japanese islands near Taiwan, Swains Island (United States) near Western Samoa, certain French islands near Madagascar and Mozambique, and the Falklands in relation to Argentina.

As the Court will readily appreciate, the principles of general international law inevitably have a general significance.

Mr. President, in front of the Court I would like to acknowledge the assistance of colleagues in preparing my presentation, and, in particular, the assistance of Commander Beazley.

I thank you, Mr. President, and distinguished Members of the Court, for your patience and consideration.

The PRESIDENT: Thank you very much, Professor Brownlie. So we adjourn now and will start again tomorrow morning at 10 o'clock to listen to Professor Prosper Weil. Thank you.

The Court rose at 1.00 p.m.