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Public sitting

held on Monday 25 January 1993, at 10 a.m., at the Peace Palace,

President Sir Robert Jennings presiding

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

(Denmark v. Norway)

VERBATIM RECORD

ANNEE 1993

Audience publique

tenue le lundi 25 janvier 1993, à 10 heures, au Palais de la Paix,

sous la présidence de sir Robert Jennings, Président

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

(Danemark c. Norvège)

COMPTE RENDU

Present:

President Sir Robert Jennings
Vice-President Oda
Judges Ago
Schwebel
Bedjaoui
Ni
Evensen
Tarassov
Guillaume
Shahabuddeen
Aguilar Mawdsley
Weeramantry
Ranjeva
Ajibola

Judge *ad hoc* Fischer

Registrar Valencia-Ospina

Présents:

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

M. Fischer, juge *ad hoc*

M. Valencia-Ospina, Greffier

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

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Mr. Per Magid, Attorney,

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

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Ms. Birgit Skov, Ministry of Foreign Affairs,

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Mme Alicia Herrera, La Haye,

comme personnel technique.

The PRESIDENT: This morning we do not have Judge Guillaume with us, for reasons that have been explained to me, and we continue with the case between Denmark and Norway by hearing the Danish Reply. But, before we begin the proceedings, I wish to notice the presence in the Court of the Vice-Premier of the Greenland Home Rule Government and Minister of Finances Mr. Emil Abelsen, whom we are very glad to have with us this morning. Now we can begin the Danish Reply with Mr. Lehmann please.

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

1. Issues still dividing the Parties

In my initial presentation of the Danish case on Monday 11 January, I stated that it ought to be the common task of the two Parties to try to narrow down their differences in order to assist the Court in its deliberations (CR 93/1, p. 18).

I am afraid that the first round of oral pleading has not succeeded in that task. The Parties still appear to be quite far apart in determining the relevance of the individual factors or relevant circumstances of the present case. This is true of the *geographical* factors, including the establishment of a *relevant area*, as well as of the factors relating to *population, conduct and proportionality*. On top of that come new challenges by Norway as to the task of the Court and its competence to deal with a request for a single line of delimitation.

There are also no meeting of minds as to the whole legal approach of the Parties. Norway applies a distorted interpretation of the treaty relations between the two Parties and adopts a legal approach contrary to the current of the Court's settled jurisprudence. Denmark applies customary international law based upon the jurisprudence of this Court. The Norwegian approach leading to a strict median line as the boundary in the waters between Greenland and Jan Mayen does not accord with all the relevant factors and cannot satisfy an ex post facto proportionality test and thereby meet the requirement of reaching an equitable solution. The Danish approach aims at balancing up all the relevant factors in order to seek an equitable solution in accordance with equitable principles and legal rules - first and foremost the norm of equity as recognized in customary international law.

What is to be done in such a situation to assist the Court? We believe that there is no point in repeating our arguments as if they had not been heard or understood by Norway. We believe they have been understood by the other side but that Norway does not wish to take them into account. But in so doing, their own presentation becomes extremely unbalanced, partisan and in many respects even unreliable. We shall concentrate in our Reply on the most obvious differences, in an attempt, once again, to assist the Court in its future deliberations.

2. The task requested of the Court

I shall start first by taking up the question raised by Norway as to the task requested of the Court. In its oral pleading, Norway is now complaining about lack of clarity in the Danish claims and submissions (CR 93/5, pp. 12-13).

Well, let us see what kind of judgment Denmark-Greenland is asking for in the present case. As is stated already in our Application, we ask the Court to decide, in accordance with international law, where a single line of delimitation shall be drawn between Denmark's and Norway's fishing zones and continental shelf areas in the waters between Greenland and Jan Mayen. So, we ask for a single line of delimitation to be drawn for those two zones. Our submissions in the Memorial and the Reply ask for exactly the same, a single line to be drawn for the fishery zone and the shelf area.

The Agent of Norway, Mr. Haug, tried to make a point out of the slightly different wording of the Application and the submissions in the Memorial and the Reply. Later counsel for Norway, Professor Prosper Weil, elaborated at great length on the same point.

But there is no difference in substance.

In order to make its point, Norway engages in a misleading interpretation of the Danish submissions. The Agent of Norway stated

> "So, while the first application was simply for a single line of delimitation, the principal submission was changed to ask for a declaratory judgement of entitlement to a full 200-mile fishery zone and a full 200-mile continental shelf vis-à-vis the Norwegian island of Jan Mayen." (CR 93/5, p. 13.)

No, Mr. President, Denmark is not asking for a declaratory judgement of entitlement. Our presentation of facts and arguments leads us to submit that Greenland has a right to a 200-mile

fishery zone and continental shelf area vis-à-vis Jan Mayen. I stress the words *vis-à-vis Jan Mayen* because that indicates - of course - that it is a delimitation situation we are concerned with, namely Greenland in competition with Jan Mayen. In our Application it was premature to tell the Court where the exact line of delimitation should be drawn. But having presented the facts and developed the law in our Memorial, we were in a position to submit to the Court - in the light of the facts and arguments presented - that the line of delimitation should correspond to Greenland's 200-mile fishery zone and continental shelf area, not simply because Greenland is entitled to such maritime zones under contemporary international law, but because the delimitation process, as described in the Memorial, leads to that result. The delimitation process in our view favours Greenland in all relevant respects. Therefore, we reach the conclusion that the Court should adjudge that Greenland is entitled to a full 200-mile fishery zone and continental shelf area *vis-à-vis* the island of Jan Mayen. I wish to stress the words *full* zone *vis-à-vis* the *island* of Jan Mayen, which clearly indicates that it is in the context of the delimitation process that Denmark has asked for the full zone and not a reduced zone. Having set out our submission as to the delimitation question, we ask the Court to draw the line of delimitation for both the fishery zone and the continental shelf *in the waters between Greenland and Jan Mayen*. Obviously, this is a line applying to the two sides - and not, as suggested by counsel for Norway, Professor Prosper Weil, a line of delimitation in respect of Greenland's own shelf and fishery zone - an absurd contention.

Our terminology corresponds actually to that used in the 1981 Agreement between Norway and Iceland on the continental shelf in the area between Iceland and Jan Mayen where the delimitation line coincides with the delimitation line for the Parties' economic zones following the outer limit of Iceland's 200-nautical-mile zone. Last - but not least - the title given by the Court to the present case: "Maritime Delimitation in the Area between Greenland and Jan Mayen" shows that the Court itself has had no difficulty in identifying the proper subject-matter of the dispute.

Mr. President, one gets the impression that Norway is running out of arguments in support of their own case when at this very last stage of the proceedings it chooses to engage itself in such a semantic exercise. Maybe Norway seeks to persuade Denmark to adopt the same attitude it has

taken towards the judicial function of the Court in the present proceedings, namely

> "In the circumstances the Norwegian Government respectfully submits that the adjudication should result in a judgment which is declaratory as to the basis of delimitation, ..." (Counter-Memorial, p. 197, para. 704.)

As the Court will be well aware the basis of delimitation, according to Norway, is entitlement.

3. The request for a single line of delimitation

Norway has raised a procedural question as to whether it is within the mandate of the Court to determine a single line of delimitation as requested by Denmark in its submissions (CR 93/5, pp. 24-25).

Our answer is as follows:

It has been suggested by the Agent for Norway (CR 93/5, pp. 12, 24-25) that, in the absence of a special agreement, the Court cannot determine a single line of delimitation, valid for both continental shelf and fishery zones. That proposition is unfounded in law.

The Court's competence under Article 36, paragraph 2, of the Statute, is as wide as could possibly be conceived, namely "any question of international law". There being no reservations, and no objection to jurisdiction or admissibility in the present case, we therefore start from the presumption that, provided the Applicant makes a legal submission, the actual task of the Court arises from the submissions of the Parties which, in so far as they contain a legal claim and a denial of that claim, define the dispute before the Court.

Denmark requests the Court to draw a delimitation line. It requests a line between the only two zones actually claimed by the Parties - the shelf and fishery zones.

Denmark's submission is clearly a claim as to a legal right opposed by Norway and from this it follows that there is a legal dispute which, under Article 36, paragraph 2, the Court is competent to deal with.

Now I do not say the Court is bound to accept Denmark's request for a single line, simply because the submission so requests. The Court would be fully entitled to say that such a boundary is unjustified in law, because specific, relevant factors dictate that there should be separate boundaries, in different locations, for the shelf and for the fishery zones. But Denmark knows of no special

factors which in this case would lead to that conclusion; and Norway does not invoke such special factors. What Norway invokes is a whole series of political considerations presented by counsel for Norway, Professor Keith Highet, in his address to the Court last Thursday. He even went so far as to suggest that maritime delimitation is inherently and prima facie inappropriate for cases brought by application (CR 93/9, p. 60). He said a situation was created where the Applicant State can dictate the course of the proceedings - may be even the judgment. Mr. President, the implications of that argument are devastating to international adjudication in maritime delimitation. It means either that delimitation is not a legal question, or that the optional clause reference to any legal question does not include such legal questions as maritime delimitation. The argument simply does not make sense. Norway has been free at all stages to challenge all Denmark's contentions. Norway was free to challenge our baseline, our proposed relevant coasts and area, our proposed delimitation line, and our submissions. Thus Denmark cannot dictate anything in this court-room. We can only argue our case just as the Respondent State can argue its case.

Now, Norway for its part tries to uphold the position, or rather fiction, that the present case is concerned with two *different* delimitation situations: one concerning the continental shelf area and another one relating to the fisheries zones between Jan Mayen and Greenland.

But in this case the Court has not received a request for the establishment of different lines, one for the shelf, a different one for the fisheries. Denmark has asked for a single line. Norway on its part has requested that the same median line should apply both to the shelf and the fishery zones.

The maritime boundary line requested by Norway would thus perform a dual function: the same line being applicable to "two different jurisdictions" as the Court said in the *Gulf of Maine* case (paras. 27, 119).

Consequently while there is divergence between the Parties as to the location of the boundary, there is coincidence as to the *scope and function* to be performed by a delimitation which will have "a twofold object" as stated in the *Gulf of Maine* case (para. 193).

This being so, the question arises, why - apart from the location of the line - is Norway making this an issue? Does it really matter whether we have one line, or two lines in an identical

location?

Well it does to Norway, apparently, as a matter of stated national interest (CR 93/5, p. 23) and Denmark is ready to take this element into account as I shall revert to later during this Reply. However, in reality we believe that Norway seeks to avoid the implications of the Court's judgment in the *Gulf of Maine* case as to the law applicable to a single maritime boundary. The Court there denied that Article 6 of the 1958 Convention on the Continental Shelf could provide the law governing a single maritime boundary.

So Norway feels bound to argue that in this case the Court must determine two separate boundaries.

First, a shelf boundary, a median-line already determined, or "in place" as Norway puts it, by virtue of Article 1 of the 1965 bilaterial Agreement, and Article 6 of the 1958 Convention, and

second, a fishing-zone boundary which under customary international law should be located identically with the pre-existing shelf boundary.

So that is really what this rather confusing series of propositions are all about. It has nothing to do with the Court's competence, or the task of the Court, in reality. But it has everything to do with the law governing the delimitation. It is simply part of Norway's attempt to have this boundary governed *inter alia* by Article 6 of the 1958 Continental Shelf Convention - or to be more precise part of Article 6. Because Norway wants to rely exclusively on the two words "median line" in Article 6 disregarding the "special circumstances" clause. In that way Norway seeks to avoid a direct confrontation between Greenland and Jan Mayen through a balancing-up of relevant factors leading to an equitable solution. In order to avoid the test of proportionality all kinds of manoeuvres are used. In the first place to dismiss the request for a *single* line of delimitation. Secondly, to claim that a median line boundary for the continental shelf is already in place and thirdly, to join - very simply - the delimitation for the fisheries to the shelf boundary. But in so arguing Norway has to overlook what cannot, however, be overlooked, namely that the whole dispute originates in the establishment around 1976-1977 of the new broad 200-mile *fishery* zones; that the concept of delimitation of these zones is based on the norm of equity; that a State cannot adopt the 200-mile

concept for the fishery zone and leave out the corollary concept of an equitable delimitation when overlapping claims are made; that the equidistance/special circumstances rule in Article 6 of the 1958 Convention is one single comprehensive rule; and that a renunciation of the special circumstances clause as claimed by Norway would - if at all possible - have to be express and relate to a particular delimitation situation.

All these aspects are being deliberately overlooked by Norway in an attempt to counter the quite simple Danish position which is that a delimitation of the fisheries zones and continental shelf within a distance of 400 nautical miles must in this area follow the same line - as has, indeed, been the situation in case-law and generally in State practice since the late 1970s, as explained in our Memorial (paras. 360-364). Such a result is also conducive to establishing finality and stability in the area - an essential goal, we believe, of the judicial process within this field of international law.

4. The aim of reaching an equitable solution

Mr. President, we welcome the statement by the Norwegian Agent in his opening address that Norway is indeed seeking an equitable solution (CR 93/5, p. 23). That represents an important legal recognition of the fundamental rule of delimitation, namely that the method to be adopted should be justified by the equity of the result - and not the other way around.

Against this background it is, in particular, regrettable that counsel for Norway, Professor Prosper Weil, should relegate equity to the subordinate function of correcting a result reached on the basis of applicable rules (CR 93/8 p. 76). But, Mr. President, equity is itself a rule of law as recognized by the Court in its 1969 Judgment (para. 85) and reiterated in the *Libya/Malta* case (para. 45). So, to state, as Professor Weil in effect does, that equity is not part of the law regulating the very process of delimitation is, indeed, to turn the whole law of maritime delimitation upside-down.

Professor Weil attacks Denmark for resorting to arguments of entitlement, though everybody who reads our Memorial and Reply can see that we are engaged in nothing but evaluating the factors and equitable principles which are basic to the whole delimitation process. It is Professor Weil, as counsel for Norway, who relies entirely on entitlement, postulating that a delimitation between

different entitlements must necessarily cut into *both* entitlements. May I ask why? Did, for instance, the delimitation between Iceland and Jan Mayen cut into Iceland's entitlement? It did not. Did the Maltese islet of Filfla cut into Libya's entitlement? It did not. Under customary international law a maritime delimitation dispute must be resolved in a way which leads to an equitable result. That requires a nuanced evaluation and balancing up of all the relevant factors of the case - like the scale of Justitia. It may be that the result of that judicial balancing leads to a line which, though equitable in general terms, cannot be upheld judicially because a positive rule of international law dictates a certain limit beyond which entitlement must not be extended. Such is the situation in the present case where contemporary international law has cut the delimitation process short at a distance of 200 nautical miles where the distance between the opposite lying coasts is less than 400 nautical miles. If no such rule existed the equitable line of delimitation in the waters between Greenland and Jan Mayen would have to be drawn closer to Jan Mayen than the 200-mile outer limit of Greenland's maritime zone indicates. That line - the 200-mile line - therefore becomes both the minimum and maximum line of delimitation in the present case. Jan Mayen for its part does not loose its entitlement as postulated by Professor Weil. Jan Mayen maintains its entitlement up to some 50 nautical miles and more, not as a result of balancing entitlements, as Professor Weil tried to put it, but as a result of balancing the relevant factors in the delimitation process.

Unfortunately, Norway does not, as we have seen, argue for an equitable solution by balancing-up the relevant factors considered in the light of equitable principles and the applicable rules of contemporary international law. Norway evades that essential process of striving to find an equitable solution by arguing, *first*, that the Parties have already agreed on a median line between Greenland and Jan Mayen in the 1965 Agreement; and, *second*, that Article 6 of the 1958 Convention requires a median line.

My colleague Per Magid will deal with the argument based on the 1965 Agreement in our next intervention.

The 1958 Geneva Convention on the Continental Shelf

As regards the 1958 Convention, I believe the Norwegian argument completely

misunderstands its effect.

Norway has made it clear that, for Norway, reliance on the 1958 Convention is a secondary or subsidiary argument - a kind of "fall-back" argument if the argument based on the 1965 Treaty fails. Denmark, for its part, fully accepts that the 1958 Convention remains in force and binding on the Parties.

But the argument based on the 1958 Convention faces two main obstacles.

First, this Court has already held, in the *Gulf of Maine* case, that the 1958 Convention cannot provide the applicable law for a single maritime boundary. Norway seeks to avoid this judicial finding by suggesting that the reason for this finding was that the 1958 Convention was excluded *because the Parties came before the Court by special agreement* (CR 93/6, p. 41).

But that is not correct. The Court's reasoning can be found at paragraphs 119-125 of the Judgment. The basis of that reasoning has nothing to do with the Special Agreement. It was rather that a convention, the 1958 Convention, dealing with only one dimension - the shelf - could not govern a two-dimensional delimitation, i.e., shelf and superjacent waters.

This conclusion is reinforced by the same dictum in the Saint-Pierre and Miquelon Arbitral Award (paragraph 40 of the Award).

Second, the Agent for Norway, Mr. Haug, treats Article 6 of the 1958 Convention as though it created an obligatory rule - the median line - but with a proviso or exception for "special circumstances", narrowly defined. That was precisely the argument rejected in the 1977 Award, where the Court of Arbitration held that there was one rule - not a rule and an exception - and that the whole purpose of including "special circumstances" was to achieve an equitable result. The 1977 Award held specifically, applying Article 6, that "failing agreement, the boundary between States abutting on the same continental shelf is to be determined on equitable principles" (Decision, para. 70).

In the event, neither group of British islands - neither the Channel Islands, nor the Scilly Islands - received full effect in that case. So why does Norway assume Jan Mayen gets full effect if the 1958 Convention applies?

In fact, Denmark submits that the application of Article 6 would lead to the same result as is contained in our submissions, because full effect for the island of Jan Mayen would not produce an equitable result *vis-à-vis* Greenland in the light of all the relevant factors, including the ex post facto proportionality test which speaks a quite different language than the median line. The extraordinary difference in coastal length alone dictates another line than the median line. Counsel for Norway, Professor Prosper Weil, challenged Denmark to indicate more precisely how the island of Jan Mayen could be considered, by itself, a special circumstance within the meaning of Article 6. I wish to refer to the Court, which has itself offered a general explanation of what is meant by the expression "special circumstances" in Article 6 of the 1958 Convention. It did so in its dictum in the *North Sea Continental Shelf* cases, paragraph 55:

> "it is clear that at no time was the notion of equidistance as an inherent necessity of continental shelf doctrine entertained. Quite a different outlook was indeed manifested from the start in current legal thinking. It was, and it really remained to the end, governed by two beliefs; - namely, first, that no one single method of delimitation was likely to prove satisfactory in all circumstances, and that delimitation should, therefore, be carried out by agreement (or by reference to arbitration); and secondly, that it should be effected on equitable principles. It was in pursuance of the first of these beliefs that in the draft that emerged as Article 6 of the Geneva Convention, the Commission gave priority to delimitation by agreement, - and in pursuance of the second that it introduced the exception in favour of 'special circumstances'." (*I.C.J. Reports 1969*, pp. 35-36, para. 55.)

In the light of that dictum, it seems fair to conclude that features which are creative of inequity in regard to a delimitation might be covered by the term "special circumstances" in Article 6 of the 1958 Convention. The island of Jan Mayen is undoubtedly such a feature on account of its particular character - it is not only small relative to the opposite coast but, in addition, it cannot sustain and has not sustained human habitation or economic life of its own, to borrow the phrase used in Article 121, paragraph 3, of the 1982 United Nations Convention on the Law of the Sea.

According to Professor Weil's analysis, Jan Mayen could not qualify as a special circumstance. Nor would, in his analysis, isolated oceanic features of even less importance than Jan Mayen so qualify. I am referring to features which are covered by the description of rocks in the provision just mentioned, but which can still - as in the case of Jan Mayen - claim entitlement to continental shelf, namely under the 1958 Convention. This serves to illustrate that a legal analysis, leading to a median-line claim for an island like Jan Mayen - a claim, which is in reality based on

nothing else than the entitlement of the feature to continental shelf - is simply not a sound analysis. For it leads to results, which are manifestly inequitable and, therefore, unacceptable. It reminds me of a saying by my old teacher, the late Professor Alf Ross, that, if the logic violates the realities it is worst for the logic - which probably has been flawed in the first place.

5. The Norwegian-Icelandic Agreements

Allow me, Mr. President, to turn now to the Norwegian-Icelandic Agreements, an important precedent for this case. These Agreements were entered into in 1980 and 1981 and concern fisheries and continental shelf questions. We heard the Agent from Norway, Mr. Tresselt, saying that the Fisheries Agreement from 1980 was exceedingly favourable to Iceland, not only in its fisheries management provisions but also, "for the de facto concession of an area of nearly 30,000 square kilometres to the north of the median line" (CR 93/5 p. 49). This is a statement against the facts. I shall not repeat my analysis of the two Agreements, as presented to the Court in my intervention on 13 January (CR 93/3, pp. 38-55). But allow me, Mr. President, to read out the following part of the Recommendation from the Foreign Affairs Committee of the Norwegian Parliament to the Parliament's Plenary on the 1981 Agreement with Iceland concerning the continental shelf:

> "The Committee would also recall that by virtue of the Agreement of 28 May 1980 between Norway and Iceland concerning fisheries and continental shelf questions, Norway indirectly approved an Icelandic economic zone of 200 nautical miles, comprising both fishing territory and the continental shelf, between Iceland and Jan Mayen. That approval at the same time marked acceptance on Norway's part of an Icelandic continental shelf of at least 200 miles towards Jan Mayen." (Counter-Memorial, Ann. 14, p. 82.)

This statement makes it crystal clear that Norway has made no concessions to Iceland in so far as Iceland's 200-mile economic zone is concerned but, as I explained to the Court on Wednesday, 13 January, Norway did in fact offer some additional rights to Iceland beyond Iceland's 200-mile zone, i.e., within Norway's exclusive zone. So these so-called political concessions did not, as Mr. Tresselt stated, relate to a zone north of the median line, but north of Iceland's 200-mile zone - and that is a quite different matter.

Mr. Tresselt did not comment upon the second Norwegian/Icelandic Agreement concerning the continental shelf. But Mr. Haug did in his intervention on 18 January (CR 93/6, p. 67). He tried to

counter the Danish argument that this Agreement and the recommendation of the Conciliation Commission preceding the Agreement are based on legal arguments and form an important legal precedent for the present case. But Mr. Haug tried to counter this in a most surprising way, because first he conceded that the Conciliation Commission did make a conclusion of law, namely as to the status of Jan Mayen as an island under international law and then he stated that the ensuing bilateral treaty was not the result of a "purely legal process". So, in fact, it is admitted that the 1981 Agreement is based upon a legal process but not entirely so. We agree. The legal evaluation was concerned with the status of islands under international law - Section IV of the Commission's Report - but it was also concerned with the effects of islands in maritime delimitation situations, seen in the light of State practice and Court decisions - Section VI of the Report; both evaluations leading to a unanimous recommendation that - and now I quote from preambular paragraph 4 of the 1981 Agreement - "the delimitation line between the two Parties' parts of the continental shelf in the area between Iceland and Jan Mayen shall coincide with the delimitation line for the economic zones". This represents the essential legal conclusion to be drawn in respect of the present dispute, namely Norway's recognition, in law, of Iceland's right to a 200-mile zone *vis-à-vis* the island of Jan Mayen. What was not a purely legal process in the 1981 Agreement related to the recommendation by the Conciliation Commission of a specified area of co-operation between Iceland and Jan Mayen on both sides of the delimitation line. The major part of that area, 75 per cent, is situated north of Iceland's 200-mile economic zone.

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Mr. President, if we look at the *individual factors* considered to be relevant in deciding the present delimitation dispute we see, unfortunately, very little common ground also on this score.

6. The relevant area

Norway does not want to enter into the decisive *ex post facto proportionality test* and consequently Norway rejects the establishment of a *relevant area*.

In our first presentation we asked Norway either to demonstrate its own concept of a relevant

area and relevant coasts - or to explain to the Court why those concepts are irrelevant to the present case.

We may now take it for granted that Norway does not intend to come up with its own suggestion for the identification of such areas. We have had quite a few quotations from the *Libya/Malta* case (1985), but so far no reference has been made to paragraph 74 of the Judgment which - *inter alia* - reads as follows:

> "In the view of the Court, there is no reason of principle why the test of proportionality, more or less in the form in which it was used in the *Tunisia/Libya* case, namely the identification of 'relevant coasts', the identification of 'relevant areas' of continental shelf, the calculation of the mathematical ratios of the lengths of the coasts and the areas of shelf attributed, and finally the comparison of such ratios, should not be employed to verify the equity of a delimitation between opposite coasts, just as well as between adjacent coasts." (*I.C.J. Reports 1985*, p. 53, para. 74.)

What is meant here by "relevant coasts" can be seen from the *Tunisia/Libya* case, paragraph 75 of the Judgment:

> "75. Nevertheless, for the purpose of shelf delimitation between the Parties, it is not the whole of the coast of each Party which can be taken into account; the submarine extension of any part of the coast of one Party which, because of its geographic situation, cannot overlap with the extension of the coast of the other, is to be excluded from further consideration by the Court. It is clear from the map that there comes a point on the coast of each of the two Parties beyond which the coast in question no longer has a relationship with the coast of the other Party relevant for submarine delimitation. The sea-bed areas off the coast beyond that point cannot therefore constitute an area of overlap of the extensions of the territories of the two Parties, and are therefore not relevant to the delimitation." (*I.C.J. Reports 1982*, pp. 61-62, para. 75.).

Contrary to the *Libya/Malta* case, the present case is favoured by a simple geography which only reinforces the applicability of the dicta just referred to.

But we must, of course, in this context of the relevant area, make sure that we get the facts right. The scale on Map 1 in the folder distributed by Norway on 15 January is not correct. The map compares Jan Mayen with the State of Malta but an extra zero has slipped into the scale. It should read 10 nautical miles and 20 kilometres respectively, and not, of course, 100 and 200 as now indicated. I also wish to point out that in real life Jan Mayen is not, as argued by Norway, being deprived of any effect *vis-à-vis* Greenland according to the Danish claims. Under our claim the island of Jan Mayen will be given a considerable effect namely an area of 31,000 km^2, slightly less than the territory of the Netherlands. In the water expanse between Greenland and Jan Mayen the

island itself, in terms of distance, gets a minimum of some 50 nautical miles, i.e., four times the breadth of the territorial sea and twice the breadth of the contiguous zone. However, as can be seen from Map V in the Danish Reply, where we have the median line and the 200-mile limit, here we can see that this minimum distance of 50 nautical miles only relates to a narrow beam just west of the island, since the breadth of Jan Mayen's zone and shelf areas increases towards the north to a maximum of 200 nautical miles, and towards the south to nearly 100 nautical miles. Thus it is not an accurate description, to put it mildly, to state as Norway does, that the proposed line of delimitation by Denmark is drawn as if Jan Mayen did not exist (CR 93/9, p. 77) and penalizes Jan Mayen (CR 93/9, p. 29).

7. The disputed area

In the late 1970s when Norway and Iceland started negotiations we know - *inter alia* from the debate in the Norwegian Parliament - that Norway sought to obtain recognition of Jan Mayen as an island under international law and not merely as a rock not entitled to broad maritime zones. Norway did in the end obtain that recognition but not at the expense of Iceland's 200-mile economic zone.

Now, some ten years later we hear from the Norwegian Agent, Mr. Tresselt, that Jan Mayen generates a maritime zone of 200 nautical miles *vis-à-vis* the competing coast of Greenland and that the median line, because of the difference in coastal length between the two territories involved, already represents a further reduction of the maritime zone to which Jan Mayen is otherwise entitled (CR 93/5, pp. 41-42). Indeed a bold statement accompanied as it was by a description of that area as the fat banana. May I just remind the Court that the median line is not a Norwegian compromise line. It is Norway's claimed line in these proceedings which leaves a disputed area labelled by Mr. Tresselt the banana split. I must say, the Norwegian ambitions on behalf of Jan Mayen have certainly increased over that short period of time since the negotiations with Iceland and Mr. Tresselt appeared to me to have "gone completely bananas" during that part of his presentation on Friday 15 January. But the Norwegian position, elaborated further by counsel for Norway, Professor Prosper Weil, is neither credible nor tenable under customary international law. Any ex post facto

proportionality test based, inter alia, on the extraordinary difference in coastal length completely destroys the Norwegian approach, which is not of this world.

8. The interests involved

As to the interests involved in the present case, it is the Danish' submission that these interests obviously would have to be seen in relation to the two relevant territories, i.e., Greenland and Jan Mayen, whereas Norway in this respect, with regard to the interests, suddenly treats *mainland Norway* as the other relevant territory. This is done in order to introduce Norway's much invoked substantial interests in the North Atlantic region. But these Norwegian interests, however valuable to Norway, remain a mainland interest not a Jan Mayen interest and cannot therefore be a relevant factor in the present delimitation which takes place in a maritime region between Greenland, Iceland and Jan Mayen to which mainland Norway does not belong. In the *Channel Island* case and the *Gulf of Maine* case cited by Norway, France and the United States were present in the respective regions, so their interests were relevant, whereas the interests of mainland Norway are not. Mr. President, I shall not repeat my arguments in favour of considering the factor of population as a decisive one in the present case. I may simply refer to the CR 93/1, pages 16-17 and 27-28.

9. Proportionality

The intervention by my colleague, Ambassador Bernhard, on 14 January (CR 93/4, pp. 41-52) concerning *proportionality* still stands as a reliable presentation of the law on the matter based upon an analysis of the existing case-law. This analysis has not been contradicted in substance by the Norwegian presentation. It is easily seen that it gives Norway great difficulties to counter these arguments based upon the jurisprudence. So, Norway reminds the Court of its freedom to make a departure from its jurisprudence in this particular case or, at least, as it was said, "to pursue a policy of restraint".

The key word in the Norwegian attempt to move the jurisprudence back to the early 1960s is the process of "distinguishing". No lawyer would deny that it is necessary to distinguish between facts and situations which are different, and that, for example, the ratio of coastal lengths does not

automatically play a role in a delimitation case just because it has influenced certain other decisions. So, the question is whether the particular circumstances of this case indicate that it should be distinguished from the earlier cases in which the concept of proportionality has played a role.

It is understandable that Norway only raises that question but does not explain how or on what basis, the cases can be distinguished. In fact, contrary to what Norway implies, all the circumstances concerning Greenland and Jan Mayen lead to the applicability *a fortiori* of the concept of proportionality.

In other words, the comparison between Greenland and Jan Mayen shows that if the role of proportionality was relevant in other cases it is inevitable in this case.

Counsel for Norway, Professor Weil, discards the role played by proportionality in all the judicial and arbitral decisions on the subject in the same way as he brushes aside the whole jurisprudence about the absence of any intrinsic merits in equidistance. In his recent book on the law of maritime delimitation he labels this jurisprudence, "a hang-over from the past and a survival of ideas no longer valid" (p. 81 in the English edition). In his oral pleading last Thursday he proclaimed that "[l]a délimitation maritime est une opération politique, au sens le plus large du terme" (CR 93/9, p. 28).

This is a comfortable way of dealing with the applicable law, just to discard the cases and proclaim your own ideas as the law in force. For instance, Professor Weil invokes in support of his denial of any role to proportionality, certain passages from paragraph 58 of the *Libya/Malta* Judgment where proportionality as a direct and independent source of seaward projection is properly rejected. But, he conveniently stops before the final part of that paragraph and does not quote the final phrase in which the Court adds that such a rejection,

> "does not however mean that the 'significant difference in lengths of the respective coastlines' is not an element which may be taken into account at a certain stage in the delimitation process" (para. 58 in fine).

What is even more significant is that in his long statement concerning proportionality (CR 93/9, pp. 9-31), Professor Weil does not quote paragraph 66 of the *Libya/Malta* Judgment which is the classical reference for defining the role of proportionality in maritime delimitation:

> "66. The Court has already examined, and dismissed, a number of contentions made

> before it as to relevant circumstances in the present case (paragraphs 48-54 above). A further geographical circumstance on which Libya has insisted is that of the comparative size of Malta and of Libya. So far as 'size' refers to landmass, the Court has already indicated the reasons why it is unable to regard this as relevant (paragraph 49 above); there remains however the very marked difference in the lengths of the relevant coasts of the Parties, and the element of the considerable distance between those coasts referred to by both Parties, and to be examined below. In connection with lengths of coasts, attention should be drawn to an important distinction which appears to be rejected by Malta, between the relevance of coastal lengths as a pertinent circumstance for a delimitation, and use of those lengths in assessing ratios of proportionality. The Court has already examined the role of proportionality in a delimitation process, and has also referred to the operation, employed in the *Tunisia/Libya* case, of assessing the ratios between lengths of coasts and areas of continental shelf attributed on the basis of those coasts. It has been emphasized that this latter operation is to be employed solely as a verification of the equitableness of the result arrived at by other means. It is, however, one thing to employ proportionality calculations to check a result; it is another thing to take note, in the course of the delimitation process, of the existence of a very marked difference in coastal lengths, and to attribute the appropriate significance to that coastal relationship, without seeking to define it in quantitative terms which are only suited to the ex post assessment of relationships of coast to area. The two operations are neither mutually exclusive, nor so closely identified with each other that the one would necessarily render the other supererogatory. Consideration of the comparability or otherwise of the coastal lengths is a part of the process of determining an equitable boundary on the basis of an initial median line; the test of a reasonable degree of proportionality, on the other hand, is one which can be applied to check the equitableness of any line, whatever the method used to arrive at that line." (*I.C.J. Reports 1985*, pp. 48-49, para. 66.)

The conclusion to be drawn from case-law is, we submit, that the *factor of proportionality* as an aspect of equity operates both as a general consideration of the comparability of the relevant coasts prima facie in order to adopt a method appropriate for producing an equitable delimitation line and as a subsequent *ex post facto* proportionality test aimed at checking the equity of the delimitation arrived at.

The factor of proportionality thus leads to the conclusion that the special features of the present case, their comparability or otherwise dictate from the very start a method other than the median line.

10. Negotiating history

As Norway continues to complain about the unilateral Danish Application in the present case allow me, Mr. President, to draw the Court's attention to what the Agent of Norway stated in his intervention on Friday, 15 January:

> "When Denmark filed its unilateral application to this Court in August 1988, the immediate reaction of our Minister for Foreign Affairs, Mr. Stoltenberg, was to state that it is perfectly normal that a dispute between two friendly countries, with a close relationship in so many fields, should be settled by this Court." (CR 93/5, p. 9.)

I believe Mr. President, that the statement by the Norwegian Foreign Minister - who is also Norway's Foreign Minister today - puts to rest all the Norwegian complaints in the written pleadings and even during this very last stage of the oral pleadings about Denmark bringing this case before the Court through a unilateral application instead of a special agreement (CR 95/5, p. 11). In particular, I want to stress that the complaint about a possible *arbitration procedure* suggested by Norway (CR 93/5, p. 9) is quite unjustified, as can be seen from the facts of the case as presented in the Danish Reply (paras. 42-47, and Anns. 60-62).

Nevertheless, the Norwegian Agent, Mr. Haug, in the same intervention wonders why friendly nations like Norway and Denmark would not agree on a negotiated settlement (CR 93/5, p. 9). Well, the answer was, in fact, given by the other Norwegian Agent, Mr. Tresselt, in his intervention the same day. Mr. Tresselt quoted from the Parliamentary debate in Norway on 6 June 1980 concerning the first Norwegian/Iceland Agreement on the fisheries question. He referred to the leading opposition spokesman and later Prime Minister, Mr. Kare Willoch, who was determined not to allow "Danish efforts to squeeze Norway out of any part of the area on the Norwegian side of the median line between Greenland and Jan Mayen" (CR 93/5, p. 50). As if this was not enough, Mr. Willoch elaborated upon this point by stressing:

> "There is, in short, no reason for Norway to recognize anything but the median line as the delimitation line between the economic zones off Jan Mayen and Greenland, and this should be made perfectly clear to Denmark. I was pleased to see in today's papers that the Foreign Minister has sent Denmark a Note about this. Indeed, it was the only course to take.
>
> Norwegian statements to the effect that the line of delimitation between the Jan Mayen zone and Greenland's zone should be established by negotiation should not be misunderstood. Negotiations will in all probability be needed to settle details connected with the delineation of the boundary on the basis of the median line principle. But there must be no negotiation about moving the line so as to enlarge Greenland's zone at the expense of the Jan Mayen zone." (Counter-Memorial, Ann. 11, p. 43.)

Other parliamentarians who, during the debate, commented on the zone *vis-à-vis* Greenland used such terms as, "Norway must stick to the median line principle" (Counter-Memorial, Ann. 11, p. 48, Mr. Per Karstensen), and "where the median line with Greenland is concerned, the Government has no leeway" (Counter-Memorial, Ann. 11, p. 72, Mr. Anders Talleraas).

Against this background, it is not surprising that Norway had very little room to manoeuvre, if

any at all, in the negotiations with Denmark on a delimitation line in the waters between Greenland and Jan Mayen. The median line was "a must" for the Norwegians. That explains eight years of fruitless negotiations.

So, proceedings were instituted in August 1988 before this World Court by Denmark and, just of a sudden, within the next ten months the first *tripartite agreement* between Denmark/Greenland, Iceland and Norway on the capelin stock was successfully concluded in June 1989. What a coincidence! After so many years of fruitless negotiations to secure a tripartite agreement to substitute for the *exclusive* bilateral Icelandic/Norwegian agreement sharing the capelin stock among themselves. Could it be, Mr. President, that the initiation of the present proceedings has been conducive to establishing a joint co-operation on the capelin stock in the waters between Greenland, Iceland and Jan Mayen? I believe it could. I believe that the Court has already been productively at work from the very start of these proceedings. But as I stated in my first intervention on Monday, 11 January, joint management agreements are indeed necessary, irrespective of legal boundaries, *but* such boundaries are conducive to the achievement of stability and finality in the area and thereby establish the basis for further joint co-operation (CR 93/1, pp. 11-12). We are, therefore, looking forward to the settlement of the present dispute, once and for all, by this Court, in a way which will render justice to Greenland.

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Mr. President, I have not touched upon the factor of conduct seen in relation to Denmark and in regard to Norway's own treatment of Bear Island. These aspects of the case, as well as Norway's argument based upon the 1965 bilateral Agreement will now be addressed by my colleague Per Magid.

In the following intervention, Professor Bowett will deal with aspects of general international law and State practice, including the Norwegian/Icelandic Agreements.

Then Mr. Finn Lynge will address the Norwegian presentation from a Greenland perception

and, at the end, I shall read out the final submissions of Denmark.

I thank you, Mr. President.

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

Mr. MAGID: Mr. President, distinguished Members of the Court. I am to address the Norwegian oral pleadings on what Norway has termed as its primary legal argument - the 1965 Agreement - and on the conduct of the Parties. I shall try to be brief.

The 1965 Agreement

Norway's surprising argument concerning the 1965 Agreement has been dealt with in Denmark's written pleadings (Reply, paras. 337-350). In oral argument the issue was addressed by Dr. Jiménez de Aréchaga (CR 93/2, pp. 60-62). What was said by Mr. Haug does not cause us to alter or qualify what we have already pleaded. But I believe the following additional comments should be made:

Norway's essential contention is that, by virtue of Article 1 of the 1965 Agreement (Counter-Memorial, Ann. 46), Denmark accepted that the median line was the boundary for all delimitations between Norway and Denmark, whether in the North Sea or elsewhere.

This interpretation does not accord with the Preamble, which refers to "*the* common boundary between the parts of the continental shelf ...". Norway reads the Agreement as if it said "the *boundaries between all* parts of the continental shelf". For clearly, the boundary in the North Sea and the Jan Mayen/Greenland boundary are different boundaries.

In Mr. Haug's explanation concerning the 1965 Agreement not a word of substance is said with respect to the official press release issued by the Norwegian Foreign Ministry announcing the conclusion of that agreement to the world at large and defining its object and purpose (Danish Annex 96).

The press release does not say anything about Article 1 being a general provision applicable to all future delimitations between the Parties. It states in so many words that the 1965 Agreement was

an *"agreement entered into by Norway concerning the delimitation of the continental shelf in the North Sea"*.

Mr. Haug has provided the Court with a lengthy review of the Agreement of 10 March 1965 between Norway and the United Kingdom and its similarities with the Danish-Norwegian Agreement. The Norwegian point is that the Agreement with the United Kingdom made no delimitation north of the 62nd parallel, and that the extension of the delimitation north of that parallel could be carried out by an amending Protocol. This Protocol of 22 December 1978, in the Norwegian contention,

> "makes the distinction between the generally agreed principle of continental shelf delimitation and the step-by-step specification or drawing of the boundary line eminently clear" (CR 93/6, p. 13).

The conclusion reached by Mr. Haug is unfounded. While the two agreements are to some extent similar, Mr. Haug ignores at least one important difference. It is evident from the Agreement between Norway and the United Kingdom that a further delimitation in accordance with the Agreement was envisaged when the Agreement was concluded. Article 3, paragraph 2, expressly provides that

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

The reason was that a delimitation further north of the 62nd parallel in the same area of the North Sea was expected to take place at a later stage. This delimitation would obviously be just a continuation of the delimitation already made.

By contrast there was no continuing delimitation to take place under the 1965 Agreement between Denmark and Norway. The agreement constituted a full and final delimitation between the Parties in the North Sea. Accordingly, the 1965 Agreement between Denmark and Norway does not contain a provision similar to Article 3, paragraph 2, of the Agreement between the United Kingdom and Norway. The area in the North Sea was delimited and no further delimitation in the area was to take place. On the contrary, any possible further delimitations between the Parties would be unconnected with the 1965 delimitation and likely to be governed by different geographical and other

circumstances. Furthermore, some potential future delimitations - and that includes the one presently before us - could not even be foreseen when the 1965 Agreement was concluded.

It is obvious that in 1965 the two Parties could not have had the area between Greenland and Jan Mayen in mind. Both Parties were asserting shelf rights under the definitions of the shelf found in the 1958 Geneva Convention - out to 200 metres or the limit of exploitability.

By reference to the technology of 1965 this area was not exploitable, so neither Party could then claim even as far as the median line. Why, therefore, should they even think about Greenland/Jan Mayen?

To suggest, as Mr. Haug does, that the Parties in 1965 contemplated all future delimitations, even in areas which only future technology might make exploitable is beyond belief.

The "dynamic" Norwegian interpretation of the 1965 Agreement does not fit with general international experience. Delimitations are "area-specific". They vary in the light of the relevant factors, especially geography, specific to that area. This is why no two judicial or arbitral decisions on delimitation are identical. That is why, in delimitation agreements, all kinds of different solutions and boundaries are to be found. It would be foolhardy in the extreme for a State to agree in advance that one method should apply to all its delimitations, in all circumstances, and ignoring major geographical and other differences. It might, theoretically, be done, but it would need clear, express words of agreement. And such words are not to be found in the 1965 Agreement. That Agreement dealt with the North Sea, and nothing more.

The restricted scope of the 1965 Agreement is aptly demonstrated by the fact that it was necessary in 1979 to enter into a new agreement between the Parties for the delimitation between the Faroe Islands and Norway. The 1979 Agreement (Annex 69 to the Counter-Memorial) does not refer to the 1965 Agreement or treat the median line boundary as already established, and in place. On the contrary, it says that the Parties "having decided to delimit the continental shelf in the area between the Faroe Islands and Norway" have agreed as follows. This clearly refers to a new decision on a delimitation, and a new agreement. The fact that there was no lengthy discussion of the merits of the Faroe Islands, justifying a median line, signifies nothing: their merits were obvious.

The 1979 Agreement is an awkward treaty for Norway. And the clear statements made by the Norwegian Government in its Proposition No. 63 presenting the 1979 Agreement to the *Storting* for ratification makes it difficult for Norway to argue its point (Annex 84 to the Reply). As the Court will recall, in that official communication the Government plainly stated that *"the [1965] Agreement did not cover the delimitation of the continental shelf ... area between Norway and the Faroe Islands"*.

Now, Mr. Haug tries to explain away the terms of this Proposition. To disentangle itself from this otherwise clear and conclusive statement, Norway has engaged in a complicated exercise of semantics. The distinguished Agent for Norway wants us to believe that in its statement, the Norwegian Government used the Norwegian word for delimitation *("avgrensning")*, not in the usual sense of that word, but in the sense of actual demarcation or drawing of boundary lines carried out under Article 2 of the 1965 Agreement (CR 93/6, p. 31).

The Norwegian contention that the reference to delimitation should be taken to refer to demarcation cannot be correct. In maritime delimitations the issue of demarcation simply does not arise. Of course the distinction between delimitation and demarcation is well-known in relation to land boundaries. A line or a map is agreed - the delimitation - followed by a demarcation exercise in which this line is marked by boundary pillars, posts and the like. But at sea that distinction has no place, for demarcation is impracticable. States delimit their maritime boundaries once and for all, by means of geographical co-ordinates. They do not proceed to mark out their maritime territories by buoys.

It is evident that to define a boundary by means of geographical co-ordinates is a delimitation operation, and not a demarcation. We have shown on the basis of Articles 75 and 84 of the Law of the Sea Convention that to define a boundary by means of geographical co-ordinates is a delimitation operation, and not a demarcation (CR 93/2, p. 62). Consequently the Proposition to the Norwegian Parliament concerning the 1979 bilateral Agreement cannot have referred only to a separate so-called demarcation arrangement under Article 2 of the 1965 Agreement.

Proposition No. 63 offers additional solid evidence which proves the fallacy of Norway's

interpretation of the 1965 Agreement. The Proposition states that during the negotiations, Denmark and Norway each tabled a proposal for an agreement on the maritime delimitation issue. Both proposals had been prepared "along the lines of" or to use Norway's translation *"according to the pattern"* of the 1965 Agreement (Annex 84 to the Reply, p. 204). But it is not said that the proposals follow from the 1965 Agreement. In other words, there was no suggestion that the 1979 Agreement was the inevitable consequence of the 1965 Agreement.

The Proposition also contains comments to each of the individual articles of the Agreement. In the comments to Article 1 it is stated that the clause provides that the boundary between the two States' continental shelf in the area between Norway and the Faroe Islands "*like the agreement* of 8 December 1965" shall be the median line. I repeat the words "like the agreement of 8 December 1965". It is "like" not "pursuant to" or some similar wording which might support the Norwegian interpretation.

In fact if one looks at the Norwegian Government's Proposition - its own explanation of the 1979 Agreement - two things are abundantly clear. First the distinction between "delimitations" and "demarcation" is never made. Second there is not one word to suggest - as Norway now does - that the delimitation of the shelf as between Norway and the Faroe Islands had already been made in Article 1 of the 1965 Agreement: and that all the 1979 Agreement was doing was to "demarcate" a pre-existing delimitation. The argument now made by Norway has been manufactured entirely for these proceedings.

The Norwegian Agent made another attempt at evading the 1979 Agreement. Mr. Haug explained that this Agreement covered not only the shelf boundary but also the fisheries and for that reason a new treaty was required, not just an additional protocol to the 1965 instrument.

But this argument is a boomerang. It would also apply to a delimitation between Greenland and Jan Mayen, since the fisheries are the main problem. This confirms that the 1965 Agreement, which was confined to the shelf, by itself is not sufficient to define the single boundary in the geographical area between Greenland and Jan Mayen and that a new agreement would have been necessary, covering both the shelf and the fisheries.

Nor does the Norwegian argument fit with Norway's own conduct in the eight years of negotiations over Jan Mayen. Mr. Haug suggests that Norway never referred to the 1965 Agreement because the negotiations never got down to questions of "detail". But the whole legal basis of Norway's claim to a median line could hardly be a mere detail. And, in fact, the Parties did spend considerable time in explaining their respective legal positions. The assumption must be that it never occurred to Norway, then, to argue that a median line boundary for Jan Mayen had been agreed in 1965.

In support of the Norwegian interpretation of the 1965 Agreement, Mr. Haug has finally referred to an answer given on 19 November 1980 by the Danish Minister of Energy (Norwegian Annex 105; CR 93/6, pp. 20-21, 33-34). Norway has quoted from the answer at length but has omitted to put the answer in its proper perspective by explaining or indicating the question to which the answer was given.

The background for the question was a request from the Danish Government to the sole concessionaire of the shelf rights in the Danish part of the North Sea to renegotiate the concession in order to get better terms for the State. Since oil had been found by Norway in the North Sea, in areas which the Member of Parliament asking the question described as areas of the North Sea "that belonged to the Danish continental shelf", the question related solely to the North Sea, and so did the response. There is no basis for using the answer given by the Minister of Energy in support of a median line delimitation between Greenland and Jan Mayen. The Minister was only addressing the North Sea. He was answering a specific question concerning the North Sea and was not giving a statement concerning Denmark's general delimitation policy.

The answer given by the Danish Minister of Energy also addresses the following question from another Member of the Danish Parliament:

> "If Norway was in its right to have the principle of equidistance recognized, can it then be correct that an agreement on Norway's rights in Eastern Greenland was included in the agreement between Norway and Denmark?"

The Danish Minister declined to answer this question stating:

> "I have no comments ... [on the] ... remarks concerning Greenland. I cannot go into

that, and I do not have any background to make any statement about that."

This underlines that the Minister, in his answer, only was dealing with the North Sea. Not Greenland or the area between Greenland and Jan Mayen.

I will now turn to Norway's remarks on the conduct of Denmark.

The Conduct of Denmark

The Norwegian attempt to demonstrate that Denmark, through its conduct, is estopped from claiming more than a median line delimitation between Greenland and Jan Mayen (Haug, CR 93/6, pp. 51-65, 69-74; Brownlie, CR 93/7, pp. 37-40) appeared to be so half-hearted that my comments can be brief.

The use of loaded words may be a matter of taste. The Norwegian Agent has a taste for it. He said that

> "(t)he Danish side *admits* in its Memorial that the Danish Minister had already in August 1979 ventured the opinion that 'Greenland must not be treated less favourably than Iceland in relation to Jan Mayen'" (CR 93/6, p. 34).

And that

> "Denmark has kindly *admitted* that the Norwegian Minister was genuinely surprised when Denmark first presented its idea concerning Jan Mayen" (emphasis added) (CR 93/6, p. 34).

And Mr. Haug goes on describing the Danish Minister's statement as "cast in the framework of a 'most-favoured nation' approach" (CR 93/6, p. 74).

To get matters straight. As early as March 1979 the Danish Minister for Foreign Affairs advised his Norwegian colleague that an equidistance line delimiting the waters between Greenland and Jan Mayen would not be acceptable to Denmark (Memorial, para. 44). There is nothing to warrant the Norwegian suggestion that this was a *"ballon d'essai"*. And Mr. Haug carefully omits to inform the Court that the statement which he claims was cast in the form of a "most-favoured nation" approach also contained the following information which Denmark - using the terminology of Mr. Haug - *admits* was said in August 1979 by the Danish Foreign Minister to his Norwegian colleague:

> "if a median line between Jan Mayen and Iceland became the end result, it could not be taken for granted that the delimitation between Jan Mayen and Greenland could also be determined by application of the median line principle" (Annex 5 to the Memorial, pp. 12-13).

I fail to see how one can describe this as a "most-favoured nation" approach.

Professor Brownlie touched very briefly on the subject of conduct in his intervention (CR 93/7, pp. 37-40). In going through the conduct of Denmark, he stated - much to my surprise - that in my intervention I "did not contradict the picture presented in Norway's written pleadings" (CR 93/7, p. 38). It is correct that March 1979 was the first time Denmark advised Norway that a median line delimitation between Greenland and Jan Mayen would not be acceptable. But to say that I have not contradicted the picture presented in Norway's written pleadings does less than justice to my statement.

Mr. President, would it be convenient to have an intermission now or do you want me to finish? I still have ten minutes to go.

The PRESIDENT: Mr. Magid. I think it would be convenient if you would like to finish and then we will take the break.

Mr. MAGID: Thank you, Mr. President.

The Agreement of 9 November 1984 between Denmark and Sweden

Mr. Haug addressed the delimitation Agreement of 1984 between Denmark and Sweden. It was correctly pointed out that the Danish island of Hesselø in the Kattegat, along with two other islands, was given full effect in the delimitation. (CR 93/6, pp. 46-47.) However, that case offers no real analogy with the present case.

Unlike Jan Mayen, Hesselø is not a barren, uninhabited island lying at a great distance from its mainland. Hesselø is inhabited. Hesselø forms part of the Danish straight baseline system. Thus Hesselø is not an isolated feature.

The effect of Hesselø is furthermore to be viewed in the context of the entire delimitation

between Denmark and Sweden. A median line delimitation was considered equitable between the two States.

Mr. Haug also offers the example of two insignificant island features that were accorded weight in delimitations in the Baltic Sea. However, this was the result of a balanced compromise between the Parties. In effect, a dispute over the weight to be given to the small and isolated Danish island group of Ertholmene was resolved by according in principle equal effect to the uninhabited Swedish rock of Utklippan. This compromise reflects once again on the *weakness* of the claims of small and isolated islands, not on their *strengths* as Norway seems to assume.

Finally, I will address the Norwegian response to our arguments on Norway's conduct in relation to the Spitzbergen Treaty and Bear Island.

Bear Island

In support of the conclusion that the Danish argumentation concerning Bear Island is "weak, to say it at least", Norway has the following three contentions:

1. Svalbard is a part of the Kingdom of Norway.
2. Denmark has not noticed that the main island Svalbard is situated less than 400 nautical miles from the Norwegian mainland.
3. Norway claims full entitlement to Bear Island's fishery protection zone.

First, the notion that Svalbard is a part of Norway. During this litigation Norway has not even commented upon, let alone refuted, the Danish review of the legal and political considerations concerning the maritime delimitations of the areas appertaining to the Svalbard Archipelago, including Bear Island. Considerations which motivated the Norwegian Government and were explained in the Storting. In view of the Spitsbergen Treaty, it is difficult to regard the maritime delimitations between mainland Norway and the maritime areas appertaining to the Svalbard Archipelago as an internal matter. Statements from the Norwegian Government and the debates in the Storting make it evident that Norway regarded the delimitations as an international matter.

Second, Mr. Haug accused us of not having done our homework. It appears that the reason

for this accusation is that we should have overlooked that the distance between the main island of the Svalbard Archipelago - Svalbard - and the Norwegian mainland is less than 400 nautical miles.

I am sure that Mr. Haug has carefully read our written pleadings and the transcript of our oral pleadings and that he has done his homework properly. In doing so, he might have noticed that Denmark actually is well aware of the distance between Svalbard and mainland Norway (Reply, para. 293 and CR 93/3, p. 36). This has had no impact on our view that the delimitation between the Norwegian mainland and Bear Island and other parts of the Svalbard Archipelago is an international delimitation. An international delimitation evidencing Norway's perception of the role of an uninhabited small island in the delimitation *vis-à-vis* a mainland. Moreover, the fact that the boundary is not effected by even Svalbard itself scarcely helps Norway. If mainland Norway claims a full 200-mile zone against not only Bear Island, but Svalbard too, this does not strengthen the Norwegian position in relation to Jan Mayen.

Third, Mr. Haug refers to the Bear Island fishery zone in an attempt to show that Norway's conduct in relation to Bear Island should have no adverse effect for Norway in the present case (CR 93/6, p. 69). Norway contends that, in relation to the fishery zone, Norway has claimed full entitlement for Bear Island. This statement reflects but once again a Norwegian attempt to substitute delimitation with entitlement. There is no argument over whether Bear Island or Jan Mayen are entitled to maritime zones. The argument presently before us relates to a different concept. It relates to the *delimitation vis-à-vis* competing coasts, in that case mainland Norway. It is the Danish contention that islands with the characteristics of Jan Mayen or Bear Island should be given no effect in competing with mainland coasts. And Mr. President, this was indeed the solution chosen by the Norway. Towards the west, where there is no competing claim, the Bear Island zone extends to the full 200 miles. But to the south, towards mainland Norway, the Bear Island zone only extends to the limit of the 200-mile zone of mainland Norway. This is the exact solution advocated by Denmark as regards the delimitation between Jan Mayen and mainland Greenland. The Norwegian intervention in no way refutes the impression that the two situations are fundamentally similar.

This concludes my intervention. Mr. President, distinguished members of the Court, I thank

you for your attention and your patience and may I suggest that after the intermission you call Professor Bowett.

The PRESIDENT: Thank you very much Mr. Magid. We will take our break now and we will try to make it a short one and be back within ten minutes. Thank you.

The Court adjourned from 11.35 to 11.45 a.m.

The PRESIDENT: Professor Bowett.

Mr. BOWETT:

Reply to the Norwegian arguments based on general international law

Mr. President, distinguished members of the Court, it falls to me to reply on behalf of Denmark to the Norwegian arguments based on general international law.

We have heard from Norway an argument conducted with skill - to which I readily pay tribute - and designed to restore equidistance as the operative norm in maritime delimitation. It is an argument which is quite irreconcilable with Norway's own position in concluding the 1980-1981 Agreements with Iceland. If it succeeds in this case, it will set back the evolution of the law of maritime delimitation by 25 years. Let me try to dissect its component parts.

Title and "equal division"

Denmark does not dispute Jan Mayen's title and, in an abstract way, one can speak of equal titles. But Norway would go further. Norway would transpose equality of title into the principle of "equal division" which, for Norway, means equidistance.

The portrayal of the 1969 Judgment by counsel for Norway is highly misleading. The words of paragraph 91 of the Judgment need careful reading and as the Court said,

> "Equity does not necessarily imply equality ... There can never be ... a question of rendering the situation of a State with an extensive coastline similar to that of a State with a restricted coastline." (*I.C.J. Reports 1969*, pp. 50-51, para. 91.)

And the concept of "equal division" used in paragraph 101.C.2 of the Dispositif was not used in reference to the whole area to be delimited, but only to those marginal areas of overlap between natural prolongations that might remain at the completion of the delimitation exercise.

So, Norway's whole premise is flawed. Here, we do not have equal coasts. Therefore, we cannot start from the premise of "equal division", and from the presumption in favour of equidistance. Yet this is precisely what Norway does - treating this as axiomatic, and then going on to show that Jan Mayen does not fit into any of the recognized exceptional situations in which equidistance can be modified or abated.

You will recall that Professor Brownlie confined the modification of equidistance to three situations.

(a) *Where incidental special features exist in a situation of quasi-equality*

Here the argument was essentially that Jan Mayen stood alone, as an independent feature entitled to maritime zones in its own right. It was, therefore, not an "incidental feature" justifying modification of equidistance.

This was, of course, the argument of France last year, in the *St. Pierre et Miquelon* case; and it was rejected by the Arbitral Tribunal - which perhaps accounts for Norway's failure to mention it in this context.

But, of course, the real point is that we are not in a situation of "quasi-equality". So there is no need to start from any presumption that equidistance is the operative rule, and then to ask whether this exception applies. The issue is the premise, not whether the exception applies.

(b) *The general geographical context*

Here, Norway tries to explain away *Libya/Malta*. Norway suggests that equidistance was modified because the relevant area lay within a semi-enclosed sea, with Sicily to the north of Malta. Norway implies that otherwise equidistance would have applied.

Would it really? Would the Court have otherwise ignored the difference in the coastal lengths? I very much doubt it. As I recall, the effect of the Italian coast to the north - the coast of

Sicily - was to curtail the northerly reach of the Libyan claims, to impose a maximum limit to those claims well to the south of the Rift Zone. Without Italy, Libya might have claimed a larger area, more in keeping with the coastal front ratio. And certainly the *St. Pierre et Miquelon* Award does not support Norway's thesis. There was no semi-enclosed sea there, only the wide Atlantic to the east, as with Jan Mayen, and equidistance was certainly not applied.

(c) *Islands "straddling" a median line*

This exception does not arise. Jan Mayen is not on a median line, so we can agree on its irrelevance.

But Norway's conclusion that, if the three "exceptions" do not apply, the median line must apply, is a non sequitur. It simply assumes the basic applicability of the median line. As I have said, we are not in a position of equality or even quasi-equality, so the basic applicability of the median line cannot be presumed.

We then turn to Professor Brownlie's argument on the irrelevance of the lengths of the two coasts.

Lengths of coast: relevant or irrelevant?

Norway suggests that the courts, in treating coastal lengths as relevant, have erred. The suggestion is that this is a confusion with "landmass thinking", and the courts have consistently rejected landmass as a relevant factor.

I confess I do not follow this argument. There is a world of difference between the coastal front, or façade, and the landmass behind it. Title derives from the former, not the latter.

And if, say, one coast is ten times the length of the opposite coast, it seems eminently fair and reasonable that the delimitation of the maritime area between the two coasts should reflect that difference. Otherwise the coasts are not treated equally, for, if the area were literally divided equally, in the result each mile of the shorter coast would attract ten times as much shelf area as each mile of the longer coast. That seems a long way removed from any concept of "equal title". And certainly it has nothing to do with the landmass behind the coasts. Now it may be true that equidistance does not necessarily effect an equal division of areas - that is, not unless the coasts are

exactly equal and exactly parallel. But it is equally true that, where the lengths of opposite coasts differ radically, equidistance will produce a radically *unequal* division.

What is *not* true is the assertion (CR 93/7, p. 52) that "distance and adjacency ... are all expressions of the qualitative idea of equality". In fact, if you take our situation of a small island lying opposite a long coast, the further the distance between them becomes, the greater the divergence between any equality in the ratio of length of coast to maritime area.

The role of proportionality

Norway's treatment of proportionality suffers from the defect that it assumes proportionality has only one role - as an ex post facto test of the equity of the result.

I had tried to point out, citing the *Gulf of Maine* Judgment, that it has another and prior role, namely to assist in the actual delimitation process, by indicating that a particular method may be suitable or unsuitable. And my submission is that, with situations of radical differences in coastal length proportionality may rule out equidistance entirely as a suitable method. However, let us take Norway's discussion of the role of proportionality as an ex post facto test. Let us concede it is a "factor", rather than a "principle" - and in that sense perhaps "auxiliary". What we cannot concede is that it is a factor which becomes "otiose" (CR 93/7, p. 58) or redundant in a situation of opposite coasts.

Norway's reasoning to support this extraordinary proposition has two parts. The first is an ill-concealed attack on the Malta/Libya Judgment. The Court is, in effect, invited to "distinguish" that Judgment. The second is the bald, and bold assertion that "in a situation of opposite coasts ... the concepts of distance and adjacency produce the legal equality of a median line ..." (CR 93/7, p. 58).

Denmark believes that to be untrue. In the Figure 2 which I used in my first intervention we had shown how the median line allocates to a small opposite island areas totally disproportionate to its coastal length, as compared with the long, opposite mainland coast. You cannot disguise that fact by saying this is nevertheless "legal equality". If one mile of island coast attracts several times the maritime area which attaches to one mile of the mainland coast, there is no "equality", legal or

otherwise, about that.

Norway's reasoning is hard to follow. Professor Brownlie says we must start from the principle of distance as the source of title (CR 93/7, p. 60). I had thought that coasts were the basis of title - the "distance-principle" governs the limit or reach of that title, but the basis of title remains the coast - but let us follow the argument further. We come to the so-called "illegal consequences" of comparing coastal lengths and these are apparently three.

First, "opposite coasts involve no problems of cut-off or encroachment" (CR 93/7, p. 60). Why so? What else is Jan Mayen's claim to a median line, except an encroachment into Greenland's 200-mile zone? Did not Iceland insist that the opposite coast of Jan Mayen should not encroach into Iceland's 200-mile zone?

Secondly, "the process of selecting relevant coasts is ... artificial ..." (CR 93/7, p. 60). Again, why so? It may require judgment, but courts have managed that task in most cases.

Thirdly, "the lengths of coasts factor involves giving major consequences to irrelevant circumstances" (CR 93/7, p. 6). The proposition is so heretical that one's curiosity is aroused as to how it can be maintained. It was supported by Figure 10 in the Norwegian dossier, but I find the demonstration totally unconvincing. The Court will recall Figure 10.

If one of the opposite coasts is of equal length - but divided between different States - why does its length become irrelevant? Think of the two broadly equal coasts in the Persian Gulf. Does their equal length become irrelevant because on the west side you have not one State but Kuwait, Saudi Arabia, Qatar, Bahrain, the Emirates? I simply do not follow. Nor can I see that it makes any difference if the length consists of a string of islands.

So I have to say that I find the whole argument to demonstrate the inapplicability of comparisons of coastal lengths between opposite coasts totally unpersuasive.

Denmark has no quarrel with the proposition that proportionality is not an independent source of rights. Nor with the view that the selection of the relevant coast requires judgment. But then to argue that the *modus operandi* of relating coasts and area involves landmass thinking (CR 93/7, pp. 66-67) is inexplicable and, in fact, unexplained.

The criticisms of Mr. Thamsborg's demonstration of coasts and relevant area is equally unexplained. It does not suffice to simply use epithets like "flawed" or "confused". What was needed was a demonstration, by Norway, that the selection of coasts and area was wrong. Such a demonstration was wholly lacking. And it does not help to imply that Denmark sees its claim to a 200-mile line as coinciding with the result produced by proportionality (CR 93/7, p. 69). We have made it absolutely clear that any strict application of proportionality - which Denmark does not seek - would produce a line much further east than the 200-mile limit.

This last point has considerable importance. The Court may have detected, in Norway's arguments, a series of hints that, if strict equidistance cannot be achieved, then "modified" equidistance might be acceptable. The difficulty is that one has to find that, in all the circumstances, equidistance does offer a reasonable starting point; and then one has to find some basis, or criterion, for the modification. Normally, proportionality calculations will provide this. But in this case these calculations suggest a line *beyond* the 200-mile limit, and the law precludes that result.

It will not have escaped the Court's attention that Norway's arguments are quite incompatible with Norway's agreement with Iceland. There is, therefore, this important element of conduct which cannot be ignored.

The Difference between Iceland and Greenland

In my first intervention I had put the question: why is it that Greenland should be treated differently from Iceland?

Mr. Per Tresselt was good enough to offer a reply to that question. He saw the 1980, 1981 Agreements with Iceland as "concessions" by Norway: he referred to "the de facto concession of an area of nearly 30,000 square kilometres ... north of the median line" (CR 93/5, p. 49). That we cannot accept. We can be confident this was not Iceland's view, and the Agreements do not use the language of "concessions" at all. We are entitled to regard the Agreements as a recognition by Norway of the legal entitlement of Iceland, to be reflected in an equitable boundary, the 200-mile limit off Iceland.

As to the differences with Greenland, Mr. Per Tresselt saw these as lying in the "history" and

the "politics" of the situations (CR 93/5, p. 46). I have only two things to say about that, Mr. President. First, these are not the differences itemised by the Norwegian Foreign Minister (Counter-Memorial, Ann. II, p. 40), so there is evidently some confusion here. Second, I have never before heard "history" and "politics" advanced as relevant factors in a maritime delimitation. But in fact, when one examines closely what Mr. Per Tresselt says, the difference lies in what he calls the "considerable Icelandic activity in the waters between Iceland and Jan Mayen" (CR 93/5, p. 46), compared to the assumed absence of activity by Greenland in the waters between Greenland and Jan Mayen.

The evidence may be somewhat exaggerated. The Icelandic activity apparently consists of taking driftwood from the shores of Jan Mayen, whaling - although the level of activity is not specified - a herring fishery in times past and capelin fishing. But, as is accepted by all Parties, the capelin fishery is post 1978.

However, it is not so much the lack of evidence of this activity which is disturbing, it is the sheer heresy of the proposition which Norway makes from it. Let me put the proposition bluntly, so that the Court will grasp its true implications. A coastal State may not be entitled to a full 200-mile zone where it has not previously been active in that area.

Can you imagine the reaction to such a proposition at UNCLOS III? By that test, most developing States would have been disentitled to a full 200-mile zone.

I suppose Norway might argue that its proposition applies only in the context of boundary delimitations. So let us try to reformulate the proposition in those terms.

For the purpose of effecting an equitable delimitation between the maritime areas of neighbouring States, the crucial, relevant factor is the extent to which the two States have utilised in the past the resources in the area.

Now there is novelty for you! You can discard all the established criteria of geography, coastal lengths, conduct of the parties, etc. What matters, according to Norway, is evidence of the use - or lack of use - of the resources of the area.

And note that Norway is not arguing "relative economic dependence", which is an argument

parties have made in past cases. For Jan Mayen has no such dependence. Norway is really saying that, because of the lack of evidence of prior use by Greenland in this area, the boundary must be less favourable to Greenland than it would otherwise have been. The audacity of the argument is astonishing. It goes far beyond a demand for "historic rights" in Greenland's waters, based upon Norway's prior fishing practices - a demand which would be untenable in contemporary law. This proposition is even more far-reaching, because its effect is to have the waters treated as Norwegian, simply because of lack of prior use by Greenland. You do not merely preserve historic rights: you change the ownership of the waters because of non-use. You penalize the developing coastal State with no evidence of prior use of its waters.

There is no mystery about the reason for this audacity. As Mr. Per Tresselt stated, since 1978 the Norwegian catch of capelin has been worth US$110 million. Forty per cent of that has come from the disputed zone. With $44 million at stake - and more to come - one can risk a little audacity.

Yet the height of this audacity is reached when we examine the theoretical underpinnings for the Norwegian thesis that equidistance - and only equidistance - offers a principled, juridical approach to delimitation.

Equidistance or chaos?

The central intellectual problem is posed by Professor Weil. He says you cannot start from "equity" - it is too elusive, amorphous, or even meaningless: so you must start from equidistance.

The difficulty about this solution is that you are immediately committed to a methodology, without any prior examination of the merits of the claims. It is a solution which nevertheless works well in many cases, where the merits are equally balanced. But, of course, it is a solution which brings in to the delimitation exercise a whole series of preconceptions, of assumptions that are highly questionable. And these assumptions are most questionable in a situation such as ours, where you have a small island, enjoying radial projection, lying off a long mainland coast.

To demonstrate this, let us go through Professor Weil's thesis, step-by-step.

Step one: you start with the notion of "equality of title": no problem.

Step two: you translate this into equality of reach, the "distance principle". This is this notion

that each coast has equal "generating power" ("puissance génératrice").

Here you run up against some very serious questions, which are virtually ignored by Norway, or regarded as inadmissible because of the presumed consequences of "equal title". First, why is it that if so much importance is attached to equal reach, no importance is attached to equal areas? Why is it that one mile of a small island's coast should project as far seawards as one mile of a long mainland coast, so as to ensure equality: but it is of no relevance that one mile of short, island coast attracts an area many times the area of the long mainland coast? In short, why is it that reach or distance is vital; and area irrelevant?

You can see now what lies behind the attack on proportionality. Proportionality compares areas to coastal lengths, and that is anathema to Norway. At least that is so at this stage.

Step three: you cope with overlapping claims by using equidistance - inevitably, because equidistance produces "equal division".

So, you have in place an equidistance boundary, ignoring all differences in coastal lengths and proportionality, and now, only at this final stage, with an equidistance boundary in place, do you turn to "fine-tuning", as the fourth and final step to introduce such modifications or adjustments to the equidistance boundary as the "relevant factors" require.

But, of course, under the Norwegian thesis this fine-tuning, this adjustment to the median line, is confined to dealing with "incidental features", such as islets, promontories and other "distortions". Proportionality, or disproportionality, is conceded to have a role here, but it is a very minor, marginal role confined to eliminating such "distortions". It cannot, at this stage, call in question the very basis upon which the equidistance line has been put in place.

This is the thesis, advanced by Norway, and so ably argued by my colleagues Ian Brownlie and Prosper Weil.

Of course, it does not match with State practice - it cannot possibly explain the Icelandic/Norway Agreements, for example. And it does not match the case-law: *North Sea, Anglo-French, Tunisia/Libya, Malta/Libya, St. Pierre et Miquelon* and so on. But, to the extent these cases do not fit the thesis, the Court is invited to distinguish them.

But, says Professor Weil, there is no rational alternative. It is either equidistance or equity, which means an unprincipled floundering in a host of subjective evaluations, a sort of juridical chaos.

Mr. President, I believe the choice Professor Weil offers us is not the only choice. The dilemma of principle (equidistance) or chaos (equity) is unreal.

The normal, principled and judicial approach is to start from the claims of the two Parties. Are they well-founded, in the light of all relevant factors - geography, including coastal configurations, lengths, concepts of title, non-encroachment, conduct of the parties, and so on? This is not an unprincipled process. Each factor can be properly evaluated.

At the end of this initial evaluation the Court will have identified the *legitimate* claims which must be reconciled. Equally, an appropriate methodology will begin to emerge, in the light of all the relevant factors. It may be equidistance, it may not.

Finally, with a basic methodology selected, it can be "fine-tuned" and tested by the ex post facto test of proportionality, or even by reference to whether the economic results would be catastrophic. And, if there remains a marginal area of genuine overlap between legitimate claims, this can be divided either equally or in the ratio of the coastal lengths which are the source of title.

Now, my brief summary does less than justice to a complex judicial process. But my main point is that it is not necessary to start from equidistance. And if you do start from equidistance, at least in cases like this with coasts of very different lengths, you build into the delimitation process some presumptions which, as I have shown, are totally unreasonable and unacceptable.

Perhaps I can now turn to State practice.

Professor Brownlie is wrong to assume we are afraid of State practice. What we were afraid of was boring the Court with irrelevant material. Fifteen judicial faces are already a sufficient ordeal: 15 bored judicial faces is something to be avoided.

There is little utility in examples of State practice that simply demonstrate islands having full effect. One can just as easily give a host of examples where islands have been given reduced effect, half-effect, or even no effect. To cite but one, in the Australia/Papua New Guinea Agreement of

1978, the Australian islands lying just south of Papua New Guinea were given no more than a 3-mile territorial sea, enclaved within the waters of Papua New Guinea.

What we should be looking for if we are really to assist the Court, are true analogies to our case - a small isolated island more than 200 miles off a long mainland coast, when the island has a claim quite independently of any metropolitan mainland.

By this test, the illustrations shown to us by Professor Brownlie are disappointing and, I repeat, largely irrelevant. I will, for the record, identify each agreement I refer to by the Figure used in the Norwegian folder, so that the Court can study these at its leisure. I will confine the illustrations on the screen to the more relevant agreements.

The island of Tsushima under the Japan/Korea Agreement of 1974 is clearly not treated in isolation, but as part of the entitlement of Japan as a whole (Fig. No. 11 B). The India/Indonesia Agreement of 1974 (Fig. 11 C) portrays a median line between two comparable coastal fronts. Certainly the Indonesian coastal front is longer than the opposite front of the Nicobars, but not four times as long, as Professor Brownlie's figures suggest. Perhaps he has measured the coast rather than the coastal front? That may explain the difference. We believe the correct coastal front figures are 12 miles for the Nicobars and 20 miles for Sumatra.

The Panama/Colombia Agreement of 1976 (Fig. No. 11 D) I have discussed earlier. The Colombian group of islands, the Intendencia San Andres y Providencia, is quite a large group and cannot be categorised as "very small islands and cays". The Intendencia is a separate administrative unit with a population of 22,000 people. It is not correct to regard the whole group as having full effect. The main island, San Andres, has full effect, but Albuquerque and the South East Cays have only half-effect. The Colombia/Costa Rica Agreement of 1977 (Fig. 11 G) obviously accorded similar weight to this group of islands.

The India/Maldives Agreement of 1976 (Fig. 11 E) shows a median line between two quite comparable groups of islands, the Maldives and the Laccadive Islands, not just the most southerly island in the Laccadive group, the island of Minicoy, which has a sizeable population. And the Maldives were "compensated" in the sense that they were given favoured treatment between Points 1

to 10 of the boundary.

The use of the Netherlands/Venezuelan Agreement of 1978, affecting the Dutch Antilles (Fig. 11 H) in the Norwegian folder is surprising; so surprising that we had not prepared a transparency for it. But the Court is already familiar with the Norwegian illustration. Certainly in the area between the Venezuelan coast and the islands of Aruba, Curaçao and Bonaire there is a median line. Given the long coastal front of the islands, and the narrowness of the intervening waters, that is scarcely surprising. But Norway makes no mention of the seaward variation, where the narrowing "funnel" does not accord full effect to the islands, but in fact reflects the coastal ratio of around 7:3 in favour of Venezuela.

The United States/Mexico Agreement of 1978 (Fig. 11 I) can be set aside. The United States has not ratified this agreement and seems unlikely to do so. And, in any event, the three Mexican islands are not isolated but very much part of the coast of Yucatan. This agreement must also be looked at together with an agreement for the West Coast, and there was a clear balancing of claims off the two coasts.

As regards India/Thailand - the Agreement of 1978 (Fig. 11 J) - I maintain my earlier statement that the Andaman group is not only a large group, but has a coastal front equal to that of the opposite coast of Thailand. The same is true of the delimitation between the Andamans and Myanmar (Agreement of 1986: Fig. 11 N). And Narcondam Island and Barren Island, in the Andamans, were actually discounted in the delimitation, even though Narcondam bears a close comparison with Jan Mayen in so far as the island has no population but only a police post and radio station. The Norwegian discussion of the Venezuela/Dominican Republic Agreement of 1979 (Fig. 11 K) seems mistaken. The median line - in fact two lines - lie between the Dominican Republic and the Venezuelan mainland - not the Dutch Antilles.

As regards the France/Australia Agreement of 1982 (Fig. 11 M), there is certainly no long mainland coast. The Kerguelan Islands have a longer frontage than Heard Island - this is true - but is the difference so great as to destroy the balance between the two? Evidently the parties thought not, particularly since France was compensated in the Coral Sea delimitation.

As regards the series of agreements concluded by Venezuela and affecting Aves Island, since Norway seems to set great store by these we had best deal with them in some detail.

Aves Island lies 300 miles north of Venezuela. Venezuelan sovereignty over the island had been recognized by the United States in 1859, and an arbitral award of 1865, between Venezuela and Holland, also upheld Venezuelan sovereignty. In the 19th century important guano deposits had been exploited on the island - and Venezuela objected to any suggestion that it was a mere rock, with no economic life of its own. More recently, by Decree No. 1069 of 23 August 1972, Venezuela had declared the island to be a wildlife sanctuary.

By an Agreement of 28 March 1978, (Fig. 11 O) the United States agreed to a median line boundary between Aves Island and the island of St. Croix, geographically close to Puerto Rico, some 145 miles to the north of Aves Island. Some three days later, on 31 March 1978, the Netherlands also signed an Agreement with Venezuela (Fig. 11 Q) agreeing a median line between Aves Island and the Dutch islands of Saba and St. Eustatias. On 17 July 1980, France also signed an Agreement with Venezuela, agreeing a line between Aves Island and the French possessions of Guadeloupe and Martinique which gave Aves Island reduced effect (reduced by approximately 11 per cent) (Fig. 11 P).

The question is: do these agreements support in any way Norway's claim that Jan Mayen is entitled to a median line *vis-à-vis* Greenland? The answer must be "No", for a number of reasons.

First, the "opposite" coasts of St. Croix, Saba, Guadeloupe and Martinique were themselves relatively small islands - even though Puerto Rico itself is quite large - so there is no real comparison with Greenland. In fact the balance was between Puerto Rico and mainland Venezuela, not Puerto Rico and Aves Island.

Second, for purely policy reasons, neither the United States nor France wished to challenge the proposition that small islands merited considerable weight in matters of delimitation. For example, France had St. Pierre et Miquelon and its many Pacific islands to think about.

Third, Venezuela attached importance to the security value of Aves Island, and a full maritime zone for it was thought to increase the means of surveillance over shipping approaching the

Venezuelan coast.

Fourth, and most important, the zone attaching to Aves Island forms a coherent whole with the maritime zone attaching to the Venezuelan mainland. There is no "High Seas" between Aves Island and Venezuela. This is quite unlike the relationship between Jan Mayen and Norway.

Fifth, and last. There is evidence that other States in the Caribbean, States members of the Organisation of East Caribbean States (OECS), are not prepared to agree to a median line boundary between Aves Island and other East Caribbean States. (See Lewis and Challenger, "Regional Co-operation and Ocean Development: the OECS Experience" in *Lecture Notes on Coastal and Estranine Studies*, Ed. Gold. A New Law of the Sea for the Caribbean (1988), No. 27, Ch. XI and Freestone, "Maritime Boundaries in the Eastern Caribbean," July 1989, Proceedings of the Coastal Zone Symposium, South Carolina).

There is one final observation on State practice to be made. Professor Brownlie referred to the "global significance" of this case - meaning that the Court's decision would affect future practice, future delimitation agreements.

That may well be. But there is no reason to suppose that Denmark's approach to this particular delimitation, if upheld by the Court, will be any more detrimental to inter-State relations than Norway's solution of strict equidistance. Indeed, the contrary may be the case.

So, in my submission, the Court has no option but to take each case on its merits. There is little point in speculating on how the Court's decision will affect this or that party, in this or that future delimitation.

Mr. President, I fear that I have now produced in the Court the reaction I was anxious to avoid. So I will end now, but not without expressing my thanks to the Court for its patience and forbearance. Could I ask you to call on Mr. Finn Lynge?

The PRESIDENT: Thank you very much Professor Bowett. Mr. Lynge.

Mr. LYNGE:

The Lion's Share

Mr. President, honourable Members of the Court, having listened to Norway's presention of its case, I feel a little puzzled at the exact nature of the attitude behind the words. When the 200-mile zone was globally adopted in the late 1970s, we understood in Greenland that one motivating factor in the community of nations was the desire to secure, for the coastal States and, in particular, the developing nations, the marine resources off their own coasts. The tide had turned, so we were brought to understand, and developing countries could from now on rely on a secure resource access for the benefit of their own economy, on land and at sea. This was, so we saw it, yet another step in the long haul of an overall decolonization process whereby, step-by-step, European control over basic third world resources was being dismantled. Therefore, it would only be a matter of a short while before also we in Greenland would obtain full international acceptance of the fisheries zone to which we were now entitled.

As it has turned out, however, it is not as simple as that. What we see now, to our dismay, is the reluctance of a highly-industrialized European country to let go of a claim which is, after all, of marginal importance to its national economy. We see here, these days, how Norway, for its own benefit, is denying a resource input into what is today, for all practical purposes, a small developing society trying to fend for itself - also economically. There shall be no doubt: the value of the capelin in the disputed area is relatively much more important to Greenland than it can ever be to Norway.

We hear Norway assert that the acceptance of Iceland's 200-mile zone *vis-à-vis* Jan Mayen was politically motivated, and therefore irrelevant to this case. I wonder which political motives govern Norway's attitude in the present case. Iceland is overwhelmingly dependent on fisheries. Norway recognizes that fact. Greenland is even more dependent on fisheries. Norway refuses to make an acknowledgement of that. Norway is trying, these days, to build a common North Atlantic marine resource management policy - together with, among others, Greenland. How in the world can Norway attempt to carve out an area twice the size of Denmark from Greenland's fishery zone, and call it a legal claim?

This approach, to us, has an unpleasant political flavour, however much our Norwegian

friends are trying to gloss it over.

Mr. President, allow me now to table a few corrections to the material put in front of us by Norway.

Professor Brownlie, in his intervention (CR 93/7, p. 19), stated in a slightly different wording what is said in the Norwegian Rejoinder, in paragraph 560 on page 166:

> "A very small proportion of the population of Greenland lives within the Arctic Circle (at the same latitudes as Jan Mayen)."

This is not so. In 1991 figures, 43.5 per cent of the Greenland population live within the Arctic Circle. That is no small proportion.

Professor Brownlie also tries to construe an argument out of what he calls the "population density" (*ibid*.) - something that maybe we had better call sparsity! The comparison he makes is blatantly unfair. If one really wants to calculate the population density of Greenland, the icecap area must be discounted. Anyone knows that the icecap is utterly and completely lifeless and uninhabitable, as opposed to the coastal areas. If then, we compare Jan Mayen to the ice-free area of Greenland, we arrive at the figure of one person per 15 square kilometres in Jan Mayen, as opposed to one person per 7 square kilometres in Greenland. Not that we expect this to make any difference in the maritime delimitation issue for which we are here, but then again, we may as well make sure that every little piece of information tabled is fair and correct.

Norway has been at great pains to emphasize the irrelevance of population. Apparently physical geography is all-important, human geography is irrelevant. The distinction seems to be unreal, for the exploitation of these off-shore resources - whether they be fish or sea-mammals, oil or gas - is for the benefit of *people* - what else?

People are not, of course, irrelevant to Norway. The only difference between the Parties is that Norway seeks to use these resources for the benefit of the population of mainland Norway, or some of them, whereas Denmark seeks to preserve these resources for the benefit of the people of Greenland.

I also believe it is correct to say that the population factor has led the international community to decide that only territories which can sustain human habitation or economic life of its own are

entitled to broad maritime zones. I am referring, of course, to Article 121, paragraph 3, of the 1982 United Nations Convention on the Law of the Sea. *A fortiori* the population factor must have a bearing upon a delimitation situation like the present one.

I also have to say something about Professor Brownlie's many misleading comments about Scoresbysund. The municipality of Scoresbysund does not consist of one (CR 93/7, p. 19), but of three settlements. Scoresbysund is not the poorest of municipalities in Greenland (CR 93/7, p. 20). Kangaatsiaq municipality on the west coast is. Scoresbysund was settled not by government initiative, but by a private group of people (*ibid*.). This was not done for sovereignty reasons, but in order to effect a thinning out of the - at the time - overpopulated Ammassalik district and in order to utilize the abundant wildlife resources of the Scoresbysund fiord system. All this can be ascertained in that same source upon which Norway builds its comments. The possibility of moving people from Ammassalik to Scoresbysund was officially mentioned already in 1910-1911, and local desires of that nature were recorded in 1919. There was no sovereignty debate at the time. The 1925 initiative to actually provide some Ammassalik families with transport to and housing in Scoresbysund was motivated by a wish to help them back to the good hunting grounds from which their forebears had come.

Professor Brownlie further says (*ibid*.) that the Scoresbysund area was unpopulated until 1925. That is not true either. There have been indigenous people in the area for thousands of years. If the Scoresbysund fiord system has been unutilized by the Inuit, it has only been for a short period of a generation or so, around the turn of the century.

To say, as Professor Brownlie does, that "Scoresbysund has an essentially political rather than an economic role" (CR 93/7, p. 20) is completely false. People moved to that place in 1925 because of the abundance of the game. They were hunters on the outlook for a good life. It is true that Scoresbysund is a very isolated spot, and that the money economy is at a low ebb. But the people are attached to their place and would not want to live anywhere else. To say that, "catch activities represent only 5 per cent of the local income" (*ibid*.), as Professor Brownlie states, is also misleading. These activities represent 5 per cent of the monetary income, the point being that this is

a community based upon a subsistence life-style where people live directly off nature's resources, largely without the intervention of cash, as can be verified in that very same source where the information about the 5 per cent is found.

Professor Brownlie also contends (*ibid*.) that recent prospecting for oil has halted a development toward dismantling the entire Scoresbysund community. That, too, is wrong. The question of depopulating Scoresbysund was mentioned informally at a Greenland Council meeting in the beginning of the 1970s. The Greenland Council, at the time, was a Danish Government instituted advisory board for the Danish Minister for Greenland, not to be confused with the popular elected Provincial Council in Greenland itself. Like many other ideas brought up in that forum, this idea was considered obsolete from the outset since by then visions of autonomy had begun to influence the political life. Thus, the idea was halted by the trend towards autonomy, certainly not by the oil prospecting activities of a later stage - some 20 years later - as contended by Professor Brownlie.

Mr. President, for how long shall I go on correcting the sorry homework done by the Respondent State? Quo usque tandem patientiam nostram abutuntur? - as Cicero would say. Let me finish my comments about Professor Brownlie's intervention by my wonderment about how he imagines to himself what he calls "a normal urban development" (CR 93/7, p. 20) on those latitudes. Would it maybe be something like highrise buildings or concrete sidewalks or subways? Normality is a relative thing, Mr. President. That kind of development certainly would not be visualized as very normal by the Scoresbysund people - if, indeed, they are capable of visualizing it at all at the place where they live. I, for my part, have a hard time doing it.

This brings me, finally, to Professor Brownlie's contention that:

> "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." (*ibid*..)

Mr. President, there certainly is a distinction! Very certainly! In some settlements, people live from generation to generation, hunting the seals and whales, hunting the caribou and muskox,

because they want to eat that kind of meat and because they want to clothe themselves in that kind of fur. They are the indigenous inhabitants of that country. They do not want to live anywhere else, because they love their land and they prize that way of life. They are the kind of people who are celebrated by the United Nations in this year of 1993.

In other places of the Arctic, you have individuals from faraway lands, separated from their families, people who eat flown-in canned beef and vegetables, doing their highly-specialized technical job - and a very well paid one at that. They wait out their contractual period comfortably in high-quality centrally-heated buildings with good easy-chairs and wall-to-wall carpets. These men do not risk their lives on the ice-floes in order to provide for their families. In their heart of hearts, they belong somewhere else in the world.

In the Arctic, we need both kinds of habitation. On Jan Mayen, there is only the latter kind. In Greenland, we have both.

At one point, Professor Prosper Weil said (CR 93/8, p. 9) that according to Denmark, Greenland should have everything and Jan Mayen nothing. To illustrate his point, he had an amusing quotation from the fables of La Fontaine (CR 93/8, p. 10). Frankly, Mr. President, as Professsor Weil began expounding the story about the lion who wants its share, I did not understand what he was getting at then. It did not last long, though, before - to my astonishment - I realized that he was referring to Greenland. Greenland as a growling king of beasts, scaring away the weak and inferior Norwegians, in order to take it all. I did not believe my own ears, but this, Mr. President, was the "humorous" allegory utilized.

Well, what is then, in reality, the balance of interests as viewed from Greenland? It has to do with fish. For the information of the Court, we have distributed this morning a picture of the capelin on the background of a ruler with the measurement in centimeters, so that one may get an impression of the shape and the size of this important little fish.

But let us now take a final look at the map. In my first presentation last Tuesday (CR 93/2, pp. 10-11), I used a standard Greenlandic school map of our country, upon which Jan Mayen did not figure. It is the one over here behind. I understand that Professor Highet took offence of that

(CR 93/9, p. 77). There was no offence intended, since the idea at that stage simply was to present the history of Greenland, nothing else. But let me add that on more recent school maps of Greenland the scope is widened so as to include also among others Jan Mayen, as can be seen in the Greenland atlas which has been distributed to the Court at the beginning of these proceedings. At this final point today, and for a different purpose, I will use another map where, of course, Jan Mayen figures. It is based upon the one tabled by Norway as Map no. 5 on Friday 15 January (CR 93/5, p. 52). It was a map that showed the extension of the drift-ice off the East Greenland coast in the month of late April.

At the same time, I also want to make a reference to the Danish Memorial, page 41 - you all know this, this is the map, actually a series of maps, showing the extension of the drift-ice, as it changes from one month to the next, the year round. As we can see in the Danish Memorial the relevant coast is blocked by drift-ice for an approximate 75 per cent of the time. Commercial fishing has been attempted out of Scoresbysund harbour, but has been given up. On an average, if we take the year-round average, the drift ice belt reaches about half way over to Jan Mayen and then it grows, it has the widest extension at the beginning of the year, February, March, April and May; and then it decreases again in the second part of the year. That is the way it keeps changing. Commercial fishing, as I said, has been tried out of Scoresbysund, but has been given up. We can say that as a general rule which is completely unalterable, if we take the median line, or let us say just half-way between Greenland and Jan Mayen, you have the ice to the west and the open water to the east. That is the general rule. And from June, July, August, September, October the open water stretches over here and then it comes back like that. So, what we see is that to the east of what approximates the equidistance line, to the east of the middle, you have the good fishing water. To the west of the middle line you cannot fish. As a general rule.

Mr. President, Denmark has analysed the concept of proportionality in maritime delimitation situations both in general and specifically related to the present dispute. We have so far made no proportionality calculations based on the drift-ice situation. If we now calculate the ice-free waters which will attach to each territory under the respective claims of the two Parties as they appear on

the Norwegian ice-map here, we see that Norway claims about 90 per cent of the good fishing water and leaves to Greenland about 10 per cent. If we take a look at the map - this of course if we stick to this line here which is a Norwegian claim - Norway will get all this, Greenland will get that. If we adhere to the Danish solution which we see here, well, we see that the good fishing waters are divided up in this month of April roughly on a 50:50 ratio.

The severe drift-ice condition is a fact of life at this part of the Greenland coast. It is unalterable. And this is what aggravates the disproportionate effect of the Norwegian claim, even given the fact that the edge of the drift ice lies considerably further to the west in the late summer, the fact remains that the median line solution will give Norway almost a monopoly over the ice-free areas, a veritable lion's share. The median line solution will give Greenland close to nothing, when it comes to fishing.

In contrast, the solution sought under the Danish claim will divide the good fishing waters in an even-handed manner between the two Parties.

These are the facts of the matter.

So, to close this statement, these facts of the matter bring us to the necessity of reshaping the La Fontaine allegory. If there is a lion out there, it is Norway, perched on the rocks of Jan Mayen, having set his mind on, as far as possible, all and every square nautical mile of the good fishing water. But the eyes of that regal beast are met, if you will allow me to reset the scene in this venerable little piece of French literature, by those of a white bear on the ice-floes to the west. There you have a polar bear who has a taste for fish. The lion, mind you, has no intention of renouncing what he considers *his* share, namely: as much as possible of the open water stretch. But faced with the bear, the unlionly solution is imposed upon him: court proceedings and adjudication.

And so, here we are. Greenland is asking for a plain and simple 200-nautical-mile limit for the purpose of securing a part of the good fishing water that is found between Jan Mayen and Greenland. This is a matter of Greenland placing its trust in the equity of the United Nations system, and of this Court in particular.

Greenland has a right to this resource.

Mr. President, honourable Members of the Court, thank you for your attention.

The PRESIDENT: Thank you very much Mr. Lynge. Mr. Lehmann.

Mr. LEHMANN:

Finishing statement

Mr. President, distinguished Members of the Court. It is my task to conclude the Danish arguments and in accordance with Article 60, paragraph 2, of the Rules of Court to read out Denmark's final submissions.

Before doing so I wish to state that the questions addressed to the Parties by the distinguished Vice-President of the Court, Judge Oda, will be answered by Denmark, in writing, in due course.

As to the Danish submissions, I can be rather brief in so far as the pleadings of the Respondent State have not convinced Denmark/Greenland that an equitable solution of the present delimitation case could follow a line less than 200 nautical miles measured from the relevant part of Greenland's baseline. Thus we maintain our submissions advanced in the Memorial and refined in the Reply in the light of the revised East Greenland baseline established in 1989 (see paragraph 31 of the Reply).

However, the Respondent State has pressed a procedural point as to what would happen if the Court does not accept Denmark's submissions. It is suggested that there would be nothing further for the Court to do (CR 93/9, pp. 70-71). Well, in the view of the Danish Government the Court would still be fully competent to determine and draw whatever delimitation line in the waters between Greenland and Jan Mayen is in accordance with international law.

In order to avoid any misunderstanding on this procedural point and following the latin proverb: *Fortiter in re suaviter in modo*, we have decided to add a paragraph to our submissions, so as to assist the Court in its task and to take into account the stated national interest of Norway. For Denmark it is the substance which counts.

Denmark's final submissions then read as follows:

May it please the Court:

(1) To adjudge and declare that Greenland is entitled to a full 200-mile fishery zone and continental shelf area *vis-à-vis* the island of Jan Mayen; and consequently

(2) To draw a single line of delimitation of the fishery zone and continental shelf area of Greenland in the waters between Greenland and Jan Mayen at a distance of 200 nautical miles measured from Greenland's baseline, the appropriate part of which is given by straight lines (geodesics) joining the following points in the indicated order:

Point No.	Designation	Latitude N	Longitude W
1	At Cape Russel	69°59'38"3	22°19'18"2
2	At Cape Brewster	70°07'24"0	22°03'55"5
3	At Cape Lister	70°29'33"5	21°32'28"7
4	At Cape Hodgson	70°32'16"7	21°28'51"0
5	Rathbone Island SE	70°39'53"4	21°23'01"4
6	Rathbone Island NE	70°40'14"7	21°23'01"8
7	At Cape Topham	71°19'56"0	21°37'57"0
8	Murray Island	71°32'45"3	21°40'00"0
9	Rock	72°16'09"4	22°00'17"6
10	Franklin Island	72°38'57"2	21°40'04"7
11	Bontekoe Island	73°07'15"9	21°12'09"0
12	Cape Broer Ruys SW	73°28'57"9	20°25'05"9
13	At Cape Broer Ruys	73°30'30"9	20°23'02"6
14	Arundel Island	73°45'49"4	20°03'28"9
15	At Cape Borlase Warren	74°15'58"1	19°22'11"4
16	At Clark Bjerg	74°20'34"3	19°11'04"7
17	Lille Pendulum	74°36'43"9	18°22'33"0
18	At Cape Philip Broke	74°57'15"2	17°31'08"5
19	Cape Pansch S	75°00'34"8	17°22'20"4

20	At Cape Pansch	75°08'37"5	17°19'01"6
21	Cape Børgen SE	75°21'26"1	17°50'52"2

(3) If the Court, for any reason, does not find it possible to draw the line of delimitation requested in paragraph 2, Denmark requests the Court to decide, in accordance with international law and in light of the facts and arguments developed by the Parties, where the line of delimitation shall be drawn between Denmark's and Norway's fisheries zones and continental shelf areas in the waters between Greenland and Jan Mayen, and to draw that line.

*

Mr. President, a copy of this text, duly signed, will be communicated to the Court and transmitted to the Respondent State in accordance with Article 60, paragraph 2, of the Rules of Court.

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

The PRESIDENT: Thank you very much Mr. Lehmann. So that concludes the Danish argument in these proceedings and we shall meet again on Wednesday morning at 10 o'clock to hear the Norwegian Rejoinder. Thank you.

The Court rose at 1.15 p.m.