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Continental Shelf Case (Libyan Arab Jamahiriya/Malta)

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A. Introduction

1 Discussions between Libya and Malta concerning the delimitation of their → *continental shelf* boundary started in 1972. These discussions revealed that both States had different views on the course of that boundary. Malta proposed a delimitation in accordance with the equidistance method. Libya rejected this proposal, referring among others to the option of a delimitation taking into account the lengths of the coasts of both States. By April 1974 the discussions turned away from the issue of delimitation and instead looked for possibilities to settle the dispute. On 23 May 1976 Libya and Malta signed a special agreement providing for the submission to the → *International Court of Justice (ICJ)* of a dispute concerning the delimitation of the continental shelf between the two States. Instruments of ratification were exchanged on 20 March 1982, and the special agreement was notified to the Court on 26 July 1982.

2 The special agreement requested the ICJ to decide what principles and rules of international law were applicable to the delimitation of the continental shelf between Libya and Malta, and to indicate how the parties could apply such principles and rules in the particular case in order to delimit without difficulty their continental shelf boundary by an agreement. The second part of this request was a compromise formula. Libya would have preferred the Court only to indicate the applicable rules and principles, while Malta wished the Court to be asked to establish the delimitation line. The Court considered that it was not debarred by the terms of the special agreement to indicate a line, and noted that both parties had indicated that the consequences of the application of any method initially adopted had to be tested to check the equitableness of the result (→ *Equity in International Law*). The court held that such an operation could not be performed unless that result took the form of at least an approximate line.

B. The Request for Intervention by Italy

3 By an application of 23 October 1983 Italy submitted a request to intervene in the case, invoking Art. 62 'ICJ Statute'. Italy was of the view that the claims of Libya and Malta extended to areas which Italy considered would be part of its continental shelf following a delimitation on the basis of international law. The object of Italy's intervention was to participate in the proceedings so that the Court could give the parties all the requisite guidance to ensure non-encroachment on areas over which Italy had rights.

4 The court emphasized that the Italian application to intervene tended inevitably to produce a situation in which the Court would be seized of a dispute between Libya and Malta on the one hand, and Italy on the other, without the consent of the former States. The court observed that in this way the character of the case before the Court would be transformed. The court held that the application for permission to intervene could not be granted. In view of these findings the Court did not find it necessary to answer the question whether Art. 62 ICJ Statute required the existence of a valid link of jurisdiction between the parties and the State seeking to intervene.

5 In its judgment on the application to intervene the Court noted that it could not wholly put aside the question of the legal interest of Italy and other States of the Mediterranean region. Subsequently, in its judgment on the merits the Court found that it had to confine itself to areas where no claims of third States existed. The Court observed that this limitation did not imply that the principles and rules applicable to the delimitation within the area to which the Court limited its judgment were not applicable outside it, or that the

claims of the parties to expanses of continental shelf outside that area had been found unjustified.

C. The Judgment on the Merits

6 Libya and Malta were in agreement that their dispute was governed by → *customary international law* and that the provisions of the UN Convention on the Law of the Sea to a certain extent formed an expression of this customary law. They did not agree on what provisions of the convention had this status, or to what extent. The Court found the convention, which had been adopted by an overwhelming majority of States, of major importance, and it regarded itself bound to consider in what degree the convention's provisions were binding on the parties as customary international law (→ *Law of the Sea*).

7 The court first turned to the legal basis of the title to continental shelf rights, noting that the questions of entitlement and definition of the continental shelf and its delimitation were not only distinct, but also complementary as '[t]he legal basis of that which is to be delimited, and of entitlement to it, cannot be other than pertinent to that delimitation' (*Case Concerning the Continental Shelf [Libyan Arab Jamahiriya v Malta]* [1985] ICJ Rep 13 para. 27 [*'Continental Shelf Case (Libya v Malta) (1985)'*]). The parties differed with regard to the legal basis of title to the continental shelf. Libya attached primary importance to the concept of natural prolongation, while Malta considered that continental shelf rights were controlled by the concept of distance from the coasts.

8 The court held that, even though it was addressing only the delimitation of the continental shelf, it could not leave out of consideration the rules and principles underlying the → *exclusive economic zone*. State practice showed that the exclusive economic zone, with its entitlement based on distance, had become part of international law. Since the rights over the continental shelf might also be enjoyed by proclaiming an exclusive economic zone, one of the relevant circumstances to be taken into account for the delimitation of the continental shelf was the legally permissible extent of the exclusive economic zone of 200 nautical miles.

9 Following this conclusion, the Court turned to the assertions of the parties concerning entitlement. The court rejected the Libyan argument based on geological and geophysical factors, observing that such factors not only had no role in verifying the legal title of the States concerned within 200 nautical miles, but also had no role in proceeding to a delimitation as between their claims. The court also rejected the Maltese assertion that the new importance of the concept of distance implied that the equidistance method was obligatory, even as a preliminary step towards drawing a delimitation line.

10 Turning to the interpretation of Art. 83 (1) UN Convention on the Law of the Sea (→ *Interpretation in International Law*), the Court recalled that in the *Case Concerning the Continental Shelf (Tunisia v Libyan Arab Jamahiriya) (Merits)* it had noted that this article placed emphasis on the equitable solution which had to be achieved. The UN Convention on the Law of the Sea restricted itself to setting a standard and it was left to the States or the courts to endow it with specific content.

11 The court followed earlier cases in holding that the delimitation of the continental shelf must be effected by the application of equitable principles, taking into account all the relevant circumstances in order to achieve an equitable result. The equitable result to be achieved formed the primary element in this duality of characterization. In defining equity, the Court cited its judgments in the → *North Sea Continental Shelf Cases* and the *Continental Shelf Case (Tunisia v Libya)*, adding that the application of equity should display consistency and a degree of predictability. Consequently, equitable principles have to be elaborated as being both the means to an equitable result in the particular case, 'yet

also having a more general validity and hence expressible in general terms' (*Continental Shelf Case [Libya v Malta] [1985]* para. 45).

12 Next the Court turned to establishing the relevant circumstances of the case. The Court observed that for a court only those circumstances which are pertinent to the institution of the continental shelf as developed within the law, and to the application of equitable principles to its delimitation, will qualify for inclusion.

13 The court referred to its judgment in the *Continental Shelf Case (Tunisia v Libya)* to point out that the coast of the parties formed the starting line to establish the extent of the submarine areas pertaining to each State. The landmass behind the coast was not accepted as a relevant circumstance as it never had been regarded as a basis for entitlement to continental shelf right. The relative economic position of States was also not relevant, as it was totally unrelated to the rules of international law applicable to the delimitation of maritime boundaries. The court observed that the natural resources of the continental shelf under delimitation so far as known or readily ascertainable might well constitute relevant circumstances to be taken into account in the delimitation, but the parties had not furnished the Court with any evidence on this point. As regards → *security* considerations the Court limited itself to pointing out that the delimitation resulting from its judgment would not be so near the coast of either party as to make questions of security a particular consideration in the present case. The principle of equality of States had no particular role to play in the applicable law (→ *States, Sovereign Equality*). The existence of equal entitlement did not imply an equality in the extent of continental shelf.

14 To decide the dispute under consideration the Court found that the choice of the criterion and the method which it was to employ to arrive at a provisional result should be made in a manner consistent with the concepts underlying the attribution of legal title. Although the importance of the distance criterion for entitlement had been established, it was also necessary to assess its impact on the delimitation.

15 The court, which referred to its judgment in the *North Sea Continental Shelf Cases Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands* where it had referred to the equitable nature of equidistance in the case of opposite coasts, noted that in the present case it for the first time dealt with a delimitation exclusively between opposite coasts. This made the tracing of a median line as a provisional step the most judicious manner in which to proceed with a view to eventually achieving an equitable result.

16 As an immediate qualification of the median line the Court found it equitable not to take into consideration one of the base-points advanced by Malta. This concerned the uninhabited islet of Filfla, which was included in the Maltese system of straight → *baselines*. According to the Court this islet had a disproportionate effect on the median line. The court noted that this finding did not involve any opinion on the legality of the Maltese system of straight baselines. However, the base-points used to calculate the continental shelf appertaining to the coastal State were not per se identical to the baselines applied by that State.

17 An important consideration in adjusting the provisional median line was the very marked difference in coastal lengths. The court found that the relevant coasts of Libya and Malta measured respectively 192 and 24 nautical miles. This difference was found to be such to warrant modification of the provisional median line. The → *proportionality* test as proposed by the Court, which was merely a corrective on another method of drawing the

boundary line, was differentiated from making the ratio of coastal lengths as of itself determinative of the extent of continental shelf proper to each party.

18 The court distinguished the taking into account of the difference in coastal lengths in the process of determining an equitable boundary on the basis of the initial median line from the proportionality test to verify the equitableness of a result. These two operations were neither mutually exclusive, nor so closely identified with each other that one would necessarily render the other supererogatory. A clear distinction between the two operations was that taking into account the difference in coastal lengths in the delimitation process did not require the definition in quantitative terms of the ratios between coastal lengths and maritime zones of the parties.

19 To establish the possible extent of the shift of the provisional median line in the direction of Malta the Court took into consideration the wider geographical context, and noted that the delimitation formed part of the delimitation between the southern and northern littoral of the Mediterranean. If account was taken of that setting, Malta appeared as a minor feature of the northern littoral of the Mediterranean. This location should be taken into account as a pertinent circumstance to be weighed in order to arrive at an equitable result. In the hypothetical case that Malta were a part of Italy the median line presumably would not be drawn between the Libyan coast and Sicily, but at least some account would be taken of Malta. This being the case, it could not reasonably be expected that Malta would be in a worse position being an independent State. A second element in deciding how far to shift the provisional median line was the considerable distance between the coasts of the parties, which made it possible to effect a significant shift of the line without it ceasing to have an approximately median location, or approaching so near to one coast as to bring into play other factors, such as security. The court decided that the provisional median line should be shifted 18 minutes of latitude to the north, while the maximum possible shift, taking into consideration the position of Sicily, would have been 24 minutes of latitude.

20 As a final step the Court applied the second type of proportionality test it had earlier referred to in its judgment. The Court found that it was not required to endeavour to achieve a predetermined ratio between the relevant coasts and the respective continental shelf areas. The court limited itself to noting that there certainly was no evident disproportion, ensuring that the proportionality test as an aspect of equity was satisfied.

21 On 10 November 1986 Libya and Malta signed an agreement implementing the judgment of the Court. The continental shelf boundary established by the agreement, which is defined by 11 points, is located between the meridians 13° 50' E and 15° 10' E, the area to which the judgment of the Court had been confined.

D. Conclusion

22 The judgment of the Court on the application of Italy in the *Case Concerning the Continental Shelf (Libyan Arab Jamahiriya v Malta)* of 1984 has been criticized because the criteria applied by the Court would make intervention without the approval of the parties virtually impossible. In two later cases, the → *Land, Island and Maritime Frontier Dispute Case (El Salvador/Honduras: Nicaragua Intervening)* and the → *Land and Maritime Boundary between Cameroon and Nigeria Case (Cameroon v Nigeria)*, respectively before a chamber of the Court and the full Court, intervention was allowed. A further criticism has been directed at the limitation of the geographical scope of decision on the merits to area that was not claimed by Italy. Thus, although the application to intervene was rejected, the application had the effect that Italy sought to achieve through its intervention. It can be noted that courts and tribunals always have been careful not to pronounce themselves on maritime delimitations in areas also claimed by third States (→ *International Courts and*

Tribunals). It has to be assumed that the Court would also have taken into account the Italian claim in the absence of a formal application to intervene.

23 The judgment on the merits in the *Continental Shelf Case (Libya v Malta) (1985)* is considered to have been a first step towards restoring consistency and a degree of predictability to the law of maritime delimitation. The judgment on the merits of the *Continental Shelf Case [Tunisia v Libya]* of 1982, in particular, has received criticism for threatening that consistency and predictability.

24 The *Continental Shelf Case (Libya v Malta) (1985)* completed the downgrading of the significance of the concept of natural prolongation for the delimitation, at least within 200 nautical miles from the baseline. The pronouncements of the Court on the relationship between title and delimitation formed an important aspect of the case. The Court established that only those circumstances are relevant which are pertinent to the institution of the continental shelf as developed within the law, and to the application of equitable principles to its delimitation. Moreover, the selection of the criterion and method employed to arrive at a provisional result should be made in a manner consistent with the concepts underlying entitlement. The Court's application of the law to the facts of the case has been criticized as not being in conformity with the importance it attached to entitlement in its pronouncements on the law. For instance, the consideration of the general geographical context and the coastal lengths are not relevant for continental shelf entitlement, but were used by the Court in the delimitation process.

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