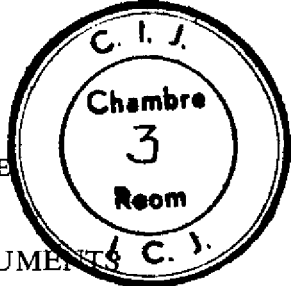


INTERNATIONAL COURT OF JUSTICE



PLEADINGS, ORAL ARGUMENTS, DOCUMENTS

NORTH SEA CONTINENTAL SHELF CASES

(FEDERAL REPUBLIC OF GERMANY/DENMARK;
FEDERAL REPUBLIC OF GERMANY/NETHERLANDS)

VOLUME II

1968

COUR INTERNATIONALE DE JUSTICE

MÉMOIRES, PLAIDOIRIES ET DOCUMENTS

AFFAIRES DU PLATEAU CONTINENTAL DE LA MER DU NORD

(RÉPUBLIQUE FÉDÉRALE D'ALLEMAGNE/DANEMARK;
RÉPUBLIQUE FÉDÉRALE D'ALLEMAGNE/PAYS-BAS)

VOLUME II



The present volume contains the oral arguments, the documents submitted to the Court after the closure of the written proceedings and the correspondence relating to the *North Sea Continental Shelf* cases. The proceedings in these cases, which were entered on the Court's General List on 20 February 1967 under numbers 51 and 52, were joined by an Order of the Court of 26 April 1968 (*North Sea Continental Shelf, Order of 26 April 1968, I.C.J. Reports 1968, p. 3*), and a Judgment was delivered on 20 February 1969 (*North Sea Continental Shelf, Judgment, I.C.J. Reports 1969, p. 3*).

The page references originally appearing in the pleadings and speeches have been altered to correspond with the pagination of the present edition.

The Hague, 1969.

Le présent volume contient les plaidoiries, les documents présentés à la Cour après la fin de la procédure écrite et la correspondance relatifs aux affaires du *Plateau continental de la mer du Nord*. Ces affaires ont été inscrites au rôle général de la Cour sous les n^{os} 51 et 52 le 20 février 1967 et les deux instances ont été jointes par ordonnance de la Cour le 26 avril 1968 (*Plateau continental de la mer du Nord, ordonnance du 26 avril 1968, C.I.J. Recueil 1968, p. 3*). Un arrêt a été rendu le 20 février 1969 (*Plateau continental de la mer du Nord, arrêt, C.I.J. Recueil 1969, p. 3*).

Les renvois d'un mémoire ou d'une plaidoirie à l'autre ont été modifiés pour tenir compte de la pagination de la présente édition.

La Haye, 1969.

CONTENTS — TABLE DES MATIÈRES

PART II. ORAL ARGUMENTS
DEUXIÈME PARTIE. PLAIDOIRIES

Opening of the oral proceedings	5
Argument of Professor Jaenicke	7
General remarks.	7
Fourth submission of the Federal Republic of Germany—not equivalent to a request for a <i>non-liquet</i>	9
Equidistance only applicable if it provides equitable result.	11
Equidistance a method and not a principle of law	13
Federal Republic of Germany not obliged to accept the equidistance <i>line as boundary</i>	14
Equidistance as alleged principle of customary law:	
relevance of reservation to Article 6 of the Geneva Convention.	16
Relevance of State practice since 1958	20
Concept of the continental shelf: the “inherency” argument.	22
Conduct of the Federal Republic of Germany at the Geneva Conference and since 1958	25
Diversion effect of the equidistance line.	27
Does equidistance method produce an equitable apportionment in these cases?	31
Equidistance method not equitable <i>per se</i>	31
Principle of the just and equitable share	32
Geographical criteria for an equitable apportionment of the North Sea continental shelf: the coastal front and sector method	36
Coastal front: definition	40
Denmark and Netherlands the only States bound to reduce the shares claimed by them.	42
The existence of “special circumstances”: Article 6 of the Geneva Convention	43
The combined effect of the two boundaries as a special circumstance	50
If equidistance not applicable, the Parties will have to re-open negotiations on guidelines provided by the Court	52
Argument of Professor Oda	
Customary international law up to 1958	53
State practice since 1958	58
Principle of just and equitable share as one of “the general principles of law recognized by civilized nations”	61
The coastal façade as starting point	62
Questions by Judges Sir Gerald Fitzmaurice and Jessup	63
Statement by Professor Jaenicke.	66
Statement by Mr. Jacobsen	68
Statement by Professor Riphagen	70

Argument of Sir Humphrey Waldock

Contentions of the Parties: the "equidistance-special circumstances" rule	75
Enunciation of three grounds of Danish and Netherlands case.	79
Special Agreements	80
Partial boundary treaties between the Parties	85
Legal attitudes adopted by the Parties prior to the proceedings.	86
First contention: rights of States over the continental shelf adjacent to their coasts; the Geneva Convention and the proximity criterion	92
Second contention: principles and rules embodied in Article 6 of the Geneva Convention an expression of generally accepted law <i>erga omnes</i>	99
Third contention: principles and rules embodied in Article 6 of the Geneva Convention have the character of general customary law	105
Reservations under Article 12 of the Geneva Convention.	107
State practice: reply to Professor Oda	112
Alleged principle of the just and equitable share	117
Interpretation of "special circumstances"	118

Argument of Professor Riphagen

Theoretical possibilities for regulation of rights of States over any given area	120
Actual development of international law	125
Criticism of the Federal Republic's concepts of the "just and equitable share", the "middle of North Sea" and the "coastal front"	128
The concepts of contiguity and equidistance the true basis of the rights of States over the continental shelf adjacent to their coasts	137

Argument of Mr. Jacobsen

"Special circumstances": approach by the Federal Republic of Germany	139
"Special circumstances": general interpretation and application.	143
Are there any "special circumstances" in the cases before the Court?	150
The "combined effect" as an alleged special circumstance; the "coastal front" approach.	156

Request by the Court and questions by Judge Sir Gerald Fitzmaurice.

Reply of Professor Jaenicke

Reply to Judge Jessup's first question	164
Limits of the Court's jurisdiction under the Special Agreements	165
Reply to contention that equidistance is equitable <i>per se</i> and equidistance-delimitation valid <i>erga omnes</i>	167
Equidistance not a rule of customary international law	173
Boundaries as claimed by Denmark and Netherlands not equitable: principle of just and equitable share	177
Criteria for equitable apportionment of North Sea continental shelf: geographical considerations	180
Reply to Judge Jessup's second question	181
The coastal front concept.	186

Reply of Professor Oda

Reply to Sir Gerald Fitzmaurice's question	193
Boundary determination according to the "façade" approach: difference from Professor Jaenicke's approach	193
Reply to Sir Humphrey Waldock's arguments	196

Reply of Professor Jaenicke	
Interpretation and application of "special circumstances" clause in these cases	201
Principle of equitable apportionment the legal basis of the "equidistance-special circumstances" rule	205
Final Submissions of the Federal Republic of Germany.	210
Request by Judge Mosler	212
Rejoinder of Professor Riphagen	
Inconsistency of arguments of Federal Republic of Germany	212
Rejoinder of Mr. Jacobsen	
Development of the Federal Republic's argument as to proper method of delimitation	223
Summary of various boundaries proposed.	236
The bend in the German coastline or "cut-off effect" not a "special circumstance"	239
Statement by Professor Oda.	241
Rejoinder of Sir Humphrey Waldeck	
Answer to Judge Sir Gerald Fitzmaurice's first question: customary international law	242
Answer to Judge Sir Gerald Fitzmaurice's second question: meaning of "adjacency"	246
Answer to Judge Sir Gerald Fitzmaurice's third question: technique of median lines and equidistance lines and results thereof	248
Appeal to equity by Federal Republic of Germany.	255
Questions by Judges Jessup and Petrán	266
Rejoinder of Sir Humphrey Waldeck	
Answer to Judge Jessup's question	266
Appeal to equity by Federal Republic of Germany (<i>continued</i>)	266
The "special circumstances" clause: position of the Federal Republic	267
Effect of two cases being before the Court together.	269
Unprecedented nature of Federal Republic's case	270
Correct interpretation of "equidistance-special circumstances" rule	278
Final Submissions of Denmark	283
Statement by Professor Riphagen	
Reply to Judge Petrán's question	283
Final Submissions of the Netherlands	284
Closing of oral proceedings	285
Reading of the Judgment	286

PART III. DOCUMENTS SUBMITTED TO THE COURT AFTER
THE CLOSURE OF THE WRITTEN PROCEEDINGS

TROISIÈME PARTIE. DOCUMENTS PRÉSENTÉS A LA COUR
APRÈS LA FIN DE LA PROCÉDURE ÉCRITE

SECTION A. DOCUMENTS FILED BY THE PARTIES ON THEIR
OWN INITIATIVE

SECTION A. DOCUMENTS DÉPOSÉS PAR LES PARTIES SUR LEUR
PROPRE INITIATIVE

I. Documents filed by the Agents for the Governments of Denmark and the Netherlands	291
---	-----

Note from the Danish Embassy at Canberra to the Australian Department of External Affairs, dated 1 July 1968	291
Note from the Australian Department of External Affairs to the Royal Danish Embassy in Australia, dated 3 September 1968. . .	293
Extract from the Australian House of Representatives Hansard, 18 October 1967, page 1946	295
Extract from the Australian House of Representatives Hansard, 26 October 1967, page 2379	297
II. Document filed by the Agent for the Government of the Federal Republic of Germany	299
Complications of a border dispute by S. E. Werners, <i>The Hague</i> (from the <i>Netherlands Juristenblad</i> , 1968, No. 9, pp. 224 and 225, 2 March 1968).	299
SECTION B. DOCUMENTS FILED BY THE PARTIES AT THE REQUEST OF THE COURT	
SECTION B. DOCUMENTS DÉPOSÉS PAR LES PARTIES A LA DEMANDE DE LA COUR	
I. Documents filed by the Agent for the Government of Denmark . .	303
1. Excerpts from a confidential report of 27 October 1964 on the Danish-German negotiations in Bonn on 15-16 October 1964 . .	303
2. Excerpts from a confidential note of 17 February 1965 to the Danish Foreign Minister, on the stand of the negotiations with the Federal Republic of Germany.	305
3. Excerpts from a confidential report of 31 March 1965 on the Danish-German negotiations in Copenhagen on 17-18 March 1965.	308
4. Excerpts from a report of 21 March 1966 on the Trilateral Danish-Dutch-German negotiations in The Hague on 28 February 1966. .	314
5. Excerpt from a report dated 11 September 1964 from the Danish Embassy in Bonn to the Danish Ministry of Foreign Affairs	315
6. Excerpts from a summary, dated 11 February 1965, of a meeting held in the Danish Ministry of Foreign Affairs on 11 January 1965 .	316
7. Excerpts from minutes dated 26 March 1965 from a meeting held in the Danish Ministry of Foreign Affairs on 22 March 1965 . . .	318
8. Text of a report dated 16 June 1965 from the Danish Embassy in Bonn to the Danish Ministry of Foreign Affairs	319
II. Documents filed by the Agent for the Government of the Netherlands.	320
Annex A: Verslag van de Nederlands-Duitse besprekingen inzake afbakening van het continentaal plateau, gehouden in Bonn op 3 en 4 maart 1964	322
Annex B: Report on the Netherlands-German discussions regarding the demarcation of the continental shelf, held in Bonn on 3 and 4 March 1964	323
Annex C: Verslag van de vervolgbesprekingen tussen de Nederlandse en Duitse delegaties betreffende de afbakening van het continentaal plateau in de Noordzee, gehouden te 's-Gravenhage op 23 maart 1964	324
Annex D: Report on the continued discussions between the Netherlands and German delegations on the demarcation of the continental shelf in the North Sea, held at The Hague on 23 March 1964 . . .	326

Annex E: Verslag van de besprekingen in Bonn op donderdag 4 juni 1964 tussen delegaties van Nederland en de Bondsrepubliek ter afbakening van het Nederlandse en Duitse deel van het continentaal plat in de Noordzee	328
Annex F: Report on the discussions between the Netherlands and German delegations on the delimitation of the Dutch and German parts of the continental shelf in the North Sea, held in Bonn on Thursday, 4 June 1964	329
Annex G: Gemeinsamer Bericht	332
Annex H: Joint report of the Netherlands-German working group	334
Annex J: Verslag van te Den Haag gehouden besprekingen op 14 juli 1964 tussen delegaties van Nederland en de Bondsrepubliek ter afbakening van het Nederlandse en Duitse deel van het continentaal plat in de Noordzee	337
Annex K: Report on the discussions held in The Hague on 14 July 1964 between the delegations of the Netherlands and the Federal Republic on the demarcation of the Netherlands and the German parts of the continental shelf in the North Sea	338
III. Documents filed by the Agent for the Government of the Federal Republic of Germany	339
1. Note verbale from the Netherlands Embassy in Bonn to the Federal Foreign Office, dated 21 June 1963 [<i>See Annexes 2 and 2A to the Memorial, I, pp. 96-97; Annex 8 to the Netherlands Counter-Memorial, I, p. 378</i>]	
2. Note verbale from the German Federal Foreign Office, dated 26 August 1963 [<i>See Annexes 9 and 9A to the Netherlands Counter-Memorial, I, pp. 379-381</i>]	
3. Note verbale from the Netherlands Embassy in Bonn, dated 30 January 1964	340
4. Note verbale from the German Federal Foreign Office, dated 4 February 1964	341
5. Notes of 19 February 1964	342
6. Summarized minutes, dated 16 March 1964, of the Netherlands-German negotiations on the delimitation of the continental shelf of the North Sea held in Bonn on 3 and 4 March 1964	343
7. Minutes of conclusions of the Netherlands-German negotiations on the continental shelf held in The Hague on 23 March 1964	345
8. Notes of 6 April 1964	346
9. Minutes, dated 4 June 1964, of the conclusions of the Netherlands-German negotiations held in Bonn on 4 June 1964	347
10. Joint report of German-Netherlands working group, dated 4 June 1964 [<i>See Annex H of the Netherlands documentation, pp. 334-336, infra</i>]	348
11. Notes of 8 July 1964	348
12. Joint minutes of German-Netherlands delegations, dated 4 August 1964 [<i>See Annexes 4 and 4A to the Memorial, I, pp. 102-104</i>]	
13. Excerpt of 10 August 1964 of the paper prepared by the Federal Foreign Office for submission to the Cabinet	352
14. Joint press communiqué of 1 December 1964	353
15. Memorandum regarding the Netherlands-Germany treaty of 1 December 1964 concerning the lateral delimitation of the continental shelf of the North Sea near the coast	353
16. Notes of 6 October 1964	354

17. Joint press communiqué of 16 October 1964	354
18. Minutes of the conclusions of the negotiations on the delimitation of the continental shelf in the North Sea between Germany and Denmark, held in Bonn on 15-16 October 1964	355
19. Report by the Plenipotentiary of Land Schleswig-Holstein, in his capacity as member of the German delegation, to his <i>Land</i> (provincial) government, dated 31 March 1965	357
20. Joint press communiqué of 18 March 1965 [<i>See Annexes 8 and 8A to the Memorial, I, pp. 114-115</i>]	359
21. Notes of 1 April 1965	359
22. Protocol to the Danish-German treaty concerning the delimitation of the continental shelf of the North Sea near the coast, dated 9 June 1965 [<i>See Annexes 7 and 7A to the Memorial, I, pp. 112-113</i>]	360
23. Memorandum regarding the Danish-German treaty of 9 June 1965 concerning the delimitation of the continental shelf of the North Sea near the coast	360
24. Aide-mémoire of 8 December 1965 addressed to the Danish Embassy, Bonn	361
25. Notes of 8 March 1966	362

PART IV. CORRESPONDENCE

QUATRIÈME PARTIE. CORRESPONDANCE

Nos. 1-57	367
---------------------	-----

PART II

ORAL ARGUMENTS

PUBLIC HEARINGS

*held at the Peace Palace, The Hague,
from 23 October to 11 November 1968 and on
20 February 1969, the President,
M. Eustamante y Rivero, presiding*

DEUXIÈME PARTIE

PLAIDOIRIES

AUDIENCES PUBLIQUES

*tenues au palais de la Paix, La Haye,
du 23 octobre au 11 novembre 1968 et le
20 février 1969, sous la présidence de
M. Bustamante y Rivero, Président*

MINUTES OF THE HEARINGS
HELD FROM 23 OCTOBER TO 8 NOVEMBER 1968

YEAR 1968

FIRST PUBLIC HEARING (23 X 68, 10 a.m.)

Present: President BUSTAMANTE Y RIVERO; Vice-President KORETSKY; Judges Sir Gerald FITZMAURICE, TANAKA, JESSUP, MORELLI, Sir Muhammad ZAFRULLA KHAN, PADILLA NERVO, FORSTER, GROS, AMMOUN, BENGZON, PETRÉN, LACHS, ONYEAMA; Judges ad hoc MOSLER, SØRENSEN; Registrar AQUARONE.

Also present:

For the Federal Republic of Germany:

Professor G. Jaenicke, Professor of International Law in the University of Frankfurt am Main, *as Agent*;

Professor S. Oda, Professor of International Law in the University of Sendai, *as Counsel*;

Professor U. Scheuner, Professor of International Law in the University of Bonn,

Professor E. Menzel, Professor of International Law in the University of Kiel, Dr. Henry Herrmann, of the Massachusetts Bar associated with Messrs.

Goodwin, Procter & Hoar, Counsellors at Law, Boston,

Dr. H. Blomeyer-Bartenstein, Counsellor 1st class, Ministry of Foreign Affairs,

Dr. H. D. Treviranus, Counsellor, Ministry of Foreign Affairs, *as Advisers*;

Mr. K. Witt, Ministry of Foreign Affairs, *as Expert*.

For the Government of the Kingdom of Denmark:

Mr. Bent Jacobsen, Barrister at the Supreme Court of Denmark, *as Agent and Advocate*;

Sir Humphrey Waldock, C.M.G., O.B.E., Q.C., Professor of International Law in the University of Oxford, *as Counsel and Advocate*;

H.E. Mr. S. Sandager Jeppesen, Ambassador, Ministry of Foreign Affairs,

Mr. E. Krog-Meyer, Head of the Legal Department, Ministry of Foreign Affairs,

Dr. I. Foighel, Professor in the University of Copenhagen,

Mr. E. Lauterpacht, Member of the English Bar and Lecturer in the University of Cambridge,

Mr. M. Thamsborg, Head of Department, Hydrographic Institute, *as Advisers*;

Mr. P. Boeg, Head of Secretariat, Ministry of Foreign Affairs,

Mr. U. Engel, Head of Section, Ministry of Foreign Affairs, *as Secretaries*.

For the Government of the Kingdom of the Netherlands:

Professor W. Riphagen, Legal Adviser to the Ministry of Foreign Affairs, Professor of International Law at the Rotterdam School of Economics, *as Agent*;

Sir Humphrey Waldock, C.M.G., O.B.E., Q.C., Professor of International Law in the University of Oxford, *as Counsel*;

Rear-Admiral W. Langeraar, Chief of the Hydrographic Department, Royal Netherlands Navy,

Mr. G. W. Maas Geesteranus, Assistant Legal Adviser to the Ministry of Foreign Affairs,

Miss F. Y. van der Wal, Assistant Legal Adviser to the Ministry of Foreign Affairs, *as Advisers*.

Mr. H. Rombach, Divisional Head, Hydrographic Department, Royal Netherlands Navy, *as Deputy-Adviser*.

OPENING OF THE ORAL PROCEEDINGS

Le PRÉSIDENT : Il m'incombe tout d'abord de rendre hommage à la mémoire d'un ancien Président de la Cour décédé pendant l'année: Jules Basdevant est mort le 5 janvier 1968. Sa biographie est étroitement liée à l'histoire de la Cour permanente de Justice internationale et de la Cour internationale de Justice. Il contribua efficacement à l'élaboration du Statut de la présente Cour, il en fut élu membre en 1946, il la présida de 1949 à 1952 et il continua de prendre une part importante à ses travaux jusqu'à sa retraite en 1964. Il y apportait une longue expérience acquise dans l'enseignement du droit à Rennes, à Grenoble, à Paris, à La Haye, à Cracovie, et en tant que jurisconsulte du ministère des Affaires étrangères de son pays. Par son savoir juridique, par la profondeur de sa pensée, par son honnêteté comme juge, il était et il restera une éminente figure du droit international.

La Cour se réunit aujourd'hui pour connaître des affaires du *Plateau continental de la mer du Nord* entre le Danemark et la République fédérale d'Allemagne d'une part et les Pays-Bas et la République fédérale d'Allemagne d'autre part.

Ces instances ont été introduites devant la Cour le 20 février 1967, date à laquelle le ministère des Affaires étrangères des Pays-Bas a, comme les Etats intéressés en étaient convenus, déposé auprès de la Cour deux compromis signés à Bonn le 2 février 1967 et entrés en vigueur le même jour, l'un soumettant à la Cour un différend entre le Danemark et la République fédérale d'Allemagne et l'autre un différend entre les Pays-Bas et la République fédérale d'Allemagne.

Le 8 mars 1967, tenant compte d'un accord intervenu entre les Parties et indiqué dans les compromis, le juge faisant fonction de Président de la Cour en vertu de l'article 12 du Règlement a fixé au 21 août 1967 la date d'expiration du délai pour le dépôt du mémoire de la République fédérale d'Allemagne dans chacune des deux affaires et au 20 février 1968 la date d'expiration du délai pour le dépôt des contre-mémoires du Danemark et des Pays-Bas dans les affaires auxquelles ces pays sont respectivement Parties. Mémoires et contre-mémoires ont été déposés dans les délais prescrits. Le 1^{er} mars 1968, après s'être renseigné auprès des Parties, le Président de la Cour a fixé au 31 mai 1968 la date d'expiration du délai pour le dépôt des répliques de la République fédérale d'Allemagne dans chacune des affaires, et au 30 août 1968 la date d'expiration du délai pour le dépôt des dupliques du Danemark et des Pays-Bas. Les répliques ont été déposées dans le délai ainsi fixé.

La Cour ne comptant pas sur le siège de juge de la nationalité des Parties, l'agent de la République fédérale d'Allemagne a fait savoir par lettre du 10 août 1967 que, conformément à l'article 31, paragraphe 3, du Statut, son gouvernement avait désigné M. Hermann Mosler comme juge *ad hoc* pour siéger dans les deux affaires. Le Président de la Cour a fixé au 13 septembre 1967 la date d'expiration du délai dans lequel les Gouvernements danois et néerlandais pourraient soumettre leurs vues à la Cour sur cette désignation. Le Gouvernement danois a fait connaître son accord dans le délai ainsi fixé et le Gouvernement néerlandais n'a pas soulevé d'objection. Par lettres datées respectivement des 9 et 12 février 1968, les agents des Pays-Bas et du Danemark ont fait savoir que leurs gouvernements avaient de leur côté désigné M. Max Sørensen pour siéger comme juge *ad hoc* dans les deux affaires. Le Président de la Cour a fixé

au 11 mars 1968 la date d'expiration du délai dans lequel le Gouvernement de la République fédérale pourrait soumettre ses vues à la Cour sur cette désignation. Ce gouvernement a fait connaître son accord dans le délai prescrit.

Le 26 avril 1968 la Cour a rendu une ordonnance par laquelle elle a constaté que les Gouvernements danois et néerlandais faisaient cause commune, a joint les instances dans les deux affaires et, modifiant les prescriptions des deux ordonnances du 1^{er} mars 1968 relatives au dépôt des duplicques, a fixé au 30 août 1968 le délai dans lequel les deux gouvernements devaient déposer une duplique commune. La duplique commune du Danemark et des Pays-Bas ayant été déposée dans le délai ainsi prescrit, les affaires sont maintenant en état.

La Cour a décidé avec l'assentiment des Parties, conformément à l'article 44, paragraphe 3, de son Règlement, que les pièces de procédure seraient mises à la disposition du public dès l'ouverture de la procédure orale.

J'invite M. Mosler à prononcer la déclaration prévue à l'article 20 du Statut de la Cour.

M. MOSLER: Je déclare solennellement que j'exercerai tous mes devoirs et attributions de juge en tout honneur et dévouement, en pleine et parfaite impartialité et en toute conscience.

Le PRÉSIDENT: J'invite M. Sørensen à prononcer la même déclaration.

M. SØRENSEN: Je déclare solennellement que j'exercerai tous mes devoirs et attributions de juge en tout honneur et dévouement, en pleine et parfaite impartialité et en toute conscience.

Le PRÉSIDENT: Je prends acte des déclarations qui viennent d'être prononcées par MM. Mosler et Sørensen et les déclare installés en leurs fonctions de juges *ad hoc* dans les présentes affaires.

Je constate la présence à l'audience des agents des Parties et de leurs conseils et je déclare la procédure orale ouverte.

ARGUMENT OF PROFESSOR JAENICKE

AGENT FOR THE GOVERNMENT OF THE FEDERAL REPUBLIC OF GERMANY

Professor JAENICKE: Mr. President and Judges of the Court, before commencing the oral arguments I would first like to say how much I appreciate the great privilege of appearing before the International Court of Justice and of presenting to you the case of the Federal Republic of Germany in the North Sea Continental Shelf cases. This is the first time that the Federal Republic of Germany is a party before this Court. Even though the general political situation has up till now prevented the Federal Republic of Germany from becoming a Member of the United Nations or a party to the Statute of the Court, the Federal Republic of Germany has the greatest esteem for the role of the International Court of Justice as the principal judicial organ of the United Nations, as the most competent institution to solve legal differences between States. It was in regard of this high authority which this Court enjoys with law-abiding nations of the world that the Federal Republic of Germany, as well as the Kingdom of Denmark and the Kingdom of the Netherlands, considered it most appropriate to entrust this Court with the settlement of the legal dispute which is now before you.

It is indeed regrettable that the nations of the world are so hesitant to make use of the International Court of Justice for the friendly settlement of their disputes. As a member of the International Law Association I have been participating, together with my learned colleague Professor Scheuner who happens to sit here by my side, in the work of the International Law Association's United Nations Charter Committee, where we had most urgently advocated that States should make more frequent use of the offices of this Court. It is in a way a deep satisfaction to me that my Government has lived up to those ideals and has charged me with practising what we have conceived theoretically.

This case has been submitted to you by special agreement or *compromis* of the Parties concerned. This procedure adopted by the Parties shows quite clearly that they had been inspired by the genuine desire to settle their differences in an amicable manner in accordance with the general obligation of all States to resolve their differences not by political, economic or other forms of pressure but by recourse to the most appropriate methods of the settlement of international disputes, namely by resorting to the judicial process. In this connection I should emphasize that the proceedings between the Parties before this Court will not in the slightest way impair the friendly relations prevailing between the Parties. Both sides, as I believe, are coming before you as friends who have differences, as may well happen between friends too, and who are seeking an impartial judgment on their differing viewpoints.

It is inherent in the judicial process and indeed most useful for the finding of the judgment that the Parties scrutinize the arguments of the other side most searchingly and try to reveal eventual fallacies of such arguments. Such is inherent in the contradictory judicial process. It does not affect the friendly spirit prevailing between the Parties and those who argue the cases of their Governments before you. I am sure that after you have passed your judgment, which will be loyally observed by us, the dispute will not leave any bitter feeling between the Parties.

The substance of the case which the Parties have submitted for your judgment has aroused wide interest. The principles and rules which govern the delimitation of the continental shelf between States which are adjacent to the same continental shelf, are still uncertain. They have up to now not yet been the object of international judicial settlement. Your judgment in this case, although in strict law it concerns only a special boundary question in the North Sea and will have the force of *res judicata* only as between the Parties to the case, will nevertheless by its authority exert a great influence on the settlement of many still unsolved boundary problems all over the world.

The progress of technology and the results of more intensive exploration will make exploitation of the seabed and subsoil before the coast more and more attractive to all nations. Exploitation may proceed to much greater depths than hitherto. This development will make States realize that the delimitation of their continental shelf is no more a question of some square miles within a short distance from their coast, but a question of what share they may expect if some day extensive maritime areas before their coast will be distributed. Thus the principles and rules declared applicable in this case may some day later decide about the distribution of vast maritime areas in the world. Thus your judgment will certainly influence the application as well as the further development of the law of the sea.

If I am now going to present the case of the Federal Republic of Germany, I trust that you will not expect me to reiterate all the facts and all the arguments which we have already advanced in support of our case in the written pleadings. For I would certainly not wish to impose upon you with arguments which you have already read in the Memorial and in the Reply of the Federal Republic of Germany. I believe I would do better to concentrate on basic questions which have to be faced in the case submitted to your judgment, and to reply, if necessary, to some new arguments which have been brought forward by the Kingdom of Denmark and the Kingdom of the Netherlands in their Common Rejoinder. I should however just make it clear that all arguments which have been brought forward in our written pleadings are fully maintained. If they do not appear any more in the present pleading it should not be inferred therefrom that they had been dropped. I have some special reason to stress the point because in some passages of the Common Rejoinder it is intimated that because we had not elaborated any more a point we had made in our Memorial it is supposed to have been dropped. This was not our intention, and if we would like to drop some point we would say so explicitly. Therefore all our arguments and observations contained in our written pleadings remain submitted to your judgment.

By the Special Agreement both Parties request the Court to declare what principles and rules of international law are applicable to the delimitation as between the Parties of the areas of continental shelf in the North Sea which appertain to each of them beyond the partial boundary they have already agreed upon. Although this question submitted to the Court is couched in rather general terms, there can be no doubt that the fundamental issue between the Parties is the question whether or not the equidistance line should constitute the boundary line between their respective continental shelves.

If I am going to refer to the equidistance method in my address, I understand it as the specific method for drawing a maritime boundary line as defined in Article 6 of the Continental Shelf Convention, that is to say, a method for drawing the boundary line in such a way that every point of the boundary is equidistant from the nearest point of each of the coasts of both States or, more precisely, equidistant from the nearest point of the baselines from which the breadth of the territorial sea of each State is measured.

On the question whether or not the equidistance line, as I have just defined it, should constitute the boundary line between the Parties, there has been disagreement between the Parties from the beginning of their negotiations. The Kingdom of Denmark and the Kingdom of the Netherlands insisted that only the equidistance line could be the basis on which the boundary line might be fixed by agreement. The Federal Government on the other hand took the position that the geographical situation in that part of the North Sea required another boundary line, a boundary line that would be more fair to both sides. The submissions of the Parties in their written pleadings before this Court reflect this conflict of views which was already apparent in the previous negotiations. The submissions of the Kingdom of Denmark and the Kingdom of the Netherlands ask the Court to declare that the continental shelf boundaries between the Parties should be determined by application of the principle of equidistance. The submissions of the Federal Republic of Germany, on the other hand, ask the Court to declare that the principle of equidistance is not applicable and that therefore the Parties have to agree on another boundary line, one which would apportion a just and equitable share to each of the Parties.

In their Common Rejoinder, the Kingdom of Denmark and the Kingdom of the Netherlands criticize the submissions of the Federal Republic of Germany, in particular Submission No. 4 brought in our Reply which states that the delimitation of the continental shelf in the North Sea between the Parties is a matter which has to be settled by agreement. Our opponents say that this submission is equivalent to inviting the Court to pronounce a *non-liquet* and to remand the case back to the Parties for another round of negotiations, without sufficient legal criteria by which to determine the boundary. I think that this criticism is not justified; it puts the legal issue before this Court into a wrong perspective, and, what is even more regrettable, it takes a rather narrow view of the role and function of this Court in the present case. Let me try to explain this in a few words.

First: If the Court would follow our submissions, the Court would make a legal decision as to what rules or principles should guide the Parties in reaching an agreement on the boundary line between their continental shelves. By declaring that the equidistance line should not apply between the Parties, the Court would remove the main obstacle that had hitherto prevented the Parties from agreeing on a boundary line, and this would open the way for the Parties to seek an agreement on a boundary line that would be regarded as equitable by both sides. I fail to see how such a ruling by the Court could be characterized as a *non liquet*.

Second point: If the Court is requested to instruct the Parties as to what rules or principles are applicable with respect to the delimitation of the continental shelf between the Parties, this constitutes a request for a positive as well as for a negative ruling as to the applicability of the rules and principles suggested by the Parties. If the Court would look with favour upon our submissions and declare that delimitation of the continental shelf between the Parties should not be accomplished by a unilateral application of the so-called principle of equidistance but rather by an agreement which would allot each Party an equitable share, I then again fail to see how such a ruling of the Court could be characterized as a *non liquet*. A rule which obliges the Parties to seek an agreement, taking into account the specialities of the situation, is as much a rule as a rule which binds the Parties on a certain method of delimitation. If the Court would adjudicate that there is a rule which obliges the Parties to seek an agreement, taking into account the uniqueness of the facts in this particular situation, then

such a rule has the same stature in international law as would have a rule binding the Parties to a particular method of delimitation.

Third point: The Kingdom of Denmark and the Kingdom of the Netherlands seem to take the position that the principles and rules for delimitation of the continental shelf, which the Court might declare applicable between the Parties, must necessarily be of such a character as to allow the drawing of the boundary line automatically, without further agreement between the Parties. However, according to State practice as well as according to Article 6 of the Continental Shelf Convention, if it were applicable between the Parties, agreement between the Parties is the primary rule if two or more States are adjacent to the same continental shelf. If under Article 6 of the Continental Shelf Convention special circumstances exclude the equidistance line as inequitable, then the more preferable boundary line necessarily has to be determined by agreement. Therefore I again fail to see how a ruling by the Court that the boundary should not be determined by unilateral application of the equidistance line, but rather should be settled by agreement between the Parties, could be characterized as a *non liquet*.

Fourth point: We would greatly underestimate the rule of this Court in the present dispute if we would suggest that the only choice available to the Court is either to provide the Parties with a geometrical rule as to how to draw the boundary line or, in the alternative, to pronounce a *non liquet*. The Special Agreement or *Compromis* between the Parties should not be construed so narrowly. What is sought from the Court is guidance for the Parties as to what rules and principles should be taken into account for an agreement on the boundary line. Such guidance might be based on the principle of equidistance, if and in so far as the Court would consider it to be equitable. However, the Court might rule applicable other principles which cannot be projected automatically into a cartographic boundary line, and which therefore necessitate further negotiations and agreements between the Parties.

I respectfully submit that it is well within the competence of the Court to refer the matter back to the Parties for further negotiations, with guidelines as to the principles an agreement should be based on. If the Court would look with favour upon our submission, such a determination would already facilitate substantially the negotiations between the Parties and by ruling the principle of equidistance inapplicable it would instruct the Parties to base their agreement on the principle of the just and equitable share instead. The Court might go further and provide the Parties with additional criteria which in the Court's view determine the equitableness of the share each Party may rightfully claim. We have indicated what in our view would be such criteria, and I shall refer again to these criteria later in my address.

I would like to recall that the Permanent Court of International Justice has been faced with a similar question in the *Free Zones* case, where the parties were in disagreement on a basic legal issue which prevented fruitful negotiations of an agreement. There the Court was asked whether it was within its competence to provide the parties with guidance as to this particular legal point for the resumption of negotiations. In its Order of 19 August 1929, which is published as No. 22 of its publications in the *Series A*, the Court said at page 13:

"Whereas the settlement of international disputes, with a view to which the Court has been established, is simply an alternative to the direct and friendly settlement of international disputes between the Parties, consequently it is for the Court to facilitate so far as is compatible with the Statute such direct and friendly settlement."

I respectfully submit that it is within the competence of this Court to decide any legal issue which has proven to be an obstacle to fruitful negotiations between the Parties.

This concludes my comments on the assertion that our submission might be regarded as not being in conformity with the aim and purpose of the *Compromis* between the Parties.

I now come to the substance of the case and I would like first to say that my address will be divided into two principal parts. In the first part I shall try to show that the Federal Republic of Germany is under no obligation to accept the equidistance method if that method does not lead to an equitable apportionment of the continental shelf between the Parties. And in the second part of my address, I shall try to show that the equidistance boundaries proposed by the Kingdom of Denmark and the Kingdom of the Netherlands do not constitute such an equitable apportionment under the special circumstances of this case.

Now, before taking up the first question, it might be convenient to clarify this issue by stating the basic legal positions of both Parties on this question.

The Kingdom of Denmark and the Kingdom of the Netherlands take the position that they were allowed under international law to rely vis-à-vis another State on the principle of equidistance, and were even allowed to determine their continental shelf boundaries unilaterally by application of the equidistance method until such time as the other State had succeeded in establishing that there were special circumstances justifying an adjustment of the boundary in the latter's favour. This legal position is founded on the legal assumption that a delimitation of the continental shelf by application of the equidistance method is *prima facie* valid under international law.

The Federal Republic of Germany, on the other hand, takes the position that the delimitation of the continental shelf between the States adjacent to the same continental shelf has to be achieved in such a way that each of those States gets a just and equitable share. All methods, including the equidistance method, that have been applied in State practice to determine the boundary between States adjacent to the same continental shelf, should be applied with a view to their purpose of effectuating an equitable apportionment between the States concerned.

In the opinion of the Federal Republic of Germany, the justification for the application of the one or the other method of delimitation depends essentially on the test of whether it effects an equitable apportionment in the concrete case. While it does not deny that the application of the equidistance method may in many cases result in such an equitable apportionment, the Federal Republic of Germany takes the view that there is no *prima facie* validity of the equidistance boundary nor any rule of international law which allows a State to delimit its continental shelf vis-à-vis another State unilaterally by application of the equidistance method unless the other State acquiesces in such a boundary.

As to the delimitation of the continental shelf between the Parties in the North Sea, the legal position of the Federal Republic is the following. First: There is no obligation on the Federal Republic of Germany to accept the equidistance method, if it is not established by agreement, by arbitration or otherwise, that the equidistance line will achieve an equitable apportionment between the Parties.

Second: The equidistance method cannot be applied here because its application would result in boundaries which do not allocate a just and equitable share of the continental shelf to Germany. Third: The Parties have to agree on another boundary line which would apportion a just and equitable share to

both sides, taking into account the extent of their territorial connection with the continental shelf in the North Sea.

If you would care to look at this big map ¹ behind me, this map illustrates the delimitation of the continental shelf between the Parties and their respective shares of the continental shelf, if the equidistance method were to be applied in that part of the North Sea between these Parties. We trust that even the most critical observer would understand that the Federal Republic of Germany could not accept such an apportionment as equitable. Why does the Federal Republic of Germany consider it to be inequitable?

First: The German part would be reduced to a small fraction of the whole North Sea area, not corresponding to the extent of its contact with the North Sea.

Second: The German part would extend only half-way to the centre of the North Sea where the parts of Great Britain, Norway, Denmark and the Netherlands meet.

Third: The square area of the German part compared with the Danish or the Netherlands' part would amount only to roughly 40 per cent. of the area of Denmark's or the Netherlands' part respectively. This, in the view of the Federal Republic of Germany, would be out of proportion to the breadth of their respective coastal front facing the North Sea.

The diagram reproduced in the Common Rejoinder of the Kingdom of Denmark and the Kingdom of the Netherlands, I, page 470, figure A, if you would care to look at this map, illustrates the disproportion between the German part on the one hand and the Danish and the Netherlands' parts on the other even more clearly.

I shall come back later in my address to the criteria for the appreciation of why such an apportionment is inequitable, and I shall then try to show what would be an equitable apportionment of that part of the continental shelf between the Parties under the special circumstances prevailing in that part of the North Sea. For the moment it may be sufficient to say the following.

The Federal Republic does not want to upset the whole scheme of boundaries in the North Sea. It does, however, ask for some adjustment of the boundaries of its continental shelf to the effect that the Federal Republic of Germany would be accorded a sector-like share comparable in shape to those of its neighbours and reaching the centre of the North Sea. I shall show later in my address why such an apportionment of the south-eastern sector of the North Sea between the three Parties to this case is indeed the most equitable solution.

In spite of this rather modest demand, the Kingdom of Denmark and the Kingdom of the Netherlands have repeatedly accused the Federal Republic of Germany of attempting to gain something at the expense of its neighbours. I must emphatically reject that accusation because the questions of where the boundaries will have to be drawn and whether those boundaries which are proposed by the Kingdom of Denmark and the Kingdom of the Netherlands are the right ones, is still *sub judice*.

I think it to be a more correct approach if we would look at this south-eastern sector of the North Sea which comprises the Danish, German and Netherlands' continental shelf as a single whole and then ask ourselves how to divide this sector between the Parties equitably. That in my view is the real issue in this case.

Now I would like to turn to the question which is the principal object of the

¹ Map exhibited in the Court room. For a similar map see the map in the pocket inside the back cover of Volume I (Annex 16 to the Danish Counter-Memorial).

first part of my address, whether there is an obligation on the Federal Republic of Germany to accept the equidistance boundary under customary international law. Before going into more details I would like you to allow me to submit some observations on the function of the equidistance method in the law of the continental shelf.

First I should point out that the equidistance method is now, as it has always been, merely a specific geometrical method for constructing a boundary line, and is not and has never been a rule or principle of law. It was a method occasionally used by States for the determination of their boundaries in lakes, rivers and coastal waters when, and only when, they were in agreement that this method effected an equitable partition of the waters between both territories.

When the experts recommended the equidistance method to the International Law Commission in 1953 and spoke of the "principle" of equidistance, they certainly did not recommend it as a "principle of law". They were experts on the drawing of boundaries, but they were not asked to determine questions of international law. They rather understood it as a principle of geometric construction which might be used for defining the boundary, so I do not think that it could be inferred from the use of the word "principle" in this report of the committee of experts that they regarded it as a "principle of law" as our opponents will make us believe.

Therefore I respectfully submit that the real question is not whether the equidistance method is a rule or principle of law, which it is certainly not, but rather whether there is any rule of law which prescribes under which circumstances the equidistance method determines the boundary. The confusion of method and legal rule, the confusion of the equidistance method as such and of the rule of law which determines the circumstances under which this method may or should be used, has very much tended to obscure the real legal issue.

Secondly, I should recall that in our Memorial we had already demonstrated the merits as well as the inherent weaknesses of the equidistance method in ensuring an equitable apportionment of maritime areas between neighbouring States. We have demonstrated the very cautious and reluctant incorporation of the equidistance method into Article 6, paragraph 2, of the Continental Shelf Convention. I shall not repeat all this here. I should, however, like to direct your attention to the following point. It is evident from the history of the equidistance method that it had been the main concern of the members of the International Law Commission as well as of the delegations at the Geneva Conference in 1948 to formulate a rule that would solve the question of delimitation between States adjacent to the same continental shelf with due regard to equity and justice and to find a formula which would ensure equitable apportionment between the States concerned. I may cite in this connection the Counter-Memorials of the Kingdom of Denmark and the Kingdom of the Netherlands which admit in paragraphs 55 and 49 respectively, that in the case of two States fronting upon the same continental shelf, the areas which are to be considered as appertaining to one or the other are to be delimited on equitable principles, they continue to say that Article 6 of the Geneva Convention was designed to translate this concept into a more concrete formula.

The committee of experts, which in 1953 first proposed the equidistance method as a suitable method for the drawing of maritime boundaries in territorial waters between adjacent States, restricted its recommendation for this method by the following reservation: in a number of cases this may not lead to an equitable solution, which should then be arrived at by negotiations. This clearly indicated that the application of the equidistance method for the determination of a boundary was considered dependent on the proviso that

this method would yield an equitable result, and that a rule prescribing the application of the equidistance method would lose its *raison d'être* if this condition were not fulfilled.

Therefore I respectfully submit that the equidistance method as such cannot be characterized as a rule or principle of law. It is merely a method which may apply as long as it ensures an equitable apportionment of the continental shelf between the States concerned, but has to be discarded in favour of another boundary line if its application proves to be inequitable. For this method to become part of international law a specific rule of law is necessary which prescribes under what circumstances the equidistance method should apply. The place of the equidistance method in maritime law cannot properly be considered without taking into account its instrumental character, namely its function as a mere instrument for an equitable settlement.

I now proceed to the question whether, as the Kingdom of Denmark and the Kingdom of the Netherlands allege, Germany was under an obligation to accept the equidistance line as a boundary of its continental shelf. The Kingdom of Denmark and the Kingdom of the Netherlands have already gone so far as to fix their continental shelf boundaries unilaterally, vis-à-vis the Federal Republic, by application of the equidistance method. They have granted concessions within these boundaries, and they have concluded and ratified boundary treaties which dispose of maritime areas as if the Federal Republic of Germany had never claimed continental shelf areas beyond the equidistance line. The last of these treaties, the Treaty of 31 March 1966, fixing a boundary between the Danish and the Netherlands continental shelf parts, as they consider them to be, has only recently been ratified, although Germany had entered a strong protest against this treaty. All this happened while negotiations were still in progress and even while proceedings before this Court were already pending between the Parties. I trust that the Court will not be impressed by those acts and will determine the principles and rules applicable in this case without regard to the facts created by those acts.

Now the legal grounds which the Kingdom of Denmark and the Kingdom of the Netherlands have advanced as justification for their claim that the Federal Republic of Germany is under an obligation to accept the equidistance line as the boundary between their respective continental shelves, may be summarized under the following categories:

First: they allege that the Federal Republic of Germany is obliged to accept the equidistance method under customary international law.

Second: they allege that the delimitation by application of the equidistance method follows from the concept of the continental shelf and is therefore binding on any State claiming a continental shelf.

Third: they allege that the Federal Republic had recognized the general acceptability of the equidistance method.

I turn to the first argument, the allegation that the Federal Republic were under obligation to accept the equidistance line under customary international law. As to this subject I may refer to the mass of arguments in our Memorial as well as in our Reply, where we have dealt extensively with this question. I feel obliged not to presume upon your patience by repeating all these arguments previously advanced by us against the alleged customary law character of the equidistance method. However, I believe that I must reply to some arguments which have been brought to the forefront in the Common Rejoinder of the Kingdom of Denmark and the Kingdom of the Netherlands.

It may well have been that the criticisms in our Reply against the lack of clarity as to the basis of the obligatory character of the equidistance method

have had an effect. In any event, some clarity has now been forthcoming. The Kingdom of Denmark and the Kingdom of the Netherlands, in their Common Rejoinder, have now more clearly explained why and to what extent they regard the equidistance method as customary international law. They assert, in paragraph 39 of their Rejoinder, that by the work of the International Law Commission, by the adoption of the Continental Shelf Convention at the Geneva Conference in 1958, and by subsequent State practice since the Geneva Conference, a consensus has developed as to the acceptability of the so-called equidistance-special circumstances rule; and that this so-called equidistance-special circumstances rule has now acquired the status of a generally recognized rule of international law. This assertion, as formulated in paragraph 39 of the Common Rejoinder, is significant in several respects. First, the Kingdom of Denmark and the Kingdom of the Netherlands now seem to agree that at least prior to the time of the Geneva Conference of 1958, and even for some time thereafter, there had been no customary law rule requiring the application of the equidistance method.

Secondly, the Kingdom of Denmark and the Kingdom of the Netherlands now admit that it is not the equidistance method as such which allegedly had acquired customary law status, but rather the so-called equidistance-special circumstances rule which has acquired this status. In other words, the alleged rule of customary international law has in its substance now been reduced to the statement that under customary international law the equidistance method applies only if no special circumstances are present. This is a very important step back, a very important retreat from the position originally taken by the Kingdom of Denmark and the Kingdom of the Netherlands in the negotiations and in some passages of their previous written pleadings. They have discarded their previous position that the equidistance method as such, or, as they choose to call it, the principle of equidistance pure and simple, has acquired the status of a generally accepted principle of law.

Thirdly, even if we would accept the so-called equidistance-special circumstances rule as the customary law rule governing the delimitation of the continental shelf, even, I say, if we were to accept that, I nevertheless cannot see how such a rule could possibly enable a State to fix unilaterally its continental shelf boundary by application of this equidistance method as long as the other State objects to such a boundary because, in its view, there are circumstances present which exclude the application of the equidistance line. There must first be agreement among the parties that no such excluding circumstances are present.

Thus, in such a case it must be settled either by agreement or by arbitration whether, under the circumstances of the concrete case, the equidistance method may be applied or not.

My fourth and my last comment on the alleged customary law status of the equidistance-special circumstances rule is this. If the special circumstances clause within that rule would be interpreted in accordance with its purpose, namely with its purpose to allow another boundary line when the equidistance method would lead to an inequitable result, then such an equidistance-special circumstances rule would not in its substance differ materially from the legal position taken by the Federal Republic of Germany. It is the position of the Federal Republic of Germany that under general international law the equidistance method cannot be applied against the State unless it is established by agreement—arbitration or otherwise—that it will achieve a just and equitable apportionment among the States concerned.

The efforts of the Kingdom of Denmark and the Kingdom of the Netherlands

to have the so-called equidistance-special circumstances rule recognized by the Court as a customary law rule binding on the Federal Republic of Germany seem mainly directed to the effect that such a rule could be interpreted as containing a presumption in favour of the equidistance method. This thereby seems to be designed to shift the onus of proof on to the Federal Republic of Germany to show some cogent reason why the equidistance method should not apply under the circumstances of the case. And it may further be designed to provide the Kingdom of Denmark and the Kingdom of the Netherlands with an argument for justifying the unilateral application of the equidistance method in delimiting the continental shelf vis-à-vis Germany.

Article 6, paragraph 2, of the Continental Shelf Convention might possibly be interpreted as creating a presumption in favour of the equidistance method because the authors of this provision thought that the equidistance line would under normal geographical circumstances yield an equitable result. They therefore prescribed the use of the equidistance method if no special circumstances are present justifying another boundary line. However, even if Article 6, paragraph 2, of the Convention could be interpreted as creating such a presumption in favour of the equidistance method, it could then only be invoked against those States which have become parties to the Convention without making a reservation to Article 6 in this respect. But it certainly cannot be invoked against the State which has not subscribed to Article 6, nor could such a presumption be regarded as having acquired the force of customary law binding on all States. And even if the presumption could be invoked in favour of the equidistance line between the parties, this does not yet convey a valid title to the equidistance boundary as long as the application of this method is disputed by the other party and the dispute has not been settled by agreement or arbitration.

The most convincing argument, I feel, against the alleged customary law character of the rule contained in Article 6 (2) of the Continental Shelf Convention is the fact that by Article 12 of the Convention reservations are allowed to all articles of the Convention other than to Articles 1, 2 and 3; and consequently, also to Article 6. Article 12 reads as follows:

“At the time of signature, ratification or accession, any State may make reservations to articles of the Convention other than to articles 1 to 3 inclusive.”

These words contain not only an implied but rather an express authorization to make reservations to all other articles of the Convention than those mentioned, including Article 6. Reservations have in fact been made to Article 6 by France, Iran, Venezuela and Yugoslavia: some of them exclude the application of the equidistance method within certain areas before the coasts of these States. These reservations have been cited in Annex 3 of the Counter-Memorial and I think I need not give any more details here. However, I would like to point to the wording of the French reservation which is particularly significant.

The Court adjourned from 11.20 a.m. to 4.05 p.m.

This morning, I had just began talking on the impact Article 12 of the Convention, allowing reservations to Article 6 of the Convention, has on the formation of customary law on the basis of the Convention. I had referred to the fact that certain reservations in fact had been made with respect to Article 6, excluding the application of the equidistance method within certain areas before the coasts of these States.

I referred specifically to the French reservation, and because it is very significant in its wording, I would like to read it here. The French reservation goes as follows:

"In the absence of a specific agreement, the Government of the French Republic will not accept that any boundary of the continental shelf determined by application of the principle of equidistance shall be invoked against it:

if such boundary is calculated from [other] baselines established after 29 April 1958;

if it extends beyond the 200-metre isobath;

if it lies in areas where, in the Government's opinion, there are 'special circumstances' within the meaning of Article 6, paragraphs 1 and 2, that is to say: the Bay of Biscay, the Bay of Granville, and the sea areas of the Straits of Dover and of the North Sea off the French coast."

You find the wording of the French reservation in Annex 3 of the Counter-Memorials of the Kingdom of the Netherlands and the Kingdom of Denmark, I, pages 377 and 231, respectively.

In view of the authorization for reservations to Article 6, and in view of the reservations that actually have been made, it seems impossible to avoid the conclusion that a provision of the Convention, whose application may be excluded by a State ratifying or acceding to the Convention, cannot be invoked under all circumstances against a State, as the Federal Republic of Germany, which had not yet ratified or acceded to the Convention, under the title of customary international law.

If the equidistance-special circumstances rule, contained in Article 6, really had been promoted to a customary law rule, as the Kingdom of Denmark and the Kingdom of the Netherlands try to assert, it would be rather astonishing that a rule, the application of which might, and in some cases had in fact been excluded under Article 12 of the Convention, had emerged by some mysterious customary law-creating process into a more stringent rule for States which are not parties to the Convention.

In their Common Rejoinder the Kingdom of Denmark and the Kingdom of the Netherlands have devoted much energy to the effort to escape from the force of this reasoning. Their arguments have followed three different lines; each of them needs special comment.

First argument: In their Common Rejoinder, the Kingdom of Denmark and the Kingdom of the Netherlands assert that reservations to Article 6 that exclude the application of the principle of equidistance would be contrary to the objects and purposes of the Convention, and therefore inadmissible. In this connection they point to the fact that such reservations had been declared unacceptable by other parties to the Convention.

This argument, however, cannot be sustained. It cannot be sustained because it is at odds with the established principles of the law of treaties with respect to the admissibility of reservations. If multilateral conventions expressly or impliedly allow reservations to certain articles of the Convention, it follows therefrom: First, that the contracting parties did not consider such reservations as being contrary to the objects and purposes of the Convention. Why should they allow them if they thought otherwise? Second, that such reservations as are authorized by the contracting parties in the treaty need not be accepted by the other parties to the Convention in order to become valid.

May I respectfully refer to the draft articles of the Law of Treaties adopted by the International Law Commission concerning the admissibility of reserva-

tions. Article 16 of the 1966 draft of the International Law Commission states that "A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation if not expressly or impliedly prohibited by the treaty". Here, in our case, reservations to Article 6 of the Continental Shelf Convention are expressly allowed. Accordingly the question whether the reservation might be contrary to the object and purposes of the treaty will be relevant only in those cases where the treaty contains no provision regarding reservations. That follows clearly from Article 16 (c) of the draft "Law of Treaties" where this condition is expressly provided for in case the Convention or treaty is silent on this matter. Since, however, the Continental Shelf Convention determines expressly with respect to which of the articles of the Convention reservations may be made, and as to which of the articles reservations are not allowed, the admissibility of a reservation depends solely on the determination whether it affects articles of the first or the second category, and not on the test whether it might be compatible with the object and purpose of the treaty. As the International Law Commission explains in paragraph 10 of its commentary to Articles 16 and 17 of its 1966 draft—I cite from this commentary:

"... where the treaty itself deals with the question of reservations, the matter is concluded by the terms of the treaty. Reservations expressly or impliedly prohibited by the terms of the treaty are excluded, while those expressly or impliedly authorized are *ipso facto* effective. The problem concerns only the cases where the treaty is silent in regard to reservations, and here the Commission was agreed that the Court's principle of 'compatibility with the object and purpose of the treaty' is one suitable for adoption as a general criterion of the legitimacy of reservations to multi-lateral treaties..."

In short, all arguments concerning the alleged incompatibility of reservations to Article 6 with the object and purpose of the Continental Shelf Treaty are beside the point.

Article 17 (1) of the 1966 draft on the Law of Treaties states that: "A reservation expressly or impliedly authorized by the treaty does not require any subsequent acceptance by the other contracting States unless the treaty so provides." In paragraph 18 of its commentary to Articles 16 and 17 the Commission explains the basis of this provision. It points to the fact that where the consent of the other contracting States to reservations had already been given in the treaty, no further acceptance of the reservation is therefore required. Therefore the validity and the importance of the reservation made by some States to Article 6 of the Continental Shelf Convention is in no way affected or minimized by declarations of other parties to the Convention that they consider such reservations unacceptable. Reservations to Article 6 could only be considered inadmissible if, and to the extent, that they were in their substance not confined to the rule contained in Article 6 but would affect other articles of the Convention to which no reservations are allowed. However, reservations excluding the presumption contained in Article 6 do not affect the substance of Articles 1 to 3 of the Continental Shelf Convention. This brings me to the second argument advanced by our opponents against the admissibility of reservations to Article 6.

The second argument runs like this: In their Common Rejoinder, the Kingdom of Denmark and the Kingdom of the Netherlands assert that reservations to Article 6 which exclude the application of the equidistance line method are inadmissible because a State might thereby claim continental shelf areas which appertained by right already to another coastal State.

The argument is that by Article 1 of the Continental Shelf Convention the coastal State had a legal title to the continental shelf areas adjacent to its coast and, as is still the argument of our opponents, that the areas that are nearer to some point of the coast of that State are adjacent and therefore appertaining to that State. This would mean that Article 1 in combination with Article 2 would already decide what parts of the continental shelf by right appertain to this or one or the other State.

Such a reasoning is wholly inconsistent with the legal concept of the continental shelf and with the system of the Continental Shelf Convention. It is based on the erroneous assumption, which we have already rebutted in our Reply, that Article 1 of the Continental Shelf Convention had, by using the term "adjacent to the coast" in the definition of the continental shelf, impliedly sanctioned some sort of possessory title of the coastal State, valid *ergo omnes* as a criterion for dividing the continental shelf between the adjacent States. Article 1 of the Continental Shelf Convention had no other purpose than to define and to delimit the continental shelf in its juxtaposition as to the territorial sea, on the one hand, and the open sea on the other.

Article 2 recognized the sovereign rights of the coastal States over the continental shelf before their coasts, without using the term "adjacent" in this context, and without attempting to decide conflicting claims of two or more States to the same areas of the continental shelf which each of them might consider to lie before its own coast and to be the natural continuation of its territory.

It was the purpose of Article 6, and of Article 6 alone, to provide a rule for resolving conflicts between neighbour States in delimiting their continental shelves. Article 6 expressly refers to the situation—I cite the words used in Article 6, paragraph 11—"Where the same continental shelf is adjacent to the territories of two or more States . . .", or in paragraph 2: "Where the same continental shelf is adjacent to the territories of two adjacent States, . . ." I think that any attempt to draw from the term "adjacent" used in Article 1 a confirmation of the principle of equidistance must therefore fail, and reservations to Article 6, excluding the application of the equidistance method in certain areas before coasts, could not possibly be incompatible with Articles 1-3 of the Convention.

Now I come to the third argument advanced by our opponents. In their Common Rejoinder the Kingdom of Denmark and the Kingdom of the Netherlands argue that the reservations that had actually been made by some parties to the Continental Shelf Convention did not question the general applicability of the rule contained in Article 6 (2) of the Convention, but that they were only made for the purpose of claiming the special circumstances clause within certain areas before their coast. Even if this interpretation of the reservations, which I cannot share, were correct, I fail to see how this would affect the validity of our argument that the play of the rule contained in Article 6 (2) may, under Article 12, be excluded by a reservation to Article 6. If these reservations have any purpose at all, they can only mean that the States which have made reservations to Article 6 do not want the rule contained in Article 6, namely if it is interpreted as a presumption in favour of the equidistance method, to be invoked against them within the areas covered by their reservation. Why should they make any reservation at all, if their claim that there are special circumstances present in this case could already be satisfied within the realm of Article 6? For example, the reservation made by France with respect to certain areas, and that is why I read the French reservation, before its coast can only mean that France does not want to recognize any presumption for the applica-

tion of the equidistance line within those areas. If I take another reservation, the reservation made by Yugoslavia can only mean that Yugoslavia does not want to recognize any exception to the equidistance line under the title of "special circumstances", as provided for in Article 6 of the Convention.

To sum up, it seems that the reservations made by some States to Article 6 of the Continental Shelf Convention confirm our view that it is necessary that the rule contained in Article 6 must have been formally accepted without reservation by a State before it may be invoked against that State. If we would not accept it, but would follow the reasoning of the Common Rejoinder, we would have to visualize the absurd result that any State, as long as it had not ratified or acceded to the Convention, would be obliged, under customary international law, to accept the presumption for the application of the equidistance line as a general rule, but that such a State, if it ratifies or accedes to the Convention, then may exclude this play of the rule contained in Article 6 by making a reservation to Article 6.

At this point we touch upon the very difficult problem—and I think it is a very important one—of the relationship between law-making conventions and customary international law. If the rule contained in Article 6, the so-called equidistance-special circumstances rule, had ever become a rule of customary international law, it could have become so only in harmony with its place and scope of application within the system of the Continental Shelf Convention. There could not have been any formation of customary international law on the basis of the Convention and by the adoption and application of the Convention if such a rule should be more severe to the States than the conventional role itself. If the rule contained in Article 6 may, under the Convention, be excluded by a reservation of a ratifying State, such a rule could not possibly have become customary international law without regard to the possibility of being wholly or partly excluded by reservations allowed under Article 12 of the Convention. If, say, the Federal Republic of Germany would today ratify the Continental Shelf Convention, and attach a reservation to Article 6 in the sense that it does not recognize the principle of equidistance being applicable in the North Sea, could then the Kingdom of Denmark and the Kingdom of the Netherlands invoke Article 6 against the Federal Republic? The legal situation would then certainly have to be judged as if Article 6 did not exist, because a valid reservation to an article of the Convention excludes the applicability of that article between the Parties. The necessary consequence of such a situation would be that the Parties had no other choice than either to agree on a boundary line which would be considered equitable to both sides, or to submit their case to arbitration, as the Parties have done in this case.

To conclude my comments on the question of reservations, I respectfully submit that all the arguments advanced by the Kingdom of Denmark and by the Kingdom of the Netherlands have not been able to weaken the importance of Article 12 of the Continental Shelf Convention as a solid argument against the alleged customary law status of the equidistance method.

I now come to another point that has been made by the other side: In trying to find more support for the customary law status of the equidistance method they have referred to the practice of States. For this purpose let us refer to the practice of States after the Geneva Conference of 1958. The opposing side has relied heavily on State practice in support of its case, and has cited numerous cases of water boundaries in rivers, lakes, territorial waters, and in the continental shelf.

I suggest it would be superfluous to discuss all these cases where States have partly agreed on the equidistance line and partly on another boundary line.

I feel, however, that it is necessary to comment on the evidential weight of all these cases as to the question whether there is an obligation to regard the equidistance method as the only rule, or at least as a general rule, which applies if no special circumstances are present.

If all those cases cited by the other side are to constitute valid precedents for such a customary law rule, it is not enough to prove that the equidistance line had been thought acceptable by the Parties in that case. There can be no doubt that in quite a number of cases the equidistance line will effect an equitable apportionment between the States concerned. This has never been denied by the Federal Republic of Germany. But it is quite another thing to assert that a State is under an obligation to accept the equidistance line as a boundary, even if that State considers the line to be inequitable, or if that State thinks that there are special circumstances which justify another boundary. If the Kingdom of Denmark and the Kingdom of the Netherlands think that there is such a rule which obliges a State under all circumstances to accept the equidistance line, perhaps special circumstances excepted, do the cases support such a theory? I think they do not.

I will explain this in a few words. First, all cases concerning the delimitation of boundaries in rivers, lakes and coastal waters should be discarded. The determination of boundaries in such waters is not comparable to the drawing of boundaries on the continental shelf. Those boundaries in rivers, lakes and coastal waters do not decide on the allocation of extensive areas with large potential resources to the one or the other State as continental shelf boundaries do. The interests which bear on the delimitation of river, lake and coastal water boundaries, are of quite another character than interests which exist if States wish to extend their jurisdiction over the continental shelf before its coast.

Boundaries of inland or territorial waters determine who is to control the surface waters, including control over fisheries, water pollution and the like. The continental shelf boundaries, on the other hand, do not accord any such rights of control over surface water. They rather determine who has authority to explore and exploit the resources beneath. The main consideration that influences State practice in the acquisition and delimitation of continental shelf areas is the idea of getting a share in the potentialities of the continental shelf that have accrued to the coastal States by the progress of modern technology. No comparable interests are at stake in the determination of inland or coastal water boundaries between neighbouring States. Therefore it is extremely doubtful, if not inadmissible, to contend that the use of median or equidistance lines in such waters could create valid precedents for the delimitation of the continental shelf.

But even if we would accept such cases as precedents, and I now stress this point particularly, all these cases would prove nothing more than that the equidistance method had been used wherever both sides had regarded such delimitations as equitable under the circumstances of the particular case. Nothing else can be proved by such agreements. If it were otherwise one would have to prove that all water boundaries had been determined and fixed on this principle. That is just, I think, the important point. We quite agree that the equidistance method had been used, but only in those cases where both States or the States concerned agreed on using this equidistance line, and naturally they only did so when both sides did consider the application of the equidistance method as equitable to both of them.

Therefore reference to agreements that have from time to time used the equidistance method do not prove at all that there is a general obligation for all

States to accept the equidistance line as the sole or the general rule. We have therefore, I suggest, to concentrate on the few cases where the delimitation of the continental shelf was in issue. Here again we find cases where an agreement had been reached to determine the boundary by application of the equidistance method. There are not many cases, and the Kingdom of Denmark and the Kingdom of the Netherlands in their pleadings had a lot to think about where such boundaries had been agreed on. However there are other cases where the agreed boundary does not follow the equidistance line. I may only refer to the continental shelf boundaries on the west coast of South America, Peru, Ecuador and Chile where the parallel of geographical latitude has been chosen as the *boundary of the continental shelf between those countries*. I have referred to what has been done in this area of the world in the Annex to our Reply under No. 2. The Kingdom of Denmark and the Kingdom of the Netherlands, in their Common Rejoinder, try to minimize the importance of these cases where the equidistance line has not been used by saying that there were highly special reasons that had led these States to agree on another boundary line. That is exactly the point. I think that these States were evidently of the opinion that the equidistance line would not be suitable for determining the limits and boundaries of their continental shelf.

What I think is most important for assessing the evidential value of all such cases is the fact that most boundaries have not yet been determined at all. Does such a practice prove that the equidistance method has been accepted as the only or general rule regardless of what share each State would receive pursuant to this method of delimitation? I do not think that the existing practice proves the recognition of such a rule. When a boundary treaty had been concluded on the basis of the equidistance method, that had been done because both sides did consider this method of delimitation as equitable under the geographical or other circumstances of the case. And even then the parties had not been blind to the effect of the equidistance boundary on the apportionment of continental shelf areas between them. Where it seemed appropriate to them, corrections have been made with a view to giving each party an equitable share.

I shall not comment on each of these cases in more detail. I shall probably do it later in the oral hearing if time permits. For the moment I respectfully submit that the State practice does not support the contention that there is an obligation under customary law to accept the equidistance method as the only or at least as a general rule—special circumstances excepted.

In attempting to put their case on a safer ground than on custom, the Kingdom of Denmark and the Kingdom of the Netherlands maintain, with even more emphasis in their Common Rejoinder than in their previous pleadings, that customary law apart, the delimitation by the equidistance line was in any case inherent in or an integral part of the concept of the continental shelf. Allow me to cite the following passage from paragraph 39 of the Rejoinder; there they say:

“Inherent in this concept [of the continental shelf] is the principle that areas nearer to one State than to any other State are to be presumed to fall within its boundaries rather than within those of a more distant State; and the application of this principle is realized by a delimitation in accordance with the equidistance principle.”

This is a bold theory, which might appear persuasive at the first glance but, I think, will prove to be untenable on closer scrutiny. Let me state the reasons for that. First we must ask what is the real essence of the alleged principle that “areas nearer to one State than to any other State” should fall within the bound-

aries of that State? Does that criterion "nearer to a State" mean nearer to its territory as a whole, or is it sufficient that the area is nearer to one single point of its coast? Both alternatives may produce rather different results. Obviously, in the present context, "nearer to a State" is meant here in the sense of nearer to some point of the coast of that State, even if it were only one single point. Otherwise it would not provide a justification for the application of the equidistance method. If it be so, however, the alleged principle that areas nearer to one State than to any other State should fall within the boundaries of the former turns out to be nothing else than another formulation of the equidistance method. Since the equidistance method determines the boundary in such a way that every point of the boundary is equidistant from the nearest points of each coast, *then by geometrical necessity the whole area within the equidistance boundaries of that State must be nearer to some point of its coast.* Therefore the alleged principle that areas nearer to one State than to any other State should fall under the jurisdiction of that State is no justification, but merely a repetition of the contention that the boundary should be drawn in accordance with the equidistance method. This does not help us to progress further.

After this clarification, the more crucial question must be posed as to what is the legal basis for the assumption that delimitation according to the equidistance method is inherent in the concept of the continental shelf?

The generally recognized right of a State to the natural resources before its coast is based on the fact that the continental shelf is thought to be, rightly or wrongly, a natural continuation of the State's territory into the sea; that is at least the underlying idea we find in the commentary of the International Law Commission to the Continental Shelf Convention. If, however, two or more States are adjacent to the same continental shelf, it may become extremely doubtful whether certain areas of that shelf have to be regarded as the natural continuation of the one or the other State. If you would care to take a look at the map in the Common Rejoinder, I, page 470, or at this big map behind me¹, both maps offer a good example of how difficult it would be to say what area should be regarded as the continuation of the territory of Denmark, of the Federal Republic of Germany or of the Netherlands. I think that the concept of the continental shelf does not imply any guidance to this question.

Speaking of the Kingdom of Denmark and the Kingdom of the Netherlands, however, they assert that the distance from the nearest point on the coast of one or the other State should decide the allocation of such areas. Such a criterion is neither inherent in the concept of the continental shelf nor could it be reconciled with the history and substance of Article 6 of the Continental Shelf Convention. The concept of the continental shelf requires a solid geographical connection of the State's territory with its continental shelf. This connection must be grounded on a firmer basis than on proximity to some projecting point of the coast. If propinquity to the territory of the coastal State has any significance in the delimitation and allocation of continental shelf areas to one or the other State, it must be understood in the much broader sense of a closer connection with the State's territory at large. Therefore, distance from some single point of the coast is not necessarily a criterion for a sufficient natural connection with the State's territory.

In the Memorial, as well as in the Reply, it has, we feel, been amply demonstrated that a boundary drawn according to the equidistance method may, by the influence of projecting parts of the coast of the neighbouring States, be diverted in such a way that parts of the continental shelf which lie before the

¹ See footnote 1 on page 12.

coast, and therefore have justly to be regarded as appertaining to that coast, would thereby be allocated to the neighbour State. May I refer for this purpose to the figures Nos. 3, 16, 17 and 18, in the Memorial, I, pages 40, 72, 73, and to figures Nos. 2 and 3 in the Reply, I, pages 427, 428. These diagrams show that the allocation of continental shelf areas cannot be based on mere distance from the coast.

I think that at a later stage of the oral hearings we might be allowed to show you a very practical example of such a "diversion effect", as I would call it, by a projecting point of the coast. It is the hypothetical case that before the coasts of Haïti and the Dominican Republic an equidistance line would have to be drawn to the north on the method of equidistance.

We shall further be able to show mathematically, by geometric construction, how much the projection of the neighbouring coast diverts the equidistance line to the other side. It is interesting to realize that only one kilometre projection of the neighbouring coast towards the sea, within farther distance from the coast, produces a diversion of the equidistance line over more than 10 to 20 kilometres. I will not dwell here on this point any longer; perhaps we may, with the consent of the other Parties and with the leave of the Court, produce the map of the coast of Haïti and the Dominican Republic, and the geometrical presentation which shows how much the projection of the neighbouring coast diverts the equidistance line to the other side, at one of the next sessions of this Court. (See p. 28, *infra*.)

If delimitation on the basis of equidistance were a logical consequence of the concept of the continental shelf, as the Kingdom of Denmark and the Kingdom of the Netherlands try to assert, one may well wonder why it was necessary to invent and debate rules for the settlement of conflicting claims of States adjacent to the same continental shelf; Article 6 of the Continental Shelf Convention with its carefully balanced formula for solving such conflicts would have been superfluous. If it would follow from the very concept of the continental shelf that each State could rightfully regard all continental shelf areas which are nearer to some point of its coast than to any other coast as already appertaining to its continental shelf, why does Article 6 of the Continental Shelf Convention speak of two or more States adjacent to the same continental shelf, and why does Article 6 provide for other boundaries if special circumstances are present?

The Kingdom of Denmark and the Kingdom of the Netherlands seem to interpret propinquity in the sense that all areas nearer to some point of the coast of a State should fall under the jurisdiction of that State should be a general principle for the allocation of maritime areas. It is on this assumption they regard precedents applying the equidistance method in lakes, rivers and coastal areas as valid precedents for the recognition of such a general principle. It might be conceded that there may be a justification for the recognition of such an idea of propinquity in the territorial sea and in the contiguous zone, because here the distance from the coast is an essential element in the function of the special legal régime covering such waters. The rights of the coastal State over its continental shelf, however, are not based on propinquity but rather on the intensity or extent of the contact of its territory with these submarine areas. Therefore, the allocation of continental shelf areas to one or the other State cannot be determined by principles or criteria pertaining to boundaries in lakes or coastal waters which may have their basis in the idea of propinquity. Precedents which seem to recognize the principle of propinquity in those situations carry no weight in determining the continental shelf boundaries.

To conclude this point, I respectfully submit that the equidistance method

cannot be considered as a principle inherent in the concept of the continental shelf.

The third ground on which the Kingdom of Denmark and the Kingdom of the Netherlands try to base their case is the prior conduct of the Federal Republic of Germany, which is interpreted as having shown that the Federal Republic itself had found the principle of equidistance acceptable. We have already dealt with this imputation in our Reply in detail and I think I need not go to great lengths in stating again the reasons why such an imputation cannot be maintained.

That the Federal Republic of Germany has taken part in the Geneva Conference adopting the Continental Shelf Convention and even finally signed the Convention in no way legally commits the Federal Republic to regard Article 6 (2) as applicable law, especially not in its narrow interpretation as advocated by our opponents.

Secondly, against the Federal Republic there cannot be employed the argument that the Federal Republic first regarded Article 6 (2) as a workable solution of the boundary problem when it signed the Convention without reservations to that Article. I might say in this connection that the Federal Republic would be perfectly right, in ratifying the Convention, to attach such a reservation to Article 6. At the time when the Federal Republic signed the Continental Shelf Convention it could reasonably expect that in the interpretation of Article 6 (2), especially of its special circumstances clause, due regard would be paid to the purpose of this clause, namely to avoid inequitable results of the equidistance method. It is quite understandable that the Federal Republic of Germany later hesitated in ratifying the Convention when it became apparent that the Kingdom of Denmark and the Kingdom of the Netherlands would interpret Article 6 (2) so restrictively.

The third point: the Common Rejoinder refers to a Note Verbale of the Danish Government of 13 May 1952 to the Secretary-General of the United Nations commenting on the proposals of the International Law Commission. This reference should, I think, show that the German Government should have been aware of such a narrow interpretation of Article 6 (2) by the other parties. There, a sketch map was attached to this document which illustrated the delimitation of the Danish continental shelf if the equidistance method would be applied. It was, as you see, a rather hypothetical comment and, moreover, this map has never been published in the official documents of the United Nations, nor has it come to the official knowledge of the German Government.

Fourth point: as soon as it became apparent that the Kingdom of Denmark and the Kingdom of the Netherlands relied on such a strict application of the equidistance method vis-à-vis the Federal Republic, the Federal Republic took every opportunity to protest against any act of unilateral application of the equidistance method and to reserve its legal position that the equidistance method should not apply between the parties in the North Sea.

In the last resort the Kingdom of Denmark and the Kingdom of the Netherlands refer to the Continental Shelf Proclamation of the Federal Government of Germany of 20 January 1964, which is produced in the Annex to the Common Rejoinder. They refer to it as if it contained an implied recognition of Article 6 (2) of the Continental Shelf Convention. This, I submit, cannot be accepted as had already been explained in paragraph 28 of our Reply. The phrase that the "detailed" delimitation would be subject to agreement with the neighbouring States showed clearly that the Federal Republic of Germany was not going to accept a unilateral application of the strict equidistance method in relation to its neighbours. In any event, that phrase was not meant to refer only to minor corrections of the equidistance line.

To sum up, I hope to have shown that there is no legal basis whatsoever for the State which has not ratified the Continental Shelf Convention to accept the equidistance method for the delimitation of its continental shelf boundary if such a boundary would not effectuate an equitable apportionment of the continental shelf between the two States.

Article 6 (2) has not become customary international law, so it cannot form a basis for the Kingdom of Denmark and the Kingdom of the Netherlands to rely unilaterally as well as in their negotiations with the Federal Republic of Germany, on the equidistance line to the effect that the Federal Republic had to accept this equidistance line even if it did not consider it equitable.

The equidistance method is not inherent in the concept of the continental shelf. Therefore, the general concept of the continental shelf cannot form any legal basis for a claim that a State must accept the equidistance method as the only or, at least, as the general rule.

There is nothing in the previous conduct of the Federal Republic of Germany that could be interpreted as a legal commitment to accept the equidistance method in the delimitation of the continental shelf towards its neighbours.

All this does not mean that the Federal Republic of Germany does not consider the equidistance method as an acceptable solution in other geographic situations. As a matter of fact, the Federal Republic has applied, in agreement with its neighbours, the equidistance method in the Baltic Sea in the determination to the delimitation of the continental shelf between Denmark and the Federal Republic in the Baltic Sea. The Federal Republic of Germany would readily accept the application of the equidistance method if the equidistance method would lead to an equitable apportionment of the continental shelf areas between the two States. I would even go so far to say that in all cases where the parties have to agree on a boundary line, that in all those cases the agreement stands under the higher over-riding obligation to accept a settlement that is equitable to both sides.

But as the application of the equidistance method does not lead to an equitable apportionment, and does not allocate an equitable share of the continental shelf to the Federal Republic of Germany, I submit that there is no obligation under international law to accept such a boundary.

That, Mr. President, concludes the first part of my address, which should show that a State, and in particular the Federal Republic of Germany, is under no obligation to accept the equidistance method as long as it is not established either by agreement or by decision of this Court that the equidistance method is really equitable and gives the Federal Republic of Germany an equitable share of the continental shelf that has to be divided up between the Parties. In the next part of my address I will then approach what is, I think, the decisive and principal question of this case—whether or not the equidistance method offers an equitable apportionment of the continental shelf between the Parties.

The Court rose at 5.15 p.m.

SECOND PUBLIC HEARING (24 X 68, 10 a.m.)

Present: [See hearing of 23 X 68.]

Le PRÉSIDENT: Aujourd'hui, 24 octobre 1968, se célèbre la Journée des Nations Unies. Il y a en effet vingt-trois ans que la Charte des Nations Unies est entrée en vigueur. La Cour, organe judiciaire principal de l'Organisation des Nations Unies, dont le Statut fait partie intégrante de la Charte, tient à s'associer à cette célébration. Elle demeure profondément consciente du rôle qui lui a été imparti au sein de l'Organisation et qui est de contribuer à l'affermissement de la paix par le règlement judiciaire des différends.

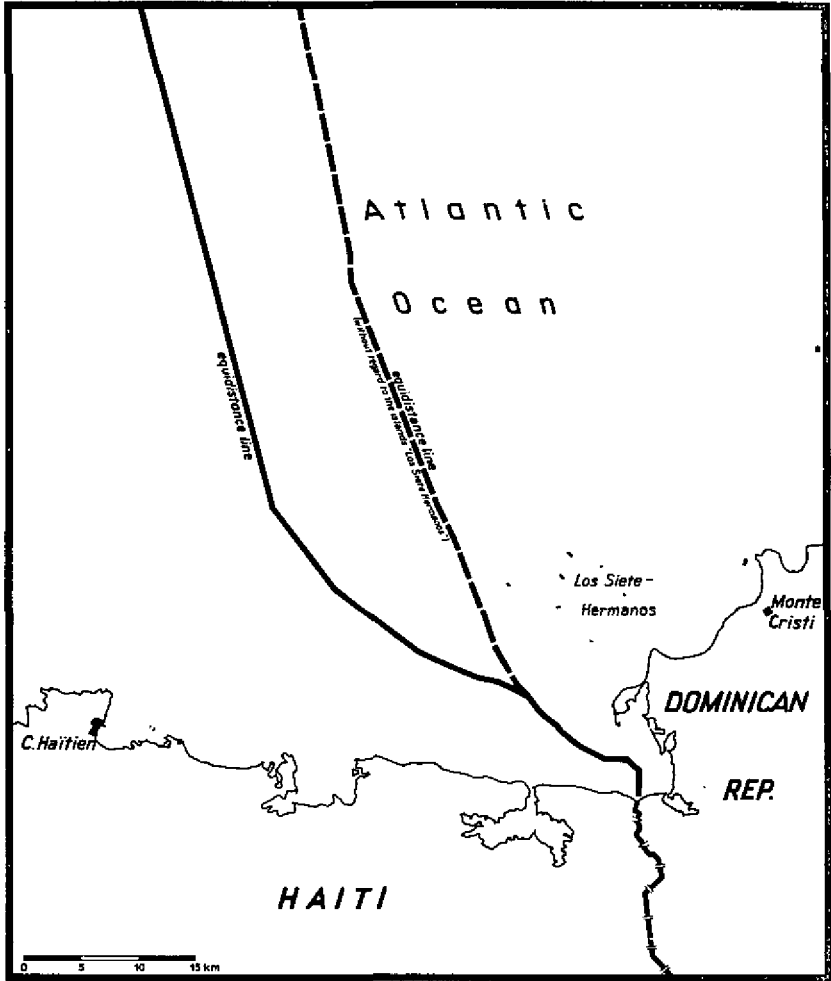
La Cour pense que la meilleure façon de commémorer cet anniversaire est d'exprimer ses vœux pour que les nobles principes de la Charte atteignent aussi vite que possible leur plein accomplissement.

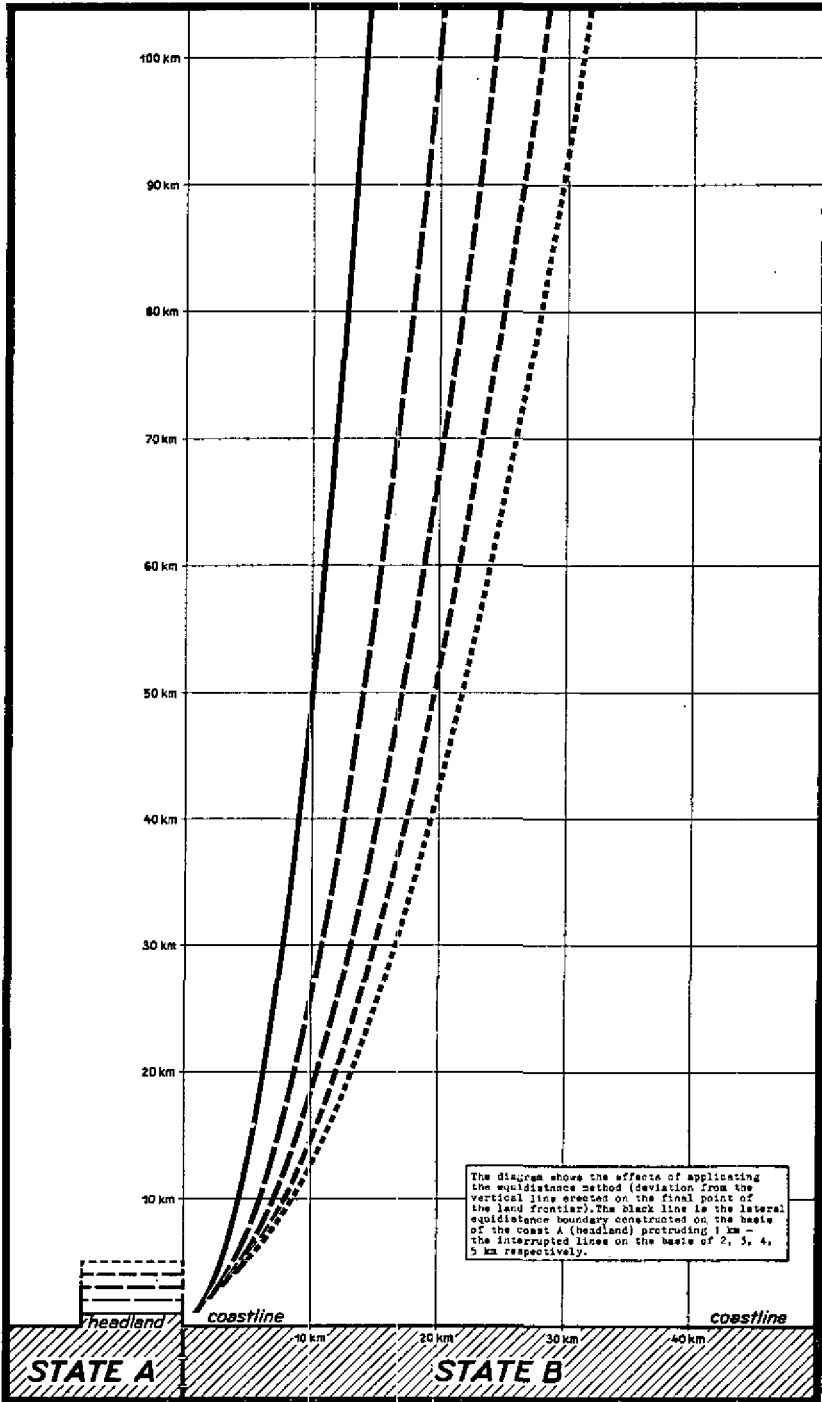
Professor JAENICKE: Before turning to the second part of my address I should go back to one point I mentioned yesterday. I announced that we would produce for demonstration purposes a map showing some particular situation, showing the effect which the configuration of the coast has on the direction of the equidistance line if it is drawn for a boundary between countries lying adjacent to one another, a so-called lateral boundary. I mentioned that a very striking example of how much the equidistance line diverts the boundary before the coast of another State is the actual geographical situation before the coasts of the Dominican Republic and Haïti. This map (see p. 28 *infra*) has been distributed this morning, to the Members of the Court, I suppose, and to the Parties.

This map, which is here in larger dimensions, shows the Dominican Republic on the right side and Haïti on the left side. The general direction of the coast is approximately parallel to this line, so that one would like to say that all the continental shelf lying north of either the Dominican Republic or Haïti could be called the natural continuation of their territories into the sea. The fact that the coast of the Dominican Republic projects here for some miles causes a diversion of the equidistance line to quite a considerable extent. These are both equidistance lines on this map, the one taking into account the small islands Los Siete-Hermanos, but we thought that as we are not concerned here with the island problem we should leave that out just for demonstration purposes, and we have constructed another equidistance line which does not take account of those islands, as if those islands were not there. Even then, the equidistance line—and that is what we want to show—diverts to a considerable extent to this left side. All this is of course hypothesis because up to now no continental shelf boundary between these two countries has been defined.

I further announced that we would produce a geometrical diagram (see p. 29 *infra*) which shows diagrammatically the impact of the effect, I might call it in short the "diversion effect", of the projecting part of the coast of the neighbouring State, so that you might judge how much even a small projecting point diverts the equidistance line before the coast of the other State. The farther you go into the sea the more the boundary is diverted from the coast and, more important, the more area is included in this diversion effect. This diagram also has been distributed this morning to the Members of the Court as well as to the Parties, and it is this diagram that needs a little bit of explanation.

This is the geometrical construction of equidistance lines on the following





hypothesis. The hypothesis is that the coastline is quite straight and the general direction of the coast is like this. Here, on the hypothetical line—it does not matter whether or not the part projecting from the neighbouring coast is here or a little bit farther off—the effect on the boundary will be quite the same. The effect will be less marked the farther off the projecting point is from the hypothetical line than it is here. Now here in this case we have made the hypothesis that the coast of the neighbouring State at this point projects 1 kilometre towards the sea, or 2 or 3 kilometres, and so on. We have only made here five hypotheses.

The first is 1 kilometre projecting towards the sea, the second 2 kilometres, 3, 4 and 5, and in each case the boundary line if constructed on the principle of equidistance will be diverted to the right side. You will see that even a projection of 1 kilometre produces the effect shown by the line which is drawn as a through line, while the dotted line on the far right shows the effect of the projecting point which is 5 kilometres more towards the sea. And then you can just judge here that, say, in a distance of 50 kilometres off the coast 1 kilometre projection of the neighbouring coast towards the sea causes a “diversion effect” of 10 kilometres. Within a distance of 100 kilometres the diversion effect of 1 kilometre is more than 10 kilometres. If there is a projection to the sea of only 5 kilometres the diversion in a distance from the coast of 100 kilometres is already, as you see, 30 kilometres. That means that within 100 kilometres distance from the projecting point of the coast of the neighbouring State which projects only 5 kilometres more towards the sea than the coast of the other State, there is a “diversion effect” of 30 kilometres. And the farther you go on the more area will be affected thereby.

That is what we wanted to demonstrate, the “diversion effect” caused when a lateral boundary is constructed on the equidistance line. I might come back perhaps to a point which we mentioned in the written pleadings, where we made a distinction between lateral boundaries and boundaries between opposite coasts.

I would like to make clear that we are not of opinion that there is a different legal régime under the Continental Shelf Convention on lateral and opposite boundaries, but what we wanted to say is that because of such “diversion effects” more lateral boundaries are affected thereby, because the configuration of the coastline normally is such that the coastline is not a straight line but either the one or the other coast is projecting a little bit more to the sea, so that in many cases lateral boundaries, if constructed on the equidistance line, do not yield so equitable a result as perhaps a median line constructed between opposite coasts.

I may add that between opposite coasts islands produce an equivalent effect, distorting the equal apportionment between the two States. It is not, I would say, a “diversion effect”; it is more a “roll-back effect”, or a “push-off effect”, because an equidistance line between the two countries, if an island lies between the two coasts, will at this point be pushed a little bit more to the other side; how much depends on the situation of the island.

That is, Mr. President, what I wanted to say in addition to what I had explained yesterday. If it is asked of one party that the other party should accept the equidistance line as a boundary, these effects would have to be scrutinized by both parties and they certainly were. One cannot expect a State where there is a “diversion effect” on its boundary to a considerable extent, to regard such a boundary line as equitable; there should then be found a correction to this line in the negotiations between the parties which neutralizes this effect. That is just what, under the régime of the Continental Shelf Convention, the special circumstances clause is supposed to do.

That concludes my first part covering the question under what circumstances a State is under obligation to accept the equidistance line as a boundary.

Now I am approaching the second part of my address which is devoted to the question—which I think is indeed the principal question in our case. Does the equidistance method, under the circumstances of the case, offer an equitable apportionment of the continental shelf between the Parties? Only if this question were answered in the affirmative the Federal Republic might be under a legal obligation to accept the equidistance method as a basis for its continental shelf boundaries.

The Kingdom of Denmark and the Kingdom of the Netherlands seem to deny the relevance of this question—the question whether the equidistance boundary would effectuate an equitable apportionment between the Parties. In their view the equitableness of the shares allocated to each Party by the equidistance method should be no pre-condition for the application of this method. If I understand some passages in their pleadings correctly, they go so far as to say that the equidistance method is equitable *per se*. The size of the shares resulting from its application is irrelevant—so they say. This is, in any case, the conclusion which must be drawn from the following passages which I found in paragraph 24, of their Common Rejoinder, I, page 466. This passage reads: “the equidistance principle in sea areas . . . excludes considerations of comparative surface shares” and, more generally, they assert in paragraph 116, at page 524:

“In international law the rules governing the determination of boundaries do not start from the premiss that there is an area of land or sea or seabed to be distributed on the basis of shares to be allotted by reference to some criterion of proportion. . . . In maritime areas, moreover, the fundamental principle for determining the title of a coastal State to extend its sovereignty over any given areas is the adjacency and appurtenance of those areas to its own coasts rather than to the coasts of any other State.”

If I understand that correctly, here again the Kingdom of Denmark and the Kingdom of the Netherlands return to their favourite theory that the only relevant criterion for the allocation of areas of the continental shelf to one or the other State is distance from some point of the coast. On this basis they claim that the equidistance method, which is nothing but a geometrical technique to draw the boundary in accordance with this criterion, therefore is automatically equitable *per se*.

I have already shown earlier that this theory cannot be accepted. The concept of the continental shelf does not imply that any area nearer to some single point or say, a small strip, of the coast of one State, would automatically, without further appreciation of the effects it would have, fall under the sovereignty of that State because of nearness to some point or some strip of the coast. This cannot be so because distance from a single point within a small part of the coast and the projecting part of the coast does not necessarily prove a sufficient geographical connection with that particular coast in general. It is just for the purpose, as I wanted to show before, that because of the diversion effect a projecting part of the coast of the neighbouring State has on the direction of the equidistance line, it cannot be said that mere distance from that projecting point is already proof of the solid geographical connection with the coasts of that State which is the necessary geographical and legal basis for claiming that these areas are part of the continental shelf of that State. This does not mean that distance may not normally determine the appurtenance of a maritime area to a particular coast; in the vicinity of the coast this system is normally applicable.

Further on, however, this system of allocating areas to the one or the other State does not work.

To conclude this point, mere distance from a coast cannot be a safe criterion of the equitableness of the allocation of a continental shelf area to that particular coast so that the equidistance method cannot be regarded as equitable *per se*, it can only be so if the geographical circumstances and the configuration of the coast are such that no "diversion effect" occurs which would make the equidistance line allocating areas to the one State which naturally would belong to the other State.

In opposition to the theory of our opponents, the Federal Republic of Germany maintains that the delimitation of the continental shelf, where two or more States are adjacent to the same continental shelf, is governed by the principle that each State should get an equitable share and that therefore a boundary, whether determined by application of the equidistance method or otherwise, need not be accepted by the other Party if it is not in harmony with that principle.

The application of the principle that each of the adjacent States shall be entitled to a just and equitable share is not a mere reference to the concept of general justice. It goes without saying that a principle or rule of law which does not merely serve the purpose of formal or technical expediency but which should govern the allocation of extensive maritime areas with great potential resources, should be framed, interpreted and applied in harmony with the concept of general justice which is the indispensable basis of every legal order. That is not the only thing that is meant by the principle of the just and equitable share, because that principle contains more legal substance than such a mere reference to the concept of general justice. It is a principle of substantive law because it directs the States which are concerned with the delimitation of their respective shares in the continental shelf to seek and apply criteria which under the given geographical situation are pertinent to an equitable apportionment of that continental shelf among those States.

I will not go deeper into the question whether or not the principle of the just and equitable share is a principle of general application. In my view, it is such a principle. It is an over-riding principle generally recognized in legal systems; a principle which governs the distribution of wealth, resources and potentialities among persons entitled to the same if the legislator has not made a specific rule for that purpose. For the case before us, however, it may be sufficient to realize that this principle of the just and equitable share has been recognized by State practice and by learned opinion as pertinent to the delimitation of the continental shelf between two or more States. In this respect, I refer to what we have said as to the principle of the just and equitable share and its application by States to the delimitation of the continental shelf, in our Memorial and in our Reply.

The opponents have attacked this concept by saying that the delimitation of the continental shelf has nothing at all to do with the distribution or partitioning of areas, but that it was a mere extension of sovereignty in space. In reply to this I would say the following. If States adjacent to the same continental shelf extend their jurisdiction over the continental shelf before their coasts, this is not merely an extension of sovereignty in space, what is involved is rather a partitioning of the potential resources of a limited area lying between the adjacent States. If you would care to look at that map ¹ behind me, you will easily

¹ Map exhibited in the Court room. For a similar map see the map in the pocket inside the back cover of Volume I (Annex 16 to the Danish Counter-Memorial).

perceive that the delimitation of the continental shelf decides on the distribution or partition of the potential resources of the North Sea. Nobody can deny this.

One cannot, as the Kingdom of Denmark and the Kingdom of the Netherlands do, regard such an act as a mere geographical extension of the realm of sovereignty of a State, without regard to the fact that by this operation large areas with potential resources, which previously were no man's property, are now allocated to the one or to the other State.

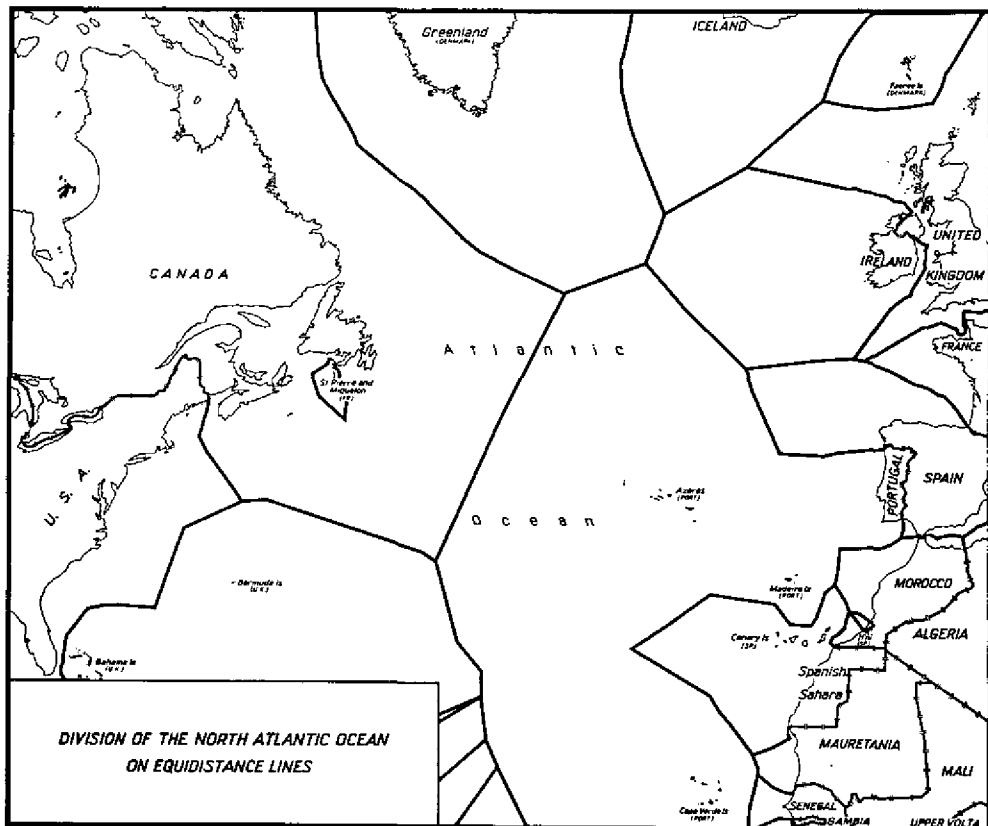
I should warn against the recognition of the theory that mere propinquity determines title to the continental shelf areas before the coast. What consequences such an approach might have for the further development of the exploitation of the resources of the sea has been drastically demonstrated by the map in our Memorial, I, between pages 66-67. This map shows the partitioning of the Atlantic Ocean among the adjacent States if each of them could claim title to the areas which are nearer to some point of its coast than to any other coast.

At this point I must draw attention to what one might call some minor incorrectness in this map. This map was drawn on a large scale for demonstration purposes only, and thus it happened that some small islands were thereby overlooked. In drawing up this map the tiny islands of St. Pierre and Miquelon off the Newfoundland coast were unfortunately neglected, but this does not affect the informative nature of this map. It could however be thought that perhaps by leaving out these islands we might have taken sides in the already known dispute between Canada and France as to whether or not, and to what extent, these islands could lay claim to a continental shelf of their own. So, to be neutral in this case, we have made a second version of that map (see p. 34 *infra*) taking into account the islands of St. Pierre and Miquelon, this new version of the map was distributed this morning to the Members of the Court and to the Parties. You will find that the islands of St. Pierre and Miquelon, which belong to France, do now appear in the new map. That does not change the general pattern of the partitioning of the ocean on equidistance lines, but I wanted to make sure that nothing in the pleadings of the Federal Republic of Germany in this case should be taken as an opinion on this question which is in dispute between Canada and France.

Now, unfortunately, the partitioning of oceans is no longer a mere hypothesis. The progress of modern technology has made it possible to exploit the sea at greater depths. Since the Continental Shelf Convention defines the outer limit of the continental shelf in terms of exploitability, as you are well aware, we may soon be confronted with claims from coastal States to large areas of the Atlantic Ocean on the basis of equidistance, i.e., on the basis that all these large areas are nearer to their coasts than to any other coast.

This is not mere science fiction which we have invented to reduce the equidistance method *ad absurdum*. It is a real danger, the existence of which has been borne out by the fact that organizations and institutions, including the United Nations, have taken up the problem of deep-sea mining, as the Court is very well aware.

It is perhaps interesting to note that a map similar to ours was produced at the hearings of the Foreign Affairs Committee in the United States Congress, when the issue of deep ocean resources was discussed. This map shows the distribution and partitioning of the Atlantic Ocean among States, should the principle of equidistance be applied. This map is to be found in a document of the 9th Congress' First Session, document House Report 999, at pages 88-89. If the Court would like to have copies of it; we will be prepared, Mr. President, to supply you with copies for your deliberations, if it is not available in the



Peace Palace. It is for you to decide whether you think it is worth while to have this map.

Now there seems to be, and I think we all agree, an overwhelming opinion that such a partitioning of the oceans should not take place, and that the resources of the oceans should be available for the benefit of mankind in general, and not for the benefit of just one State which happened to be nearer to these extensive and profitable areas than any other State. May I quote the following passages from a report drawn up by the Deep Sea Mining Committee of the International Law Association submitted to the Conference of the International Law Association at Buenos Aires in 1968. I shall quote from page 4:

"In case exploitation were to become independent from any depth whatsoever and the definition of Article 1 of the Convention on the Continental Shelf were followed consistently, the consequences would be that the oceans would have to be divided between the coastal States. Various solutions are possible, depending on whether or not islands are taken into account . . ."

We can see from this map what huge areas groups of islands, such as the Azores and others, could claim as their continental shelf. This is just an observation on my part, and I shall now proceed with the quotation:

". . . and whether the principle of equidistance or any other criterion for delimitation were to be adopted. Partitioning of the large oceans in particular will lead to a disproportionately privileged position for the coastal States. The choice of the basis on which the partition will have to take place may seriously hamper the institution of deep-sea mining regime. An arrangement whereby exclusive rights to the ocean bed and subsoil are accorded to a group of States located on a particular continent would only shift the problem of partition and would not offer sufficient guarantee of a permanent solution either."

Such an unfortunate development of the law of deep-sea mining, however, could, in our view, be stopped much easier if the delimitation of the continental shelf areas would not be determined solely by the geometrical principle of distance from the coast, but also with due regard to the material consequences such a delimitation would have on the allocation of such large areas with its enormous potential resources. Therefore mere propinquity to the coast should not be regarded as sufficient title to the resources of the sea under international law.

I am sure that the Court will be aware of the impact that the recognition of such a title based on mere propinquity would have on the development of the law of the sea in this field. I think I should recall in this connection that it was not the idea of propinquity which had inspired the founders of the principle of equidistance to introduce it into the law of the sea. What they had in mind was rather to use it as a better method of equitable apportionment. The equidistance method was not regarded as a principle equitable *per se*, but rather as a method for achieving a more precise result in allocating to each party an equal share of the waters between them. For this I may quote Mr. Boggs, one of the leading experts on maritime boundaries, who was mainly responsible for the development of the equidistance method, and who was also a member of the committee of experts which recommended this method to the International Law Commission. His well-known treatise on international boundaries, which was published in 1940, treats the equidistance method—which he had first expounded and elaborated in this treatise—as a better device to draw the so-called "middle line". He states on page 179 of his book that the division into two equal areas

seemed to him to be an important element of the equidistance principle. Thus from the beginning the equidistance method had been introduced primarily as a method to achieve a more equitable apportionment and not merely as an expression of the alleged principle of propinquity.

So much for the assertion of our opponents that the effects resulting from the application of the equidistance method should be regarded as irrelevant.

As our legal position is that the application of the equidistance method is dependent on the equitableness of the shares allocated thereby to each of the States, what then are the criteria that determine the equitableness of the apportionment effected by the application of the equidistance method in the case before us. Here I approach the most difficult issue, which will arise everywhere where the equitableness of an apportionment has to be judged.

We have proposed several criteria in our written pleadings and in this case I might refer to all that has been said in this respect; especially I refer to the so-called coastal front and sector approach which we have proposed as an appropriate method for the appreciation of the equitableness of the apportionment in the case before us, i.e., in the special case of the partitioning of the south-eastern sector of the North Sea continental shelf.

The Kingdom of Denmark and the Kingdom of the Netherlands have launched a bitter attack on this coastal front and sector approach. They have denounced it as a novel invention for the purpose of our case which, as they say in paragraph 26 of their Common Rejoinder, I, pages 468 and 469: "moves out of the realm of existing rules and principles of international law into the field of arbitrary constructions" and "has no basis whatever either in geography or in law".

Now we have already said something in reply to these accusations and in addition to what we have said in our written pleadings with respect to these criteria I should—I think this is very important—make it quite clear that these criteria have been developed with due regard to the special legal and geographical situation in the North Sea. Please allow me to explain this in more detail.

First, I have to reject the accusation that we were inviting the Court to recognize such criteria as principles or rules of international law which should govern the delimitations of the continental shelf. In our written pleadings we have made it plain from the beginning that criteria of this sort were not principles or rules of general application. We regard them only as a standard of evaluation as to what method of delimitation would be equitable under the special geographical situation in the North Sea. We regard them as a standard of evaluation pertaining only to that particular situation. That this was the real meaning of the coastal front and sector concept could not be overlooked if one reads *lit. (d)* of our conclusions in our Reply, I, p. 433, where we have said:

"The breadth of the coastal front of each State facing the North Sea is an appropriate objective standard of evaluation [I stress these words] with respect to the equitableness of a proposed boundary."

If the Court would follow our thoughts in applying this standard of evaluation to the delimitation of the continental shelf of the North Sea, the Court would not, as our opponents seem to intimate, apply a rule of law hitherto unknown in international law; they would only appreciate the equitableness and applicability of the equidistance boundary in that particular geographical situation.

If, as I hope, I have made this clear, I may be in a better position to explain that the apportionment of the continental shelf by sectors, on the basis of the coastal front of each State, is a natural consequence of the application of the

continental shelf concept to the special geographical situation prevailing between the Parties in the North Sea.

Criteria for the appreciation of the equitableness of apportionment among the Parties adjacent to the same continental shelf need not and sometimes cannot be of general application in all geographical situations. Geographical configurations differ from each other and each situation may call for a new appreciation of special factors that have to be taken into account. It is therefore not surprising that the standard which is called for in the concrete case of the North Sea between the Parties may have no precedents in other parts of the world. Therefore the absence of such precedents is not an argument and cannot be an argument against the propriety of this standard.

I shall now try to develop the standard for an equitable delimitation of the continental shelf between the Parties step by step.

The first fact which we have to take into account is the legal situation already existent as to the delimitation of the North Sea continental shelf. The continental shelf of the North Sea, I would like to stress this point, is already divided up into three sector-like parts or slices, if you like to say so, the British sector, which as you will see, is a rather large sector, fortunately for Great Britain, the Norwegian sector and the remaining sector comprising the Danish, German and the Netherlands parts. This general pattern of delimitation has already been agreed to by treaties between Great Britain, the Netherlands, Denmark and Norway. The Federal Republic of Germany has also taken no objection to this division of the North Sea continental shelf into those sectors as have been agreed on in the boundary treaties I have just mentioned between these States. Only the sector which comprises the parts of Denmark, the Federal Republic of Germany and of the Netherlands has still to be divided up between those three Parties. There is no agreement as yet, as to the division, the partitioning, of the sector-like part and it is just that question which is before you. Such is the problem of apportionment as is posed now on the existing legal situation in the North Sea. We cannot overlook the fact that we already have these three sectors and the question remains how should we equitably divide the third remaining sector in the south-eastern part of the North Sea.

The second fact we have to take into account is the geographical situation in that part of the North Sea where the remaining sector which has to be divided up between the Parties is situated. Our opponents cannot deny the geographical fact that this part of the North Sea is roughly circular—surrounded by several States. Besides, the exact shape of this enclosed part of the continental shelf is not material. It does not matter whether it is quadratic, rectangular or exactly circular. Nor is the configuration of the coast line material in this respect. The undeniable geographical fact remains that in this part of the North Sea several States surround that part of the North Sea as if they were sitting around a table, and perhaps I might add, waiting to get a piece of the cake which is to be divided up between the parties. Going back to the real essence of the geographical situation, the undeniable geographical fact is that the parts of the continental shelf of each State surrounding that continental shelf are converging into each other. The convergence of the continental shelf of all these parties and in particular of the three Parties which are before you at the moment in this case, calls for special criteria in the appreciation of the equitableness of a partition of this last undivided sector among them.

In converging the continental shelves of Denmark, of the Federal Republic of Germany and of the Netherlands, like the three big sectors, form also by mere geography sector-like slices with the coastal front of each State as a basis. Therefore, I think that division by sectors has not been, as our opponents say,

arbitrarily engrafted upon that part of the North Sea; but it is rather a natural consequence of the geography in that part of the world. I may add, if I speak here of sectors or sector-like slices I do not mean that such sectors must be true sectors in the geometrical sense. However, the convergence of the continental shelves into each other can be best described by the sector concept. Looking at the map of the North Sea and taking the third sector comprising the continental shelves of Denmark, of the Federal Republic and of the Netherlands as a whole, it seems natural and equitable in my view, that the division of this still undivided sector follows the general sector-like pattern of division of the North Sea.

The boundaries drawn by application of the equidistance method within this sector would allocate slices of the continental shelf to each of the three Parties which do not conform to that sectoral concept. The division would be as shown here on the big map before you. Is this equitable or not? The Kingdom of Denmark and the Kingdom of the Netherlands say it is; the Federal Republic of Germany says it is not. Is it possible to develop a criterion which may provide us with a standard to decide this?

The most reliable basis for the development of an appropriate criterion would, in my view, be the legal basis of the title of the coastal State to the continental shelf before its coast. We should start from that because the rights to the continental shelf have to be considered on this concept.

Fortunately, the Parties are in agreement as to the basis of this title. It is the doctrine that the continental shelf is the natural continuation into the sea of the territory of each coastal State. We absolutely agree with the statement contained in the Common Rejoinder of the Kingdom of Denmark and the Kingdom of the Netherlands that there must be a solid geographical connection between the territory of the coastal State and the areas that may be justly claimed to constitute such a natural continuation of its territory into the sea.

The Parties differ, however, as to what are the criteria which, in harmony with the doctrine, should determine whether a specific area of the continental shelf has to be regarded as a natural continuation of the territory of the one or of the other State adjacent to the same continental shelf.

There again we are confronted with the fundamentally different approach of both Parties as to the criterion that should determine the title of each coastal State to a specific continental shelf area before its coast.

The Kingdom of Denmark and the Kingdom of the Netherlands say that the propinquity from a single point or some small part of the coast is sufficient proof that a specific area has to be regarded as appertaining to its territory. That is supposed to end the matter. This is practically equivalent to saying that the construction of the boundary on equidistance determines its own equitableness.

The Federal Republic is of the opinion that such an approach to the matter cannot be maintained. We feel that we have already demonstrated amply enough that propinquity to a single point of the coast of a State cannot alone determine the allocation of extensive areas of the continental shelf to that State. This is neither inherent in the concept of the continental shelf nor in harmony with State practice, nor consistent with the history of Article 6 of the Continental Shelf Convention. I need not repeat the arguments advanced against such a theory, I have brought them several times in my address already as well as in the Reply and in the Memorial of the Federal Republic of Germany.

If you would care to look at the map showing the apportionment of the North Sea continental shelf between Denmark, the Federal Republic of Germany and the Netherlands, as envisaged by our opponents, one might just ask

whether the areas between the north-western end point of the German share and the middle of the North Sea where the other boundaries meet, should really be regarded as a natural continuation of the Danish or the Netherlands territory. Would it not be likewise, if not more convincing, to regard those areas as the natural continuation of the German territory? The contention of the Kingdom of Denmark and the Kingdom of the Netherlands that the smaller distance of those areas to some part of the Danish or Netherlands coast should decide this issue is in contradiction with their own doctrine, according to which there should be a solid connection between the territory of the State and the submarine areas before those areas could be regarded as the natural continuation of its territory into the sea.

It may be interesting for the Court to know that the allocation of these areas—I refer to the areas around the vicinity of the line stretching out from the end point of our share to the middle of the North Sea where the other boundaries meet, which represent thousands of square miles—their allocation to Denmark or to the Netherlands respectively, would be decided under the equidistance method by a difference of distances of not more than 5 to 15 nautical miles to the next point of the German coast. If the Danish and the Netherlands coastal areas, from which the distance under the equidistance method is measured, were 15 nautical miles more distant from the middle of the North Sea where the other boundaries meet, the German part would, under the equidistance method, reach out to the middle of the North Sea. And some 10,000 or more square miles would be allocated to Germany.

We have prepared a diagram, which has not yet been distributed, which shows mile by mile the impact of the distance from the coast on the allocation of these areas to the one or the other side. The consequence we draw from this is that such small differences in distance from each coast cannot be a convincing proof that these areas must be regarded as a natural and solid continuation of one State's territory into the sea. Such a theory would afford minor differences in the configuration of the coast of each of the three Parties an undue and inequitable influence on the allocation of extensive sea areas.

In short, it seems that distance from the coast alone is not an appropriate criterion to determine the equitableness of some mode of partitioning where the continental shelves of the coastal States converge into the middle of an enclosed continental shelf area.

The Court adjourned from 11.20 to 11.45 a.m.

When I finished just a few minutes ago I referred to the question of what may be considered the natural continuation of the State territory into the sea. In view of the geographical situation where the continental shelves of the States concerned converge into each other, the Federal Republic takes the view that in such a situation it is rather difficult, if not impossible, to say in terms of distance whether those areas in the middle of an enclosed continental shelf are the natural continuation of the territory of the one or the other State.

While in the coastal belt it might be more appropriate to regard distance from the coast as the criterion determining the appurtenance of certain areas to the coast; farther away from the coast, the distance from some point of the varying coastline is not any more suited to prove convincingly the connection of such areas with the one or the other State. That was the reason why we were looking for a better basis than mere distance to define into what direction and to what extent an area within this continental shelf, an enclosed continental shelf, might

be regarded as the so-called natural continuation of the State's territory into the sea.

We thought that the coastal front of each State facing the North Sea may define better the direction and extent of the natural continuation of the State territory into the common continental shelf.

This criterion, the so-called coastal front, has nothing to do with baselines used for the measurement of the territorial sea or the contiguous zone; any criticism that it lacks foundation in the law and practice of States with respect to the delimitation of such zones before the coast, is, it would seem, beside the point. Our coastal front concept merely tries to define from what natural geographic basis the territory of the coastal States continues or extends into the common continental shelf.

From that basis it may be possible to define better what areas of the continental shelf should be regarded as appertaining to the one or the other State. The coastal front with which each coastal State faces the common continental shelf allows a determination into what direction the continental shelves of each North Sea State converge into each other. The direction would then be geometrically, if I might also go into a geometrical abstraction, defined by the perpendicular line, perpendicular on the coastal front. This allows the determination of the point where the continental shelves converge into each other. The breadth of each coastal front allows, on the other hand, to elevate the relative mass of submarine area each State contributes to the common continental shelf.

Therefore, the Federal Republic regards the sectoral division on the basis of the coastal front of each State, with sector-like slices proportionate in size to the relative breadth of the coastal front of each State, as the most equitable apportionment under the very special circumstances of this particular geographical situation, in a situation of converging continental shelves.

As an illustration I refer to the diagrams in figures 1 to 5 in our Reply, I, pages 427-430. These diagrams show that the coastal front concept is solely designed to define what may be regarded as the natural extension of each State's territory into the enclosed continental shelf. If you look at these figures you will see that if you face the sea from the coast the natural continuation of the coast into the sea will be naturally defined by a line perpendicular on the coastal front and it is, of course, the purpose of the concept of the coastal front to judge from which basis the territory extends into the sea. I would like to apply these abstract criteria to the actual geographical situation in the North Sea between the Parties.

Here we have first to define what is the coastal front of each of the three States which want to divide up this south-eastern sector between them. I might in this regard refer to the map reproduced in the Common Rejoinder, I, page 470, where our opponents try a little bit to reduce to *ad absurdum* our coastal front concept; but I think it is somehow rather informative on what might be regarded as the coastal front from which the territory extends into the North Sea.

However, not to be misunderstood, continuation of a State's territory into the sea is here understood in the juridical sense, underlying the concept of the continental shelf; of course it does not mean the true geological continuation. If we would go into this field and say what is geologically the natural continuation of the continent's territory into the sea, then probably Denmark would get no continental shelf at all in this part of the North Sea because the North Sea descends to the ocean from the south to the north. But this, of course, is not meant here. The question is how to divide the south-eastern sector equitably between the three States. And as the partitioning that has already taken place

here provides us with some sort of a centre of the North Sea, we can more easily say what should be, and what is, the coastal front of each of these States from which the continental shelf extends to this centre.

I would say that it would be fair not to regard as the coastal front what is shown in figure A of the Common Rejoinder. I would rather say that the coastal front of Denmark facing the North Sea is a line which is roughly to the north from the end point of the land frontier between Denmark and the Federal Republic, while the coastal front of our territory which extends in the North Sea could best be defined as a line between the end point of this land frontier between Denmark and the Federal Republic, and the end point of the land frontier between the Netherlands and the Federal Republic. This straight line just says that the territory of Germany extends from this basis, or from behind, it doesn't matter, into the North Sea. As to the Netherlands coastal front, I wouldn't be so unfair as to say that the coastal front goes down to the southwest. I would say that what must be regarded as the coastal front is a line from the end point of the land frontier between the Netherlands and the Federal Republic to the point where the North Sea gets smaller and gradually passes into the Channel. I would say that the coastal front goes to the point where the equidistance line between Great Britain and the Netherlands makes a bend to the west because this point approximately marks the end of the coastal front with which the Netherlands face the North Sea. But you may take what you like, I don't mind whether you take some other line as the coastal front, that would be more favourable to us. I have taken as the coastal front that which is the least favourable to us. If you take these coastal fronts as the basis, you would then see that if you erect a line perpendicular to each of these coastal fronts, they converge approximately in the centre where the other boundaries already meet. That is of course not a delimitation of boundaries under a geometrical method. It is just trying to say what could be approximately regarded as to be the natural continuation of these States' territories into the sea, how they converge into each other and what part would be regarded as belonging to the continental shelf of one or the other, as being the extension of their territories into the sea.

It does seem, we respectfully submit, to be obvious that a sector-like part reaching out to the centre where the continental shelf sectors of Great Britain, Norway, Denmark and the Netherlands already meet would better be regarded as the natural continuation of Germany's territory into the continental shelf than the small size enclosed within the equidistance boundaries.

Our opponents say that it is inadmissible to infer from the relative length of the coastal front the relative size of each share, since the length of the coastline could not convey any title to a specific size of the share. Here again I must stress the fact that we do not want to propose a rule of general applicability to the effect that any State in any geographical situation may claim a share of the continental shelf equivalent in size to the length of its coast. We only suggest that in this particular geographical situation, where the continental shelves of States constitute, by virtue of their geography, converging sectors, the breadth of the coastal front would be a proper standard of the size of the share each State should get if an equitable apportionment were to be achieved. In a sectoral division the relative breadth of the baseline determines the relative size of the share each State would get under such an apportionment.

What we say with regard to the coastal front sector approach is this: under the general pattern of sectoral division in the North Sea, which is somehow dictated by geography, the continental shelves of all three Parties converge into each other in a direction which may be said to be running towards the centre

of the North Sea, where the other boundaries already meet, and that the basis of these sectors determines the relative size of the shares.

Therefore we maintain that a sectoral division on the basis of the coastal front of each State directed to the centre part of the North Sea is an appropriate standard of evaluation, whether or not a proposed delimitation of the continental shelf in that part of the North Sea is equitable. If we now compare what part the Federal Republic of Germany would get under a delimitation in accordance with the equidistance method, it is easily perceived that this part falls far short of such an equitable apportionment, as I have indicated. Consequently, there is no obligation for the Federal Republic of Germany to accept the equidistance method for the delimitation of the boundaries of its continental shelf.

In their Common Rejoinder, the Kingdom of Denmark and the Kingdom of the Netherlands ask whether they should provide for the augmentation of the German share if that share is really inequitable. They ask, why should such additional surface be provided by Denmark or the Netherlands rather than by other countries adjacent to the North Sea, which perhaps have much more continental shelf area available? And why should then only Germany receive additional surface and not other countries adjacent to the North Sea? This question is wrong in its approach to the matter.

The Federal Republic does not want to gain something from Denmark or the Netherlands which rightfully belongs to them; the unilateral delimitation by the Kingdom of Denmark and the Kingdom of the Netherlands by application of the equidistance method is not yet law. If the share Germany could get under this method of delimitation is not equitable, it is because Denmark and the Netherlands would by this method gain more than they could justly expect under the principle of equitable apportionment. The shape of their sectors, by delimitation under the equidistance method, is only due to the configuration of the coastline. Each of their coasts comprises parts which project towards the centre of the North Sea and thereby divert the equidistance boundary into the German sector. This special "diversion effect" of projecting coastal parts is shown diagrammatically in figure 5 in our Reply, I, page 430. If you take figure 5 you will see that, for an observer facing the centre of the North Sea, State A and State C have their coastlines projecting towards the middle of that sea—it is not the North Sea, it is a more abstract version of our situation—and by a "diversion effect" of the projecting parts under the application of the equidistance method it happens that the continental shelf sector of State B is reduced to this small part which is shaded in figure 5 on page 430.

As other North Sea States do not profit from the application of the equidistance line at the expense of Germany, it seems logical as well as right that the Federal Republic of Germany cannot ask these other States to reduce their share in order to make the German share more equitable.

In view of the criteria which in our opinion determines the inequitableness of the apportionment of the continental shelf between the Parties, I respectfully submit that the Kingdom of Denmark and the Kingdom of the Netherlands cannot claim that the Federal Republic of Germany accepts the equidistance method as an equitable boundary for the delimitation of its continental shelf. It would then be for the Parties to agree on another boundary line which will apportion a just and equitable share to each of the Parties.

After I have shown, I hope, that the partitioning of this south-eastern sector of the North Sea between the three Parties is not equitable under the criteria one might apply to this case, I could have concluded my arguments as to the non-applicability of the equidistance method, because, as I said yesterday, there

is no obligation under general international law to accept an equidistance line which is not equitable.

However, the Kingdom of Denmark and the Kingdom of the Netherlands have based their arguments on the theory that the so-called equidistance-special circumstances rule contained in Article 6 of the *Continental Shelf Convention* had acquired the force of general international law.

In the event the Court would like to look with some favour on this theory, I feel that I must go on to show that also under Article 6 of the Convention, if it were applicable between the Parties, the Federal Republic of Germany would be under no obligation to accept the equidistance line as a boundary of its continental shelf. In order to show this I have to go into the difficult question of the interpretation of the special circumstances clause in Article 6, paragraph 2, of the *Continental Shelf Convention*. In this respect the difference between the Parties is as wide as it possibly can be.

In their Common Rejoinder the Kingdom of Denmark and the Kingdom of the Netherlands try to reduce the scope of application of the special circumstances clause by such an extent that this interpretation, if it were right, would in effect bring about that by the back-door the equidistance method would again appear on the scene as the only rule. The arguments in support of this interpretation are mainly contained in Chapter 3 of the Common Rejoinder, I, pages 526 *et seq.* I believe that I have to comment on these arguments in some detail.

The Kingdom of Denmark and the Kingdom of the Netherlands seem to take the position that it is a special privilege of the parties of the *Continental Shelf Convention*, given to them by the Convention, to invoke the special circumstances clause in order to exclude the application of the equidistance method if such circumstances are present. Should this mean that States which are not parties to the Convention are not allowed to invoke such special circumstances, but have to accept the equidistance boundary under any circumstances under the hypothesis that the equidistance method had become customary or general international law?

I cannot see what else could be the meaning of Submission No. 4 which the Kingdom of Denmark and the Kingdom of the Netherlands have added in their Common Rejoinder to their previous submissions. Submission No. 4 stipulates in effect that if the conventional regime is not applicable between the Parties—

“... the boundary is to be determined between the Parties on the basis of the exclusive rights of each Party over the continental shelf adjacent to its coast and of the principle that the boundary is to leave to each Party every point of the continental shelf which lies nearer to its coast than to the coast of the other Party”.

This however is nothing else than another formulation of the equidistance method, which would then be the only rule applicable towards States which are not parties to the Convention, because Submission No. 4 does not contain any reference or exception to special circumstances. If this were the law, it would be in flat contradiction to the development of the law on the continental shelf and to the history of Article 6 (2) of the Convention. One might even ask why the Kingdom of Denmark and the Kingdom of the Netherlands have ratified the Convention if they could have avoided the invocation of the special circumstances exception by remaining outside the Convention.

The assertion that the equidistance method is the only rule between States which are not parties to the Convention, lacks any foundation in the practice of

States. Such an assertion is even less understandable since the Kingdom of Denmark and the Kingdom of the Netherlands have taken great pains in their written pleadings, in particular in their Common Rejoinder, to convince the Court that, under general international law, it is not the equidistance method pure and simple that had become a rule of general international law, but that it was the so-called equidistance-special circumstances rule which had become so. If that would be so, also under general international law, any State could invoke special circumstances excluding the application of the equidistance line.

I cannot see how one could follow their submission No. 4 which, in my view, is inconsistent with this theory. I hope therefore that the Court will reject this submission. I have dealt enough with this question and will now turn to the more principal question which criteria will determine the interpretation of the special circumstances clause, and I have to comment on the criteria for interpretation that have been advocated by the Kingdom of Denmark and the Kingdom of the Netherlands in their Common Rejoinder. Briefly stated, the criteria they have suggested for the application of the special circumstances clause are the following.

First criterion: the special circumstances clause may only be invoked if the correction is justified towards both States, to the one which gains as well as to the one which loses by the correction (para. 123, of the Common Rejoinder, I, p. 526).

Second criterion: the clause may not be invoked against "a State whose continental shelf has a solid geographical connection with the territory of that State . . . constituting a natural continuation of the territory of the State" (para. 125, of the Common Rejoinder, I, p. 527).

Third criterion: the clause will only be applicable if some insignificant island or comparable peninsulas justify other basepoints for the construction of the equidistance line (paras. 126-128, of the Common Rejoinder, I, pp. 527-528).

Fourth criterion: the clause will only allow corrections by using other basepoints for the construction of the equidistance line (para. 129, as well as paras. 138-141 of the Common Rejoinder, I, p. 528 and pp. 531-532).

Taking all these criteria together, which in the opinion of our opponents should all be observed simultaneously, one gains the impression that they are calculated to reduce the scope of application to such an extent that, contrary to the intention of the authors of Article 6, the equidistance line will practically remain the only rule.

The only exception where, in the view of our opponents, a correction may be permitted, not of the equidistance line, of course, but only of some basepoints for the construction of the lines, is the case of insignificant islands or comparable peninsulas; what situations are envisaged in this respect may be seen from the diagrams which appear, figures E, F and G, in the Common Rejoinder, I, pages 533-535—rather extreme situations which I have not yet found on the maps. This minor concession for a correction of the strict application of the equidistance method is the bare minimum which probably seemed indispensable in view of the commentary of the International Law Commission to its draft Article 72, which later became Article 6, on the delimitation of the continental shelf, where islands were specifically mentioned as examples justifying another boundary line.

The case of special configurations of the coast, which in the commentary of the International Law Commission was mentioned as the primary example which would justify another boundary line, has completely disappeared from the scene. Only certain peninsulas of sharply projecting points, in themselves insignificant, comparable to insignificant islands lying before the coast, remain

as cases where a correction of the basepoints of the equidistance line is generously allowed.

The observations as to the geographical situation in the North Sea seem to indicate that in the views of the opposing Parties, the resulting equidistance line for the boundary of the German continental shelf, as is shown on this map, is always considered as normal if it is constructed in conformity with the course of the ordinary coastline. The Danish and the Netherlands share are normal, and just because they follow the principle that they comprise only areas which are nearer to their coasts than to the German coast. That is what they say with respect to the normality of the situation.

What other coastal configurations, besides the already mentioned insignificant, sharply projecting peninsulas, may then ever justify another boundary line? Ostensibly there are none. The allegation that the reduction of the scope of application of the equidistance clause to insignificant islands or insignificant peninsulas is in harmony with the *travaux préparatoires* of the Continental Shelf Convention, is an assertion which, in my view has no foundation. I would refer in this respect to the history of the special circumstances clause in our Memorial, paragraphs 50 to 52, I, pages 53-56; paragraphs 68 to 72, pages 65-74.

In addition to these observations, which are objections against the general line of interpretation of the special circumstances clause in the Common Rejoinder, the four criteria I mentioned before deserve special comment.

The criterion that the special circumstances clause cannot be invoked if the correction of the boundary is not justified with respect to a State which loses by the correction, is on its face a simple truism; I agree to what they say, the correction must also be equitable or just to the losing Party.

If reapportionment has to be made of the continental shelf among the States concerned, no-one would deny that it must be equitable to all States concerned. Only those States which would be privileged by the application of the equidistance method in gaining additional continental shelf areas, if compared with the share they would get on an equitable apportionment, will have to satisfy the claims of those States which, in contrast, would suffer an inequitable result by the equidistance method.

In the case before us, the Kingdom of Denmark and the Kingdom of the Netherlands would, in our opinion, gain more continental shelf area by the application of the equidistance method than under an equitable apportionment, that is an apportionment on the lines I have shown before. The equidistance boundary can only be equitable or inequitable—it cannot be regarded inequitable to the Federal Republic of Germany, but equitable to the Party on the other side of the boundary.

While the first criterion, namely that the correction must be just to both sides, seems to be acceptable on its face, it acquires quite another meaning when combined with the second criterion. This criterion attempts to evolve the theory that a State whose continental shelf boundary conforms to the principle of propinquity, a propinquity as defined by the opposing Party, always has just boundaries and will never be obliged to cede an inch of its continental shelf to another State.

In the words of the Common Rejoinder, the second criterion is formulated as follows (para. 125, I, p. 527):

“... the ‘special circumstances’ clause ... cannot be applied against a State whose continental shelf has a solid geographical connection with the territory of that State thereby constituting a natural continuation of the territory of the State in conformity with the general geographical situation ...”

We could subscribe to that were it not for the fact that the Kingdom of Denmark and the Kingdom of the Netherlands understand any area which is nearer to some point of their coast than to any other State as being the natural continuation of their territory, with the only exception, perhaps, that insignificant islands or peninsulas might be disregarded if they were present here.

By that formula, the second criterion comes down to the simple assertion that the "special circumstances" clause can never be invoked against a State whose continental shelf boundaries conform to the principle of equidistance.

Such an interpretation of Article 6 deprives the special circumstances clause of its real purpose, namely as an escape clause for those cases where the application of the equidistance method would be inequitable and another more equitable boundary has to be found.

The third criterion, which allows the only exception to the second criterion, reduces the scope of application of the equidistance line to insignificant islands or peninsulas. No other coastal configuration may justify a correction of the equidistance line. I cannot find any indication in the work of the International Law Commission or in the *travaux préparatoires* of the 1958 Geneva Conference that such a narrow scope of application of the special circumstances clause was ever envisaged by the authors of this clause.

The Committee of Experts which had recommended the equidistance method to the International Law Commission had done so with the express reservation that in a number of cases this equidistance method may not lead to an equitable solution. In that case they say, such a solution should then be arrived at by negotiation. It was in view of this reservation that the International Law Commission adopted the special circumstances clause in order to make the equidistance method acceptable to the members of the Commission and to provide for cases where the application of the equidistance line would lead to hardship to one of the States concerned. In its commentary the Commission said:

"... provision for departures necessitated must be made by any ..."
I stress this word "... by any exceptional configuration of the coast, as well as the presence of islands or of navigable channels. This case may arise fairly often so that the rule adopted is fairly elastic".

There is no trace that the Commission wanted to confine the application of the special circumstances clause to such extraordinary examples of insignificant islands or peninsulas given in the Common Rejoinder, I, pages 533-535, or that the reference to special configurations of the coast should be construed so narrowly. The deliberations at the Geneva Conference do not shed any more light on the interpretation of the clause. There is a remark by Mr. Kennedy (the United Kingdom Delegate), *Official Records of the Conference*, Vol. VI, page 93, in the discussion of the Fourth Committee of the Conference which found the approval of Miss Whiteman (the United States Delegate), that islands should be treated on their merits, and that very small islands or sand cays should in any case be neglected. But these were certainly not thought to be the only cases of special circumstances.

The long discussions and deliberations on the special circumstances clause can only be interpreted in the sense that it was not possible to define the scope of application of the clause in more specific terms. The clause was deliberately left vague to cover all cases where the exigencies of an equitable apportionment would require its application. In any event there was a desire to have an escape clause to avoid inequitable results by the application of the equidistance method.

I now come to the fourth criterion. This stated that the clause would only

allow a correction by using other base points for the construction of the equidistance line.

I think that the fourth criterion is nothing more than a consequence of the narrow criteria before. In view of the fact that by criterion number 3 only insignificant islands or insignificant peninsulas could justify correction of the equidistance line, this naturally necessitates the neglecting of these islands or peninsulas as base points, but will not necessitate another method for the construction of the boundary line.

It is, however, not justified to say that this may be the only manner of removing a hardship caused by the strict application of the equidistance method.

Article 6, paragraph 2, says:

"... In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary shall be determined... by the principle of equidistance..."

There is no hint in the wording of Article 6, paragraph 2, that the only way of making allowances for special circumstances would be to change the baseline. If the authors of Article 6 had wanted to limit the explication of the clause to this effect, they would have stated the same. On the contrary, the words: "... unless another boundary is justified by special circumstances" seem to indicate rather that the alternative boundary need not be constructed as an equidistance boundary.

Why didn't they say: if there are special circumstances the boundary should then be constructed on another baseline?

To conclude: I see no justification whatsoever for such a narrow interpretation of the special circumstances clause as it is advocated by the Kingdom of Denmark and the Kingdom of the Netherlands. I see no explanation for that, unless one can surmise the purpose to escape from an objective evaluation of the equitableness of the equidistance method in the case before this Court.

If such a narrow interpretation, which must reduce the meaning of the clause to practically nothing, would gain ground, that would result in the silent but effective burial of the special circumstances clause and in the establishment of the equidistance method as the only rule. Such a construction would seriously hamper the development of the law of the continental shelf and States would hesitate to ratify the Continental Shelf Convention even more than previously.

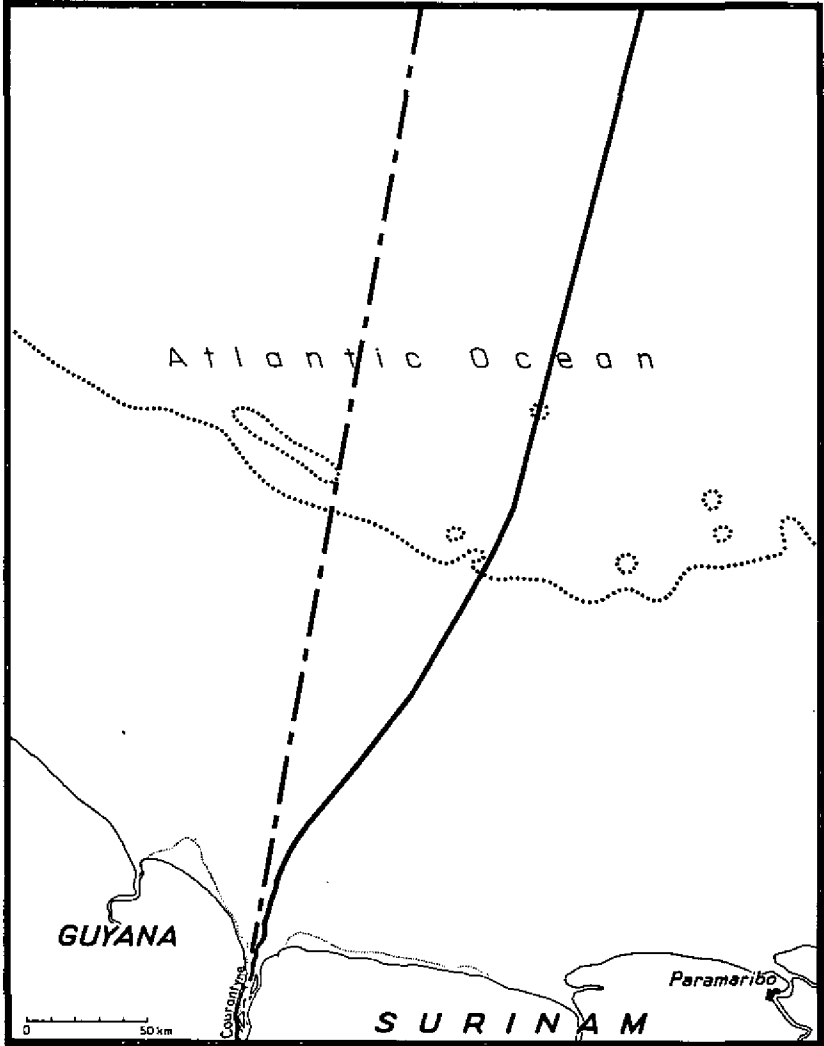
I cannot believe that this is really the conviction of the Kingdom of Denmark and the Kingdom of the Netherlands with respect to the interpretation of the clause. We have got information that the Kingdom of the Netherlands, for example, which is responsible for the foreign relations of Surinam, which is part of the Kingdom of the Netherlands, seems to take another view in this situation. We have distributed an article which became known to us during this year on some dispute that is going on between Surinam and Guyana concerning the delimitation of their respective continental shelves. We have submitted this article, which recently appeared in the *Nederlands Juristenblad*, 1968, No. 9, pages 224-225 to the Court as well as to the Parties and a map (see p. 48, *infra*) showing the substance of this dispute¹. So far as I have heard there has been no objection to producing this article and map up to now, and it may be that you already have this map before you. Is there any objection?

Professor RIPHAGEN: Mr. President, we have no objection.

Professor JAENICKE: Thank you very much.

This shows that Surinam wants to have the boundary of the continental shelf

¹ See p. 299, *infra*, and Nos. 41, 43 and 44, pp. 386, 387 and 388, *infra*.



constructed in such a way that it would be the continuation of the westward bank of the Courantyne river, which would be the line to the left on this map, while Guyana on the other hand would like to rely on the equidistance line, which is the through line here on the right of the map. While I do not want to pass any judgment on the question which of these two lines is equitable, I just wanted to show that the Kingdom of the Netherlands does not apply such a narrow interpretation to the special circumstances clause in this case, and it is interesting that this case of the lateral boundary where the projecting coast of Guyana diverts the equidistance line before the coast of Surinam. This is just an example of the "diversion effect" which might be a justification for invoking a special circumstances clause.

In opposition to the untenable narrow interpretation advocated by the Kingdom of Denmark and the Kingdom of the Netherlands, the Federal Republic takes the position that the special circumstances clause must be interpreted according to its purpose. As it is the purpose of the clause to avoid inequitable results of the equidistance method, it seems justified to say that it could be invoked in any case where one could establish that the equidistance method would result in an inequitable apportionment of the continental shelf among the States concerned.

Of course, it is insufficient to invoke mere equity in order to establish that there are special circumstances which justify another boundary line. Here, again, we must search for criteria which can determine whether the circumstances of the situation are so special as to justify another boundary line. In their Counter-Memorial, the Kingdom of Denmark and the Kingdom of the Netherlands have tried to split up this basic question into two. The first, to enquire whether the circumstances of the case are special, and after this has been established to ask further whether this special situation justifies another boundary line. I do not think that these two questions can be separated from each other because the special nature of a particular situation cannot be ascertained without knowing in what respect the situation has to be found special. Since there must be some special reason to justify another boundary line, the particular situation must necessarily be distinguishable from others by special facts which provide sufficient justification for a different boundary line.

Now I think that the special circumstances clause does not require that there exists a factor which is itself abnormal or exceptional. A certain coastal configuration cannot be characterized as abnormal by itself. Who would dare to determine what a "normal" or "abnormal" geography is? Only the effect of that factor or a combination of the factors on the apportionment of the continental shelf could constitute a special situation which would justify a different boundary. There are no factors which necessarily lead to an inequitable result nor are there factors which can never cause such a result. It depends on the specific situation, on the geography, on the land frontiers, on the extension of the continental shelf, etc., whether the combination of all these factors gives the situation such a special characterization that the application of the equidistance line would produce an inequitable result. Here again, the preliminary question poses itself—what are the criteria which determine the equitableness or inequitableness of the apportionment of the continental shelf?

The Federal Republic of Germany is of the opinion that under Article 6 of the Continental Shelf Convention the criteria which determine the presence of special circumstances excluding the equidistance line, are quite the same as those which determine the applicability of the equidistance method between States to whom the Convention does not apply. This could not be otherwise. The equitableness of the apportionment of the continental shelf among the

adjacent States is not dependent upon the question as to whether the boundary is drawn between parties or non-parties to the Convention. If an inequitable apportionment of the continental shelf between the Parties is sufficient ground for invoking the special circumstances clause, I could refer to the criteria which I have already mentioned in the first part of my address this morning, with respect to the applicability of the equidistance method under the non-conventional regime.

However, I should like to show that even under the conventional regime, if it were applicable between the Parties, there is sufficient reason, in the situation before the Court, to recognize special circumstances which justify a boundary other than the equidistance line.

Even if we were for a moment to forego the concept of the equitable apportionment which has found so little favour with our opponents, is there a situation which might be generally characterized as a special circumstance justifying another boundary line? I think that such a situation does indeed exist.

Any geographical factor which diverts the course of the equidistance boundary between two States in such a manner as to cause the allocation of considerable areas of the continental shelf to one State—I must just repeat to be quite clear, any geographical factor which diverts the course of the equidistance boundary between two States in such a manner as to cause the allocation of considerable areas of the continental shelf to one State which is necessarily classified as a natural continuation of the territory of a second State, then such a factor must be regarded as a special circumstance within the meaning of Article 6, paragraph 2, of the Convention.

Under the aegis of this definition I could even with satisfaction acquiesce in the viewpoint of our opponents who say that the State has a valid title to those areas before its coast which are to be regarded as a natural continuation of its territories—this of course implies that the State has no valid title to areas which are the natural continuation of another State's territory. If the equidistance line diverts the boundary into the area which is the natural continuation of the other State then, in my view, special circumstances exist.

There again, the problem in the case before us is reduced to the following question: Does the equidistance boundary follow the true limits of the continuation of the State's territory into the sea? As to the situation before the Danish, German and the Netherlands coast, the real question is: What areas have to be regarded as the natural continuation of the one or the other State? That brings us in fact back to the same criteria which we needed for determining the equitable apportionment of the continental shelf between the Parties under the non-conventional regime.

The Kingdom of Denmark and the Kingdom of the Netherlands allege that all areas which are nearer to some point on their coast than to the German coast have to be regarded as a natural continuation of their territory. Therefore, they claim that the equidistance boundary is perfectly normal because it allocates to them only such natural continuation areas. This would in effect come down to a mere tautology, to saying that an equidistance boundary is normal because it is equidistant.

Now I turn to the question how to determine whether the equidistance line follows the direction in which the territories of the three Parties continue into the sea. Suppose you would isolate the Danish and the northern part of the German coast and disregard the existence of all other coasts of the North Sea, as if both countries were facing an open sea. Then it might be possible, under this hypothesis, to regard the areas west of both countries as a natural continuation of their territories into the sea. The equidistance line could then be

regarded as normal and equitable. You could do the same with the Netherlands coast and the adjoining part of the German coast and disregard the other North Sea coasts, just as if both countries were facing an open sea to the north-north west, the areas north-north west of both coasts might then be regarded as a natural continuation of the Netherlands or German territories into the sea. The equidistance boundary might then, in such a case, be regarded as normal and equitable.

Such an approach, however, isolating both situations in such a way, distorts the general geography of the situation. You cannot split up the boundary question between Denmark and Germany or between the Netherlands and the Federal Republic of Germany as if there were no other countries adjacent to the North Sea.

I again refer to the informative diagram in the Common Rejoinder, I, page 472, or if you prefer, to the big map before you. What is the direction into which the territories of the three States extend themselves into the North Sea? If you take as a basis the general direction of their coasts, or the direction of the coastal front of each of the three States, the direction of the extension of their territories extending into the North Sea is determined by a line perpendicular to each respective coastal front. Then their continental shelves gradually converge into each other and if we then determine what areas are the natural continuation of the one or the other State, we are, for the manifestation of the geography, forced to regard them as sector-like slices converging towards the place where the continental shelves of Great Britain, Norway, Denmark, the Netherlands and the Federal Republic of Germany meet. It is just like the same operation we did before when we discussed the equitableness of an apportionment of this remaining factor in the south-eastern part of the North Sea.

If we now pose the question whether the equidistance line follows the natural continuation of the three territories into the sea, we have to regard this problem as a single whole. Then we come to a completely different result, because the Danish as well as the Netherlands coast is projecting towards the centre of the North Sea, while the German coast, between the two others, curves back from the general coastline. Thereby, the equidistance line on both sides is distorted into the German sector so that both lines meet not far from the German coast. This cutting off of extensive areas of the continental shelf can only be regarded as a special circumstance, because it cuts off extensive areas of the continental shelf which should be regarded as the continuation of German territory in view of the criteria which I developed earlier this morning.

This "cut-off effect" has been demonstrated diagrammatically by figure 3 as well as figure 5 in our Reply, I, pages 428 and 430. This cutting-off effect would have come about—as you will see if you compare figure 3 and figure 5—either if the three countries would face an open sea, or an enclosed sea like the North Sea. This I submit, forces us to the conclusion that such a "cut-off effect" invariably is the special circumstance which justifies another boundary.

In their Common Rejoinder, the Kingdom of Denmark and the Kingdom of the Netherlands try to deny that their coasts have projecting parts causing a diversion of the equidistance line. They say that the Federal Republic of Germany had not in the slightest way suggested what part of their prominence coast had to be considered as projecting or what influence on the boundary line such a part might have.

I think that I have shown quite clearly what are the projecting parts I have in mind and either the diagram or the map will show how the form of the coastline of Denmark as well as the Netherlands produces this "cut-off effect".

Now I hope I have, by this, made clear what special circumstances the Federal

Republic of Germany regards as present in this case. The correction which the present situation calls for is to neutralize this cut-off effect of the diversion of the equidistance line. This can be done by agreeing on a boundary which follows more closely the direction in which the continental shelves of the three States converge towards the centre of the North Sea. Again I must emphasize that this does not mean that the Federal Republic of Germany wants to be compensated at the expense of its neighbours.

The Federal Republic of Germany maintains that the areas of the continental shelf involved in such a correction, lying ahead of the Germany stair towards the middle of the North Sea which has, up till now, been unilaterally treated as part of the Danish and Netherlands continental shelf, do not appertain to our neighbour States, if the concept of the continental shelf is understood correctly. The reason is that it cannot properly be regarded as the continuation of their territory in the sea.

If the Court recognizes that special circumstances are present which justify a boundary other than the equidistance boundary, the legal consequence would then be that another boundary line would be drawn under Article 6 (2) if it is applicable. Thus the result would be the same if Article 6 (2) were applied to the case. In any event the Parties will, if the Court would recognize that the equidistance method would not be applicable, have to agree on another boundary with such guidelines as the Court may deem proper to give to the Parties with respect to the factors which they should take into account. This is in accordance with general international law as well as with the conventional regime under Article 6.

Under general international law the determination of the boundary is entirely left to the agreement of the Parties. Although it may be true that there are cases where a party must accept the equidistance line as a basis for a boundary proposed by the other party, if it is equitable, it is equally true that in other cases the parties must agree on another boundary line if the equidistance line is not equitable. If the Parties referred to arbitration, as they have done in this case, and if the Court were then to find that the Federal Republic of Germany is under no obligation to accept the equidistance line, the matter would necessarily have to be referred to the Parties for further negotiations on another boundary line, with such guidelines as the Court in its discretion might deem proper to give to the Parties.

Under the regime of Article 6 of the Continental Shelf Convention, if it were applicable between the Parties, the determination is also primarily left to the Parties. It then depends whether there are special circumstances or not. If the Parties agree that there are no special circumstances then the equidistance boundary is the boundary, but if the Parties are in dispute as to whether there are special circumstances or not, the matter has to be settled either by agreement or by arbitration. If the Parties resort to arbitration as they have done here, and if the Court would then find that there are special circumstances, the matter will necessarily be referred to the Parties for further negotiations on another boundary line and also with such guidelines as the Court, in its discretion, may deem it proper to give the Parties with respect to the factors they should take into account. In this case the primary method of settlement prescribed in Article 6, namely that the boundary line should be determined by agreement, will become operative again.

Certainly the considerations under which the Court might find that the equidistance line is not applicable in this case will give enough guidance to the Parties as to what should be the equitable apportionment of that part of the continental shelf.

The Court rose at 1.10 p.m.

THIRD PUBLIC HEARING (25 X 68, 10 a.m.)

Present: [See hearing of 23 X 68.]

Professor JAENICKE: Today I would like to afford my learned colleague, Professor Oda, the opportunity to address the Court on the subject-matter of the dispute before you. I need not introduce Professor Oda in his capacity as an expert of maritime law. I will presume that you know him already by his writings on this subject.

Professor Oda has been intimately connected with the law of the sea since 1958. He has been a member of the Japanese delegation to the Geneva Conference on the Law of the Sea in 1958. He has recently participated in the work of the United Nations *Ad Hoc* Committee to Study the Peaceful Uses of the Sea-Bed and the Ocean Floor Beyond the Limits of National Jurisdiction.

Professor Oda will continue the presentation of the case on behalf of the Federal Republic of Germany in his personal capacity as learned counsel to the Government of the Federal Republic of Germany.

ARGUMENT OF PROFESSOR ODA

COUNSEL FOR THE FEDERAL REPUBLIC OF GERMANY

Professor ODA: Mr. President and Judges of the Court, I deem it indeed an honour to be able to make an appearance before the Court. I also consider myself privileged that the Government of the Federal Republic of Germany and its Agent, Professor Jaenicke, have entrusted me with the task of pleading this case as counsel and have thereby offered me the opportunity to attempt to delineate the issues now before the Court.

Quite clearly, this is a case which, due to its complexity and due to its importance both to the Parties and to the community of nations as a whole, has elicited lengthy and learned written pleadings from both sides. In so far as oral arguments are concerned, I appear here following the Agent of the Federal Republic of Germany, Professor Jaenicke. The facts and the fundamental issues involved in this case have therefore been amply discussed and I would not presume to imagine that I could, at this stage, treat a wholly new aspect of this case. What I would like to do, however, is to see if I cannot perhaps serve the Court by touching upon and, in some instances, re-examining some of the factual and legal implications which confront us by approaching this from a somewhat different, somewhat personalized, as it were, viewpoint. With this in mind I would try to be selective rather than inclusive: to the extent that I am obliged at times to cover territory discussed previously, I ask your indulgence.

May I outline those matters upon which I would like to make some general comment. Subsequently I would like to touch in some detail upon some of the matters which I think merit attention.

To begin with, let us return to a few basic elements of this case which might perhaps be lost in the development of detailed analysis unless attention is redirected to them. If we examine the large copy of the map which is displayed at the rear of the courtroom¹ and the similar map, figure 2, in our Memorial, I,

¹ See footnote 1 on page 32.

page 27, it becomes apparent that, in the situation of the North Sea, we are confronted with lines of demarcation which are both just and uncontested and others which are not. Contested lines have no definite legal existence prior to final adjudication by the Court.

If a line drawn for demarcation purposes is to become legally binding for the parties concerned, it is necessary that it receives legal recognition. There are three alternatives how this can be achieved. The line must be fully agreed to by those nations whose vital interests are at stake, or such a boundary must have come into being pursuant to a recognized customary rule of international law, or else it must have received confirmation by a competent international tribunal.

The enumeration of these alternatives makes it clear that a boundary has no legal existence if it does not correspond to one of the three law-creating processes just mentioned. I would refer to the line drawn as the median line between the British Isles on one side and the European Continent on the other as being in harmony with the principles of international law.

The use of a median line is a method of demarcation which, if used in proper geographical context, and if no unsound subsequent conclusions are drawn from its existence, can lead to commonsense results and just and equitable solutions. However, you will note that I mention the importance of usage in its proper context. The median line drawn between the British Isles and the European Continent must therefore be seen in the proper context. That situation is one in which the median line is used to divide the maritime areas found between nations whose coastal frontages lie roughly in opposition to each other. In contrast, the equidistance line is not properly employed as a line of demarcation between adjacent coastal States, in those instances where maritime areas at a substantial distance from the shoreline are to be apportioned. The Parties to this litigation are adjacent coastal States. The attempt to use equidistance lines formalistically applied to apportion the continental shelf areas of these adjacent coastal States, with the consequence of having lines of demarcation drawn in this fashion reaching far out beyond the coastal belt, can quite easily lead to the odd result so well illustrated on the map in the rear of the courtroom.

Having begun with this very brief discussion of prime examples of both the proper use and the misuse of equidistance lines for demarcation purposes, I would like to follow from this into a more detailed discussion of four separate, logically related topics. May I outline them briefly?

The first deals with the point that the equidistance method, as envisaged and advocated by the Kingdom of Denmark and the Kingdom of the Netherlands, was not a rule of customary international law with regard to the delimitation of the continental shelf at the time when the Geneva Convention on the Continental Shelf was adopted in 1958.

Secondly, I think that I can show that the relevant State practice for the past ten years since 1958 has not become sufficiently developed as yet so as to coalesce into customary international law with respect to the equidistance method.

My third point follows the necessary conclusions of the first two. Since the question of how to treat demarcation lines in situations similar to the present case cannot be answered by recourse to customary international law, and since no such custom can be correctly said to have been developed either prior to or subsequent to the Geneva Convention on the Continental Shelf, I therefore respectfully refer to Article 38, paragraph 1, of the Statute of the Court; that the Court, I respectfully submit, should apply in this case the general principles of law recognized by civilized nations.

My fourth, and final, discussion will treat the question of how the above-

mentioned general principles of law recognized by civilized nations can provide us with the necessary criteria for deciding what would constitute a just and equitable share in the particular factual situation now confronting us.

As I mentioned, the first thing I would like to do is to negate the existence of relevant customary international law prior to 1958. You will remember that in my opening remarks I referred to what I call the "odd" results which would be reached in this particular situation through strict application of the equidistance method. It is interesting to note, therefore, that prior to 1958, the year of the Geneva Convention on the Continental Shelf, no State custom or practice had been established with regard to such a manner of applying the equidistance method. I should make it quite clear that I am not attempting to infer that the fundamental principles of the regime of the continental shelf were novel in 1958. I am merely trying to emphasize that in 1958 solutions to some of the detailed problems concerning the continental shelf concept had not yet been found.

I think it is undisputed that with respect to the general concept of the continental shelf, because of continual State practice since the end of World War Two (particularly in the form of numerous proclamations concerning the shelf) customary international law with respect to the continental shelf in general had evolved by 1958.

We have the example of the Truman Declaration of 1945, which says:

"In cases where the continental shelf extends to the shores of another State, or is shared with an adjacent State, the boundary shall be determined by the United States and the State concerned in accordance with equitable principles". (*U.N. Legislative Series, Laws and Regulations on the Regime of the High Seas, Vol. 1, 1951, p. 38; italics added.*)

Among examples we have the proclamations by Saudi Arabia and several of the Trucial Sheikdoms concerning the continental shelf in the Arabian Gulf and the Iranian pronouncement concerning the continental shelf of the Arabian Gulf.

It is most noteworthy that in all the above-mentioned examples great emphasis was laid in the proclamations that the boundaries should be delimited in accordance with the principle of equitable apportionment. It is also relevant, in contrast to the present situation, that these claims were not objected to by any other States, and therefore these claims can be said to have been tacitly accepted. The opposing side in this case cannot be heard to argue that there is an element of tacit acceptance here.

It would be fair to say, therefore, that, until 1958, it was an equitable standard, rather than the strict application of formal geometric construction which provided a standard for apportioning the continental shelf areas.

Regarding the over-all continental shelf regime, the late Sir Hersch Lauterpacht had already in 1950 referred specifically to the doctrine of the customary law of the continental shelf. Further, he emphasized the absence of protests by other States affected by these proclamations. Sir Hersch Lauterpacht's viewpoint has had a strong effect upon other scholars. For instance, Professor Kunz took the same approach to these problems. He advanced the opinion that the doctrine of the continental shelf was at that time not yet a norm of general customary international law, but could be considered a new norm of general customary international law *in fieri, in statu nascendi*.

By 1958 there was widespread recognition that a coastal State is vested with exclusive sovereign rights for the exploitation of natural resources from the continental shelf contiguous to its coast. The rights of such a coastal State over its contiguous continental shelf are exclusive in that other States who are not

contiguous to such a shelf cannot claim or acquire rights to the part which appertains to the aforementioned coastal State. This fundamental doctrine is reflected in the Convention on the Continental Shelf in Article 2, paragraphs 1, 2 and 3. In no way then could the general concept of the continental shelf existent at the time of the Convention be said to enable a coastal State to acquire exclusive rights to contiguous continental shelf areas to the detriment of adjacent coastal States whose coastline is also contiguous to that same continental shelf. Those sections of the Convention which dealt with the particular problems of delimiting the geographical extension of the shelf and of the boundary lines between adjacent coastal States contiguous to it were new and did not reflect customary international law existent at that time. It might be useful to stress the development of those rules in the Convention, Article 6, which represent a new rule not found in customary international law. The background thereto can be found in the deliberations of the International Law Commission between 1950 and 1956.

The report of the International Law Commission rendered in 1950 contained relevant comment in paragraph 199 (*Yearbook of the International Law Commission*, 1950, Vol. II, p. 384). At that time the Commission began to note that boundaries had to be delimited in cases where the interest of two States overlapped, with regard to mutual interests so that no State could penetrate into regions which belonged to another State. In 1951 a special rapporteur of the Commission on this subject, Professor François, stressed in paragraph 162, section 9, of his report (*ibid.*, 1951, Vol. II, p. 102) that in this situation common accord was a primary element in delimiting boundaries and, I would point out, that, as to the method of actually drawing the boundary, the special rapporteur spoke merely of prolonging the line which separates the respective territorial waters of the States concerned.

The only definite matter alluded to was a median line, which concerned the situation involving the delimitation of boundaries between opposite coasts.

The report of the International Law Commission in the year of 1951, which took due note of the comment of the special rapporteur, again emphasized the need for agreement in drawing continental shelf boundaries of adjacent coastal States and, in the absence of agreement, a solution by arbitration or by adjudication on the principle *ex aequo et bono*. It is, I think, most interesting and relevant that the commentary to Article 7 of the 1951 International Law Commission Report states:

“It is not feasible to lay down any general rule which States should follow; and it is not unlikely that difficulties may arise. For example, no boundary may have been fixed between the respective territorial waters of the interested States and no general rule exists for such boundaries.” (*Ibid.*, 1951, Vol. II, p. 193.)

There can be no clearer proof that at the time of this report—1951—there was no possibility whatsoever of the existence of a customary rule of international law which demanded the application of what is now known as the equidistance method.

In the course of the deliberation of a committee of experts which was appointed in 1953 to find appropriate methods of drawing boundaries, direct mention was made for the first time of the equidistance method. Significant once again is that the committee conceived of a very narrow scope of application for this rule. Let me quote you the remarks of the committee:

“The Committee considered it important to find a formula for drawing the international boundaries in the territorial waters of States, which could

also be used for the delimitation of the respective continental shelves of two States bordering the same continental shelf." (*Ibid.*, 1953, Vol. II, p. 79. English text according to Danish Counter-Memorial, I, p. 258, *supra*.)

I think that this is a very important point and I would like to dwell upon it if I may. The statement that I have just quoted does say that the equidistance method can also be used for delimiting the continental shelf. If one reads a statement without obtaining strained or tortured interpretations, it is clear that the equidistance method was conceived of primarily for the demarcation of the territorial waters of coastal States. The use of this method for apportioning the continental shelf was mentioned as a mere possibility, and could not even remotely imply a mandate for the use of this method in all situations. The fact that the equidistance method was designed primarily to delimit territorial water boundaries is all the more important when we consider that in such a case relatively short distances from the coastal front are involved, and the extreme, and even sometimes bizarre, results reached by strictly applying the equidistance method to apportion the continental shelf at greater distances from the coastline cannot come into play.

It is evident that the arbitrary effects of the strict equidistance method increase with the distance from the coast. The shortcomings are insignificant near the coast but can become monumental far off shore.

If any doubt remains that the equidistance method was not introduced for general application in order to apportion vast expanses of marine areas, it would be well to consider the reservation contained in the preamble to the report of the Committee of Experts:

"It should be emphasized that these replies are given from the technical point of view, bearing in mind in particular the practical difficulties of the navigator." (*Yearbook of the International Law Commission*, 1953, Vol. II, p. 77. English text according to the Danish Counter-Memorial, I, p. 254.)

It seems almost too evident that a navigator would not be concerned at all with the continental shelf boundaries but rather with the areas defined by the limits of the territorial waters. After all, the former boundaries do not involve issues of admiralty law but of exploitation rights to the resources of the shelf subsoil. And yet you will remember that the rule formulated in this report looks to "the practical difficulties of the navigator".

The Report of the International Law Commission in 1956 then mentioned, in Article 72 thereof (*Yearbook of the International Law Commission*, 1956, Vol. II, p. 264), the use of the equidistance method to determine the allocation of the continental shelf between adjacent States, with of course, the special circumstances limitation. Much has previously been said by Professor Jaenicke about the question of special circumstances, so I shall not dwell upon this. I would merely stress that the International Law Commission was aware of the impossibility of strictly applying the equidistance method and, therefore, not only included the special circumstances reservation, but, in the commentary on the relevant article (Article 72) stated that "the rule adopted is fairly elastic".

We come now to my point of departure, namely the Geneva Convention on the Continental Shelf in 1958. I hope that I have shown that at that time the equidistance method did not represent a rule of customary international law and that to the extent the equidistance method was incorporated into the articles of the Convention, its rule of application was seen as being of a suggestive rather than of a mandatory nature. Flexibility, as I have quoted before, rather than rigidity, was to be the criterion for determination. I have thus far discussed the

lack of customary law status of the equidistance method up to the time of the Geneva Convention on the Continental Shelf. I would now like to turn to part two of my discussion which relates to the status of the equidistance method following the Convention of 1958. I propose to examine in some detail the State practice with regard to the division of continental shelf areas. I shall then see what general conclusions can be drawn from the over-all picture. I would emphasize once more that to the extent it is claimed that the equidistance method has customary law status, it must have acquired such status since 1958, if it had done so at all. I think that I can say that it has not done so. Let us look to the precedents in this area.

There are a certain number of them and the shortage of time alone precludes me from discussing them all. To begin with, I think we can well dispose of those examples which concern bilateral agreements between States having opposing coastal fronts. Such a division would of course constitute a solution on the basis of a median line, and, as we have already indicated, the Federal Republic of Germany does not object to the use of the median line as a criterion under the proper circumstances. Since in the present case we are not faced with a dispute concerning the median line of the North Sea I think I need not discuss those precedents involving States with opposing coastal frontages. What I would like to do is to examine the factual situation in some of the precedents that involved agreements between adjacent coastal States as to the delimitation of their joint boundaries defining their respective offshore areas. I shall then ask whether we can present a useful analogy between these precedents and the factual situation that now confronts this Court.

If we can take the position that the median line method is not directly relevant to this case, we will find that what remains of the precedents on State practice does not present us with any clear cases where the equidistance method was strictly applied to draw boundaries between adjacent coastal States. What we do find among the precedents, however, are some cases which, though not directly analogous in fact to this one, nevertheless deserve comment because they may render us some insight as to how this troublesome factual situation might possibly be solved in a just and equitable manner.

If we take a brief view of the situation in the various continents, in South America we have the example of simultaneously executed bilateral agreements between Chile, Peru and Ecuador. These countries entered into agreements providing for the allocation among them of vast expanses of offshore areas. It is significant that those countries intending to draw boundaries reaching a far distance from the coastline, disregarded the equidistance method and instead employed an alternate approach. The three countries delimited their maritime zones by drawing boundaries extending 200 miles from the actual coastline. These lines were constructed by drawing them along the parallels of latitude which continue the parallel of geographical latitude from the final point of land frontier. The fact is that in this precedent we have a workable solution for the allocation of extremely far-reaching boundaries to delimit maritime areas among adjacent coastal States; a method other than the equidistance method was employed. I would note in passing that we are not concerned here with the merits of the 200-mile claim but rather merely with the method in which the lines were drawn.

I would next like to turn to the matter of the concession granted by Kuwait to the Kuwait Shell Petroleum Development Company. Reference was made thereto in Appendix 5 to Annex 9 of the Common Rejoinder of the Kingdom of Denmark and the Kingdom of the Netherlands. A map contained therein delineates the concession area granted to the Kuwait Shell Petroleum Develop-

ment Company; I would like to refer to this map for the purpose of clarity.

May I call your attention to the fact that our opponents in Appendix 5 to Annex 9 of their Common Rejoinder in a note contained in the lower right-hand corner of this map have alleged that the concession boundary would correspond to boundaries drawn on the equidistance principle if certain islands are disregarded. At least, that is the meaning I derive from the words "simultaneously equidistance line when the islands [names omitted] are disregarded". It may well be that these concession lines correspond to results reached by an application of the equidistance method upon certain premises. However, consideration of this situation will not cast much light on how to achieve a solution in the North Sea. This example is not relevant to the case before the Court. For one thing, it may be presumed that the opposing side has had to look very hard and very far indeed for an example of any allocation of maritime areas far offshore based upon the strict application of the equidistance method. This is not an example of a bilateral treaty between sovereign States; rather it is a concession granted by a sovereign State to an oil company, pursuant to the exercise of the State's sovereign rights. Of course, the opposing side may look upon the Kuwait Shell Petroleum Development Company as a sovereign entity. It may well be that things have come to such a point but I, as a cautious jurist, would not yet be ready at this time to grant that the Shell Oil Company presents the attributes of sovereignty. But let me continue. Disregarding for the moment this obvious distinction there are still serious problems in trying to draw analogies from the Kuwait concession situation. The latter is not at all as clear as this sparsely drawn map would indicate. The Kuwait Government apparently does not regard the boundaries indicated thereon as final.

Kuwait, which shares sovereignty over the neutral zone between it and Saudi Arabia, granted a concession touching upon the coastal front of the neutral zone to the Arabian Oil Company in 1958. This latter concession area overlaps significantly into the Shell concession area delineated on the map in question contained in the Common Rejoinder. Since the same State, Kuwait, which granted the Shell concession also [together with Saudi Arabia] granted the Arabian Oil Company concession, this means that the lines indicated on the map cannot be regarded as final. The significance of the concession to Kuwait Shell is greatly reduced as a precedent for the employment of the equidistance method involving long distances offshore.

To complicate the situation depicted by this misleadingly simple map even further, it should be noted that the Government of Iran has granted two other oil companies concessions which again significantly overlap and intrude upon the Kuwait-Shell concession areas depicted. When this is taken into account, I would submit that, as an example of a continental shelf allocation achieved by the strict and undisputed application of the equidistance method, this precedent becomes next to valueless. If this is not enough, while we are on the subject of this example brought forth by our opponents, it should be noted that a provision in the Kuwait concession to the Arabian Oil Company stated that demarcation should be finalized by negotiation with a view to a determination on equitable principles.

I would like now to turn to the example of the demarcation of the continental shelf contiguous to the coast of the State of Senegal. This boundary separates the territory apportioned to Senegal on the one side and Portuguese Guinea on the other side. It should be noted that this boundary was agreed upon in 1960 before Senegal achieved its independence. I would point out that here we are confronted with a solution which had no recourse to the equidistance method. In the case of the adjacent States of Senegal and Portuguese Guinea, the

off-shore boundary was drawn as a rectilinear extension of the border between the two respective territorial waters. The latter border is a straight line. This example is mentioned in the Danish Counter-Memorial, I, page 267, and in the Netherlands Counter-Memorial.

An interesting example is the boundary which apportions areas of the continental shelf between the U.S.S.R. and Finland respectively. Here, we have a situation where the pertinent boundary line may be said to change its nature at a certain part of its course. For a certain distance after it leaves the coast from the point in the Gulf of Finland where the land frontier between the two countries ends, the boundary looks like a lateral line; then it turns and continues on a course in the Finnish Gulf half-way between the coast of Finland and the opposing shoreline. This latter part of the boundary must truly be classified as a median line. On the other hand, that segment of the boundary which touches the coast constituting a lateral line, was, due to special circumstances, not drawn on the basis of the equidistance method. If this example has any relevance to the present case, I believe, therefore, that it constitutes a negative precedent as to the equidistance method.

We may discern a somewhat similar situation in the recent treaty concluded between Norway and Sweden, which divides the continental shelf in the Skagerrak in a manner depicted on the map to be found in the Common Rejoinder, I, page 553. For the sake of clarity may I refer to this map for the purpose of analysis.

The opposing side has seen fit to classify this line as a lateral boundary drawn on equidistance principles. A glance at the map will show that this is hardly the case. For one thing, even a cursory examination shows that, regardless of what this line is called, it looks very much indeed like a median line, since the relevant coastal fronts of both lie almost opposite each other.

A median line solution in this context would seem to be a perfectly fair one and, undoubtedly, that is why the contracting parties agreed to this delimitation. Further, special circumstances were taken into account in drawing the line. In view of the fact that the solution to this situation is an equitable one and provided for the modification of the equidistance method because of special circumstances, I am not at all displeased that the opposing side chose to provide the Court with such a graphic rendition of it in the Common Rejoinder.

The concrete cases discussed up to this point are a result of bilateral treaties between States and I feel that it can be said that they do not present a picture in favour of the application of the equidistance method in the present situation. In evaluating the State practice in this field, I would now like to turn my attention to solutions attempted by means of unilateral State acts. There are few such instances of that type of State practice. To my knowledge, they comprise the situations existing with respect to:

1. *Iraq*: As the opposing side asserted in paragraphs 70 ss. of the Common Rejoinder, the Iraqi Government envisages a delimitation of the continental shelf off her coast in the Arabian Gulf on equidistance principles;
2. *Belgium*: As the opposing side indicated in paragraphs 61 and those following of the Common Rejoinder, Belgium would be ready to delimit her part in the continental shelf of the North Sea by agreements with her neighbours on equidistance lines, should the Bill introduced by the Belgian Government be passed.
3. The Decree by the Presidium of the U.S.S.R. Highest Soviet, dated 6 February 1968, referred to by the opponents in paragraph 66 and Annex 6 of the Common Rejoinder, repeats almost verbatim the contents of Article 6 of the Geneva Convention on the Continental Shelf.

4. Australia has unilaterally claimed continental shelf areas off her territories vis-à-vis West Irian—claims partially based on the equidistance method.

Let us see if we can draw any relevant conclusions from the above enumerations of these unilateral acts.

First, there is, of course, no assurance that the parties who unilaterally acted will in the future maintain their respective positions. Secondly, the States which have thus unilaterally acted are presumably well content with a solution they themselves have chosen. Thirdly, to our knowledge at the present time, the boundary solutions enunciated unilaterally apparently do not seem to present inequitable situations to the adjacent States concerned.

A review of the unilateral State practice, therefore, shows, I submit, no cases of any relevance whatsoever to this dispute.

I have tried in the second part of my general discussion to examine the State practice as of the date of the Geneva Convention on the Continental Shelf in 1958. It is my conclusion, which I respectfully submit to the Court, that the State practice in the last ten years has not caused the equidistance method to acquire the status of a rule of customary international law. I have also tried to show that, prior to 1958, there was no rule of customary international law as to the use of the equidistance method. I submit, therefore, that the strict application of the equidistance method in the present factual situation cannot be justified by recourse to customary international law.

I now turn to the third major point of my argument. It is my contention that a solution in this case must be based upon the principle of a just and equitable share.

However, to reach this criterion for determination, I do not think it is necessary that we have any recourse to the Statute of the International Court of Justice—Article 38, paragraph 2 (decision *ex aequo et bono*)—an approach which the Parties would, of course, have to agree to. This approach, however, was not treated in the *Compromis* and so, if we are to discover the rule calling for an equitable solution in this case, we shall have to look elsewhere within Article 38 than to paragraph 2. I think this can be done. Let us glance very briefly at the alternative open to the Court under Article 38, paragraph 1, as to what law is applicable. Paragraph 1 (*a*) speaks of treaty law; this is, of course, not applicable here since the Federal Republic of Germany has not yet ratified with good reasons, as Professor Jaenicke has shown, the Convention on the Continental Shelf of 1958. Let us turn to paragraph 1 (*b*): it is my position, as I submitted to the Court in the second part of my argument, that there is no general practice accepted as law which would call for the strict application of the equidistance method in this particular factual situation before the Court, nor does paragraph 1 (*b*) provide us with any international custom which would provide a specific solution. That leaves us, of course, only with paragraph 1 (*c*) which refers to “the general principles of law recognized by civilized nations”.

The latter paragraph is the one which, I submit, we can look to with success in order to find a proper solution. It can well be said that the doctrine that equitable distribution under the law should be achieved in a just and equitable fashion, to permeate and imbue the entire range of the rules of law known to civilized mankind so that the principle of equitable solution to legal problems is an inseparable and vital element of all general principles of law.

There is an assumption, nay, even a presumption, so fundamental as to appear as an axiom, which suggests that there is a general principle of law, recognized by civilized mankind, which calls for the law, if at all possible, to be applied in

such a fashion as to achieve substantial justice. Substantial justice, I submit to you, means in such a situation that each party to a dispute will receive a just and equitable share; I say that it is my conviction that this is law.

I might add in this respect that Article 6, paragraph (2), of the Geneva Convention on the Continental Shelf which, even though not binding on the Federal Republic of Germany as treaty law does represent a facet of international law by virtue of the high sentiment which it embodies. In the course of the discussions leading to the formulation of Article 6, it was quite apparent that the representatives of the nations taking part in the Geneva Conference on the Law of the Sea were greatly concerned with the idea of a just and equitable solution in the demarcation of such boundaries.

I suggest, therefore, that we need look no further than to Article 38, paragraph 1 (c), of the Statute of the Court to find a rule of international law commanding a just and equitable division of the areas in controversy.

May I cite the Court a recent and very illuminating example of how, in a somewhat analogous situation, a just and equitable solution in harmony with Article 38, paragraph 1 (c), of the Statute of the Court was reached. According to information found in the trade press and confirmed by official sources, the two States bordering the Arabian Gulf, Iran and Saudi Arabia, have initialled an agreement over a disputed offshore area, thereby dividing it not by a median line or another geometrical demarcation but rather by a novel so-called "economic solution". This has been done by dividing all of the "recoverable oil" in the previously disputed area into two equal parts. Ideas which had been advanced earlier, of dividing the "oil in place", were discarded. The equal share now relates instead to all "recoverable oil" contained in the pertinent geological structure. I feel that this example well illustrates that where there is goodwill and a certain flexibility in approach on all sides a truly equitable solution can be achieved if one does not insist on adherence to abstractly conceived technical demarcation lines.

In this part of my argument I have discussed why I think that a just and equitable share is called for by the law in general. I would now like, in the fourth and final address, to explore how perhaps, in the concrete case facing us, this general mandate to seek equitable solutions could be achieved. I offer the following as a suggestion of just one possibility to the Court, with no implication thereby that I am attempting to circumscribe the Court's discretion in arriving at other possible solutions.

One of the great difficulties in this situation is that our opponents have insisted on the strict application of the equidistance method. As I have said previously, one of the problems of the equidistance method, if strictly applied, is that it can lead to such inequitable results. I propose a somewhat different approach which may be more suitable.

The equidistance method can only be properly applied at short distances from the coast. The further the lines are drawn from the coast, however, the more will even minute variances in coastal configuration affect the angle of the lines and thereby the amount of territory they will delimit far offshore.

I suggest, therefore, that if we wish to draw lines of demarcation to apportion areas of the continental shelf far removed from the coastal belt, we shall have to take a modified approach if a sensible outcome is to be achieved. In this specific case such modification might well entail the drawing of geographically delimited lines of demarcation not based upon the angled inward-curving North Sea coast of the Federal Republic of Germany. Rather, I propose that the lines of demarcation be drawn from a basis represented by the coastal "façade", if I may so call it. How do I visualize a coastal façade? To answer this, may I

refer to the very interesting map found in the Common Rejoinder of the Kingdom of Denmark and the Kingdom of the Netherlands, I, p. 470.

The line drawn on this map from the island of Sylt to the island of Borkum gives us some indication of how I would visualize such a coastal façade. I should make it quite clear that I am not alleging that precisely this line constitutes the basis for a modified approach to drawing the lines of demarcation; rather, what I am stating is that, in my opinion, this line provides us with a starting point of reference for further evaluation and discussion. At least I suggest such a general approach would provide a break-through towards a solution which, until the present, has not been found within the general scope of the discussion.

I feel that the façade approach that I have just proposed has significance in attempting to draw lines of demarcation for vast areas of the sea because it avoids deriving from the coastal configuration such an *a priori* predominance of one coastal State over the adjacent coastal State as is inherent in the equidistance method.

Therefore, I respectfully submit that we have in the façade method a theory which becomes more useful in the particular circumstances of greater distance from the shore. In contrast to the equidistance method whose value, given an irregular coastline, may decline with the distance, the façade theory provides us with a method which can equitably apportion far-ranging offshore areas.

I have tried, in my address, to achieve a certain balance among my four arguments. I divided the first two in an attempt to show that certain elements, customary rules of international law, do not provide us with a method to settle our case. I have gone from there to part three to show that the general principles of law recognized by the civilized nations provide us with a general standard which we could follow. In part four I have tried to show one specific new approach which might give impetus to the standard of justness and equitableness which is the general principle recognized by all nations.

The Court adjourned from 11.15 to 11.40 a.m.

QUESTIONS BY JUDGES SIR GERALD FITZMAURICE AND JESSUP

Le PRÉSIDENT: Conformément à l'article 52, paragraphe 2, du Règlement de la Cour, deux membres de la Cour désirent poser à M. l'agent de la République fédérale d'Allemagne des questions auxquelles celui-ci pourra donner des réponses ultérieurement ou immédiatement, selon qu'il désire ou non se réserver un certain délai pour les préparer.

Judge Sir Gerald FITZMAURICE: I wanted to ask a question which arises partly out of remarks which were made yesterday by Professor Jaenicke, and partly out of somewhat similar remarks made this morning by Professor Oda.

Professor Oda was suggesting to us an alternative to the equidistance method and he suggested what one might call the principle of the coastal front, and pointed to the map in the Common Rejoinder, I, p. 470. And in this case it would involve drawing a baseline between the Islands of Sylt and the Island of Borkum, a baseline from which lines of demarcation would be drawn. Professor Oda said that he thought in that way a break-through could be arrived at, a new method, so to speak, of dealing with this problem; but he did not go on to indicate exactly how he would draw the lines of demarcation from each end of the baseline.

On the other hand, yesterday, Professor Jaenicke, in speaking on the same topic, if I understood him rightly, suggested that the lines of demarcation at each end of the baseline would be lines perpendicular to the baseline. But if we look at the map of the North Sea it is evident that lines drawn perpendicular to the baseline would go off in a north-westerly direction, they would meet the median line between Norway and Denmark. I therefore assume that Professor Jaenicke, when he talked of lines perpendicular to the baseline, was speaking in a general way, or that he had some other case in mind and perhaps not particularly this case.

So I would be glad if either Professor Jaenicke or Professor Oda could give us some clarification on this matter, and in particular, if they could indicate, perhaps with a pointer on the map, exactly how they would draw the lines of demarcation on the assumption that a straight baseline was drawn between the Islands of Sylt and Borkum.

Professor JAENICKE: If I were asked to answer these questions, I would perhaps divide what you asked, Your Honour, into two parts. I mean, the first is the question whether there is any difference between the scheme I envisaged yesterday and the scheme envisaged by Professor Oda. As far as this is concerned, and as to how the system which Professor Oda has advocated would turn out in practice, I would please ask the President to leave us time to demonstrate this the next time, in the second round of the oral pleadings.

But Your Honour, as to what you said, regarding my remarks yesterday on lines perpendicular to the baseline, I think I can now explain what I had in mind with these lines perpendicular to the baseline. These lines were not meant as lines of demarcation, nor as some sort of proposed boundaries to the continental shelf towards the neighbouring States. They were only meant to show in which direction the continental shelves of the three States converge, at which point they converge. May I perhaps try to point this out.

Judge Sir Gerald FITZMAURICE: Could I just draw your attention to this, that my point there is simply that lines perpendicular to a straight baseline cannot converge.

Professor JAENICKE: Well, I maintained that each of the three countries has its own coastal front, and if you have defined the general direction of these coastal fronts, then, of course, if they do not have the same general direction, they will converge. I may demonstrate, perhaps, what I have in mind.

If we take, for instance, the baseline indicated both by Professor Oda and by me—I think that we are of the same opinion—then you see that this would be the coastal front, because the territory of the Federal Republic of Germany continues into the sea in the direction of the middle of the North Sea. If you take one coastal front and erect a line perpendicular to this coastal front, in the middle, of course, then such a line indicates in which direction this continental shelf of German territory extends into the sea.

If you take another coastal front, say of Denmark, and you take roughly a line north to south, that would be the coastal front, in our opinion, of Denmark facing the North Sea. We would not be so unfair as to take the coastal front which the other side has put down on the map in the Common Rejoinder, I, p. 470. So if we take a more fair line, just say north to south, and erect a line perpendicular to that coastal front, then you will see that these lines will converge somewhere in the North Sea.

If you take another coastal front, let us say the Netherlands, it would be difficult to know what you would like to call the coastal front of the Netherlands facing the North Sea, but if you take a fair view of what would probably be the most favourable one to the Netherlands, and if you erect a line perpendicular to

that coast, in the middle, then you have the direction in which the continental shelf of the Netherlands converges with the other two

That was what I meant by the line perpendicular to the coastal front: just to show that I think that the territory goes in this direction into the North Sea. Because the territories are continuing from all sides into the North Sea, then somehow they converge in the middle of the North Sea. This was the concept that I had in mind, taking the coastal front as the basis and also taking an already determined fixed point or area, the middle of the North Sea, because it has already been agreed upon that these three sectors will be formed. The British and Norwegian and the other sector of the three as far as it had already been agreed upon. Then we have to take this as the basis and so we have an indication in which direction the territories of the other three will converge to this point.

Judge Sir Gerald FITZMAURICE: Would I be expressing your thought correctly if I said that what you meant was not so much perpendiculars as parallels? In other words that having fixed your baseline, the direction of movement from the baseline is parallel to the baseline at each stage. You have a baseline like this, it moves out to sea in a direction always parallel to the baseline, and then if you have two baselines set at angles, then those directions of movement will naturally converge.

Professor JAENICKE: Yes, that would be the same expressed in another geometrical way.

Judge JESSUP: I do not necessarily expect answers to these questions at this time, but leave that to the convenience of the Agent for the Federal Republic of Germany.

My first question is this: the Agent for the Federal Republic of Germany in his address to the Court, made some references to the resources of the continental shelf in the North Sea and I may add that Professor Oda this morning called attention to a recent agreement between Iran and Saudi Arabia which dealt with resources.

Will the Agent of the Federal Republic of Germany, at a convenient time, inform the Court whether it is the contention of the Federal Republic of Germany that the actual or probable location of known or potential resources on or in the continental shelf, is one of the criteria to be taken into account in determining what is a "just and equitable share" of the continental shelf in the North Sea?

And that is my first question. My second one is perhaps a little long but copies of it may be obtained from the Registrar after the close of this sitting.

I would explain that the written pleadings of the Parties refer to or reproduce the texts of various agreements concluded between States bordering on the North Sea, whereby common boundaries between their respective parts of the continental shelf in the North Sea were specified and delimited. So far as I have ascertained it does not appear that any one of these agreements was concluded before 1962.

I would ask the Agent for the Federal Republic of Germany to assume two hypothetical cases:

Primo: Assume that in 1960 or 1961 the United Kingdom and the Federal Republic of Germany agreed to specify and delimit such a boundary between their respective parts of the continental shelf in the North Sea in accordance with Article 6, paragraph (1), of the Geneva Convention on the Continental Shelf.

Will the Agent for the Federal Republic of Germany have prepared and distributed to the Court at a convenient time, a figure or a chart comparable to

Figure 1 in the Memorial, I, page 24, showing the median line between the two States concerned? That is between the United Kingdom and the Federal Republic.

Secundo: Assume a similar agreement at about the same time, that is 1960 or 1961, between Norway and the Federal Republic of Germany; will the Agent for the Federal Republic of Germany have prepared and distributed to the Court at a convenient time, a similar figure or chart showing the median line between Norway and the Federal Republic of Germany?

Professor JAENICKE: Mr. President, would you allow me to answer these questions and produce the maps at a later stage of the oral hearing?

Le PRÉSIDENT: *Accepté!*

STATEMENT BY PROFESSOR JAENICKE

AGENT FOR THE GOVERNMENT OF THE FEDERAL REPUBLIC OF GERMANY

Professor JAENICKE: Taking again the floor after the address of my learned colleague, Professor Oda, it is not my intention to continue in presenting our case with new and long arguments. I only want to add some short general remarks to what I said yesterday.

In the days of the Permanent Court of International Justice, it would have been inconceivable that parties would have argued before the Court about the determination of boundaries through the high seas. At that time the principle of the freedom of the high seas and its unhampered use by all dominated legal sources in this field. However, the law of the sea is in the process of change, new problems need new approaches. One of the new problems is the allocation of extensive areas of the continental shelf beneath the seas. Already, the seabed and subsoil of the North Sea have become the object of exploitation. Already, new boundaries have been drawn through the waters of the North Sea.

Your judgment, I think, will put the finishing touch to the partition of the North Sea between the adjacent States. We trust that your judgment will contribute to a just and equitable apportionment of all the uses and resources the *North Sea provides for the nations*.

The Federal Republic of Germany believes that a partitioning along the lines I indicated yesterday, a partitioning which would allocate each of the Parties a sector-like part reaching the centre of the North Sea, would be the most equitable apportionment.

Such an apportionment would also reflect and serve the common interests of the North Sea States. The North Sea cannot be considered as a mere object of mineral exploitation. It is foremost an open sea with important shipping lanes connecting the coastal States with the world.

The partitioning of the continental shelf between the North Sea States must take cognizance of those facts. There are the difficult problems of reconciling the different uses of the North Sea with each other, of controlling the installations for the exploitation of the subsoil in the North Sea and balancing the needs of economic exploitation with the equal need for providing safe shipping lanes with sufficient depth in the shallow North Sea.

All these problems of common concern to all North Sea States would be better solved if each State which legitimately should have a say in decisions regulating the different beneficial uses of the North Sea, would have control over the continental shelf until the middle of the North Sea. At this point or area all North Sea States meet which have an equal interest in these matters.

As a matter of fact, those joint interests of all coastal States would be served much better if the middle part of the North Sea would have been established as a common continental shelf under joint control of all adjacent States. Unfortunately, that idea has not found sufficient support. If, however, each of these States would reach to the middle of the North Sea, this fact would certainly stimulate them to joint action in those fields of common interest.

That, Mr. President, concludes, for the present stage of the oral hearings, the presentation of the case of the Federal Republic of Germany.

Before leaving the rostrum I shall not fail to thank you, Mr. President, and Judges of the Court, for the kind patience with which you have listened to our argument.

The Court rose at 12.10 p.m.

FOURTH PUBLIC HEARING (28 X 68, 3.5 p.m.)

Present: [See hearing of 23 X 68.]

STATEMENT BY MR. JACOBSEN

AGENT FOR THE GOVERNMENT OF THE KINGDOM OF DENMARK

Mr. JACOBSEN: Mr. President, Members of the Court, it has always been the firm policy of Denmark to join in every endeavour to strengthen the possibilities of judicial decision of disagreement in international relations. It is therefore in conformity with a long tradition of general policy and with the fullest satisfaction and confidence that the Danish Government has joined in placing this case before the Court.

May I add, Mr. President, that personally I feel deeply honoured to be allowed, without any earlier experience, to represent my country before this Court.

In spite of the firm Danish belief in international judicial decision, the Danish Government has only once before been represented in this courtroom. It was 35 years ago in the case of the *Legal Status of Eastern Greenland*. This fact reflects another strong Danish opinion, that international problems can be and shall be settled through negotiations and agreement, and that Denmark would rather go a long way to meet the demands of another State than let the matter develop into a case demanding judicial decision. When, nevertheless, Denmark now finds herself opposed to a neighbour State with whom friendly and neighbourly relations are a matter of course, it has a double reason.

From the first day and till today it has been and is the firm conviction of the Danish Government that the delimitation of the continental shelf in the North Sea, as it is carried out by Denmark, is just and fair and in every way in accordance with the generally accepted rules of international law.

At the same time the Danish Government must consider this case as being of the utmost importance. Denmark has so far had no natural resources or riches. In the modern search for oil and gas extensive exploration has taken place without positive results, apart from the fact that not very far north of the boundary line in question oil and gas have been found. Even if it is not yet known whether commercial exploitation is possible, the position of the boundary line must be considered as being of the utmost importance.

For these two reasons the Danish Government has found it necessary to ask the Court for a decision based on law.

Denmark's general position with regard to the whole question of the continental shelf is very simple indeed. When the work in the International Law Commission had begun, she followed it closely and she commented upon the preliminary draft of the International Law Commission, setting forth ideas as to the delimitation of the continental shelf which were in fact identical with the later provisions of the final draft and consequently with those of the Convention itself.

Denmark took an active part in the Geneva Conference, signed the Convention and ratified it in due course. Accordingly, by a Royal Decree of 7 June 1963, she claimed exclusive rights over the adjacent continental shelf, indicating that the delimitation in the absence of any special agreement should take place

according to the principle of equidistance. The text of this Royal Decree can be found in the Memorial, paragraph 12.

Between Denmark and her neighbour to the east, the Kingdom of Sweden, no agreement regarding the delimitation has yet been entered upon. But as both States have accepted the Convention, the delimitation will, of course, take place in accordance with the rules of the Convention. With all her other neighbours Denmark has concluded treaties regarding the delimitation of the continental shelf.

With the Kingdom of Norway not being a party to the Convention, the treaty fixes the boundary line expressly in accordance with the principle of equidistance. This boundary applies to the North Sea as it is defined in the North Sea Fisheries Convention of 1882, as well as to the Skagerrak to the north-east of the North Sea.

With the United Kingdom and the Kingdom of the Netherlands, both parties to the Convention, the continental shelf boundaries in the North Sea have by treaties been delimited according to the equidistance principle.

With the Federal Republic of Germany not having ratified the Convention, two agreements have been reached.

By a protocol of 19 June 1965 it has been agreed that the continental shelf boundary in the Baltic Sea, which is not shown on the map here in the courtroom, shall be the median line. This means a delimitation on exactly the same basis as that of the Convention.

And by a treaty of the same date the continental shelves of the two States near the coast, but for a considerable distance out to sea, were delimited by a straight line, the inner starting point of which is the intersection of the outer limits of the territorial waters as set down in a boundary description from 1921. This point is not exactly equidistant because of considerations regarding a navigable channel. The outer point, which is today marked on the map on the wall, is an equidistance point between the coasts of Denmark and the Federal Republic. The straight line between those two points, of course, comes nearer and nearer to a true equidistance line the nearer the line approaches the outer end point, the equidistance point.

This is a delimitation in accordance with the rules of the Convention, based on the principle of equidistance but with a slight deviation near the coast caused by a special circumstance, in this case the 1921 delimitation of territorial waters.

These two agreements with the Federal Republic were concluded as the result of bilateral discussions between the two States involved and quite independent of the Netherlands-German partial delimitation which had been agreed upon substantially earlier.

Consequently, the only part of the seas surrounding Denmark where there is no convention or treaty regarding the continental shelf is the stretch between the outer point of the Danish-German continental shelf boundary near the coast and the south-eastern end point of the Danish-Netherlands boundary, the point on the map where the two boundaries are seen to intersect. All other Danish continental shelf boundaries have been delimited, or will be delimited as far as the Kingdom of Sweden is concerned, by treaty according to the rules of the Convention. And this remaining part of the Danish-German boundary line in the North Sea has been unilaterally delimited by Denmark by the Royal Decree which I have mentioned, according to the main rule of the Convention, the equidistance principle. What this means can be seen on the map where this line is drawn.

The basis of the equidistance delimitation is, on the Danish side, the west coast of Jutland, the Danish mainland, a completely normal, practically

straight coast. This boundary line is a direct continuation of the partial boundary line and it is based on the same principle of delimitation as that partial boundary line, the principle of equidistance.

The Danish Government can find no reason why this remaining part of the maritime boundaries should not be delimited in accordance with the same general principles which are applied to, or are to be applied to, all the other Danish continental shelf boundaries towards the Federal Republic, as well as towards a number of other States, namely the rules of the Convention.

This case between the Federal Republic and Denmark is, as far as the facts are concerned, quite separate and independent from the other case before the Court between the Kingdom of the Netherlands and the Federal Republic of Germany. But as the legal considerations in the two cases are to a very great extent identical, my friends the Agent for the Kingdom of the Netherlands and the joint counsel, Professor Sir Humphrey Waldock, and I have arranged for a presentation of the case of the Netherlands and the case of Denmark in such a way that repetitions and, consequently, waste of time, as far as possible are avoided. The Agent for the Kingdom of the Netherlands will indicate how this presentation is to take place.

STATEMENT BY PROFESSOR RIPHAGEN

AGENT FOR THE GOVERNMENT OF THE KINGDOM OF THE NETHERLANDS

Professor RIPHAGEN: Mr. President and Members of the Court, it is a source of profound satisfaction to my Government that your Court, the principal judicial organ of the United Nations, is, once more, called upon to deliver judgments in two very important legal disputes between States.

I need not recall the fundamental importance my Government attaches to the settlement of disputes by the International Court of Justice as an essential element in the accomplishment of the purposes and principles of the United Nations Charter.

The mere fact that disputes on matters of such weight as the delimitation of the continental shelf under the North Sea are brought before your Court is welcomed by all who believe that disputes between States should be settled by peaceful means in such a manner that not only international peace and security, but also justice is preserved.

My government feels confident that your Court does preserve justice, and from this confidence derives the additional satisfaction of being able to submit to the binding and final decision of this august world tribunal a case, the outcome of which is of prime importance to the Netherlands.

Mr. President and Members of the Court, at the outset of this oral argument I feel bound to stress once again that the Special Agreement concluded between the Government of the Federal Republic of Germany and the Government of the Kingdom of the Netherlands requests the Court to settle a dispute between those two countries, that is, between the Federal Republic of Germany and the Kingdom of the Netherlands.

Indeed, this dispute is one relating to the location of the boundary line which separates the continental shelf area appertaining to the Netherlands from the neighbouring continental shelf area appertaining to the Federal Republic.

This is a matter which regards only those two countries, and a matter which can be decided on the basis of the legal relations between, and the facts relating to, those two countries only.

That the Federal Republic of Germany also happens to disagree with a

neighbour on another side, the Kingdom of Denmark, on the location of another boundary line, that between the shelf area appertaining to the Federal Republic and the shelf area appertaining to the Kingdom of Denmark, is, from the legal point of view, entirely irrelevant for the present dispute between the Federal Republic and the Kingdom of the Netherlands.

Indeed, when the Netherlands Government presented its Note Verbale of 21 June 1963 to the Government of the Federal Republic (the German text is in Annex 2 of the Memorials and the English translation in Annex 8 of the Netherlands Counter-Memorial) in which it informed the Federal Republic of its opinion regarding the location of the boundary line between its continental shelf and that of the Federal Republic, the Netherlands Government was, at that moment, unaware of the situation as between the Federal Republic and the Kingdom of Denmark.

Actually it appears from the Note Verbale of 10 September 1964, reproduced as Annexes 1 and 1 A of the Memorials, that only more than a year after the receipt of the Netherlands Note Verbale of 21 June 1963 the Federal Government invited the Danish Government to negotiate on the boundary question.

In the meantime, bilateral talks and negotiations had taken place between a German delegation and a Netherlands delegation. These bilateral negotiations were completed before the Federal Government issued its invitation to the Danish Government.

As appears from the joint minutes of 4 August 1964, reproduced as Annexes 4 and 4 A of the Memorials, the boundary dispute between the Federal Republic of Germany and the Kingdom of the Netherlands, now submitted to your Court, had, at that time, already fully matured. Then, as now, the Netherlands considered that also the further course of the common boundary line, beyond the 54th degree of latitude, is determined by application of the principle of equidistance. Then, as now, the Federal Republic held a different view.

The bilateral character of the delimitation question is emphasized by the very proclamation of the Federal Government concerning the exploration and exploitation of the German continental shelf, dated 20 January 1964, reproduced in Annexes 10 and 10 A of the Netherlands Counter-Memorial. It is there stated:

“Im einzelnen bleibt die Abgrenzung des deutschen Festlandsockels gegenüber dem Festlandsockel auswärtiger Staaten Vereinbarungen mit diesen Staaten vorbehalten.”

Or, translated into English:

“The detailed delimitation of the German continental shelf vis-à-vis the continental shelves of other States will remain the subject of international agreements” (plural!) “with those States.”

Indeed a bilateral agreement was concluded between the Federal Republic and the Netherlands on the delimitation of the continental shelf, though this agreement only covered the boundary line up to the 54th degree of latitude.

Certainly, at the end of the bilateral negotiations, which resulted in the initialing of the draft of the agreement just mentioned, the German delegation announced the intention of the Federal Republic to bring about a conference of all States adjacent to the North Sea, an intention the Netherlands delegation simply took note of.

The Federal Republic apparently later gave up this intention. Still later, at the end of 1965, the Federal Republic instigated tripartite talks between the three Parties now before your Court. But these talks were rather concerned with the co-ordinated handling of the two bilateral disputes.

Incidentally, the two Aide-Mémoires of 8 December 1965, to the Danish and Netherlands Embassies—the full text of the Aide-Mémoire to the Danish Embassy is reproduced in the Danish Counter-Memorial, I, pages 165-166—refer to further bilateral negotiations with regard to the delimitation itself, and propose tripartite negotiations only on the procedure of settlement, by arbitration, of the two disputes. In fact the tripartite talks ended in the drafting of the two separate special agreements.

All this is not merely a matter of formalities, but reflects the very root of the question of substance now submitted to the Court, as my learned colleague, Sir Humphrey Waldock, will later expose to the Court.

Indeed, Mr. President, this bilateral approach is not only in conformity with the whole philosophy of the rules of international law relating to boundaries, and with your permission, Mr. President, I will elaborate this point in a later stage of the Oral Proceedings, but is also more particularly in conformity with the wording of Article 6, paragraph 2, of the Geneva Convention on the Continental Shelf.

In its Note Verbale of 21 June 1963, the Netherlands Government communicated its view that the part of the continental shelf of the North Sea over which it exercises sovereign rights is delimited to the east by the equidistance line beginning at the point where the thalweg in the mouth of the Ems reaches the territorial waters. I recall that this Note Verbale is reproduced in Annex 8 of the Netherlands Counter-Memorial.

The Federal Republic of Germany, in its reply to this Note Verbale—the reply can be found in Annexes 9 and 9 A of the Netherlands Counter-Memorial—declares to hold the view that “there are historical reasons and other special circumstances” which justify the adoption of a delimitation line different from that indicated by the Netherlands Government, and proposes bilateral negotiations, and “on the position of the boundary line in the area of the continental shelf”.

The Netherlands Government subsequently accepted the view that there are special circumstances in the mouth of the Ems, which justify a deviation for a particular stretch of the partial boundary line from the equidistance line.

The nature of this special circumstance, and the extent to which it justified a deviation from the true equidistance line, have been described in paragraphs 29 and 30 of the Netherlands Counter-Memorial. This special circumstance clearly concerns, and concerns only, the relationship between the two countries. The same is true for the deviation from the equidistance line justified by this special circumstance, to wit: the extension of the line, which is not a State boundary line, determined in the Supplementary Agreement of 14 May 1962 to the Ems-Dollart Treaty of 8 April 1960, both bilateral treaties.

The particular regime of the Ems-Dollart, laid down in the bilateral agreements just mentioned, is, itself, of course, closely related to the geographical realities of the coastlines of the two States in this particular region.

As the map in the Netherlands Counter-Memorial¹ clearly shows, the German island of Borkum and the low-tide elevation near to it, called Hohe Riff, are lying off the coast of the Netherlands mainland.

This geographical fact greatly influences the location of the equidistance line as between the two countries. The map I just referred to only shows the influence of the low-tide elevation, the Hohe Riff, on the equidistance line, but it is easy to see at a glance that the equidistance line would be located much more to the east of the lines indicated on that map, if not only the low-tide elevation,

¹ See map in back pocket of Volume I (fig. 2).

Hohe Riff, but also the German island of Borkum, which lies off the coast of the mainland of the Netherlands, were discarded.

How much more to the east the equidistance line would then run can be seen on a map (see p. 74, *infra*) we have prepared for the convenience of the Court and which has been distributed¹. I have a blow-up of this map here and perhaps the Court would take a look at the influence the island of Borkum, lying off the coast of the mainland of the Netherlands, has on the location of the equidistance line, this line being the actual equidistance line accepted between the Parties and that line being the equidistance line as it would be if this off-shore island would not have been taken into account.

The Court will, no doubt, note the close similarity between this map and the map presented by the Federal Republic of the equidistance line between Haiti and Santa Domingo (see p. 28, *supra*).

Mr. President and Members of the Court, there is one small point in the oral argument of my learned colleague, Professor Jaenicke, on which I feel bound to comment in this introductory statement, since it specifically relates to the Kingdom of the Netherlands.

The Agent of the Federal Republic has thought fit to distribute a note by a Mr. Werners, which was published in a Dutch weekly legal periodical, the *Netherlands Juristenblad*, together with a map, which does not figure in that periodical, but was apparently prepared by our opponents themselves.

By producing this note the Agent of the Federal Republic, and I quote his own words according to the provisional verbatim record of the second day, on page 49, *supra*:

"... just wanted to show that the Kingdom of the Netherlands does not apply such a narrow interpretation to the special circumstances clause in this case, ..."

Thereby, the Agent of the Federal Republic is more or less suggesting that the Kingdom of the Netherlands invokes, in this area of the world, other rules and principles of international law than it invokes in the North Sea in the present dispute, or at least, interprets these rules differently according to its convenience.

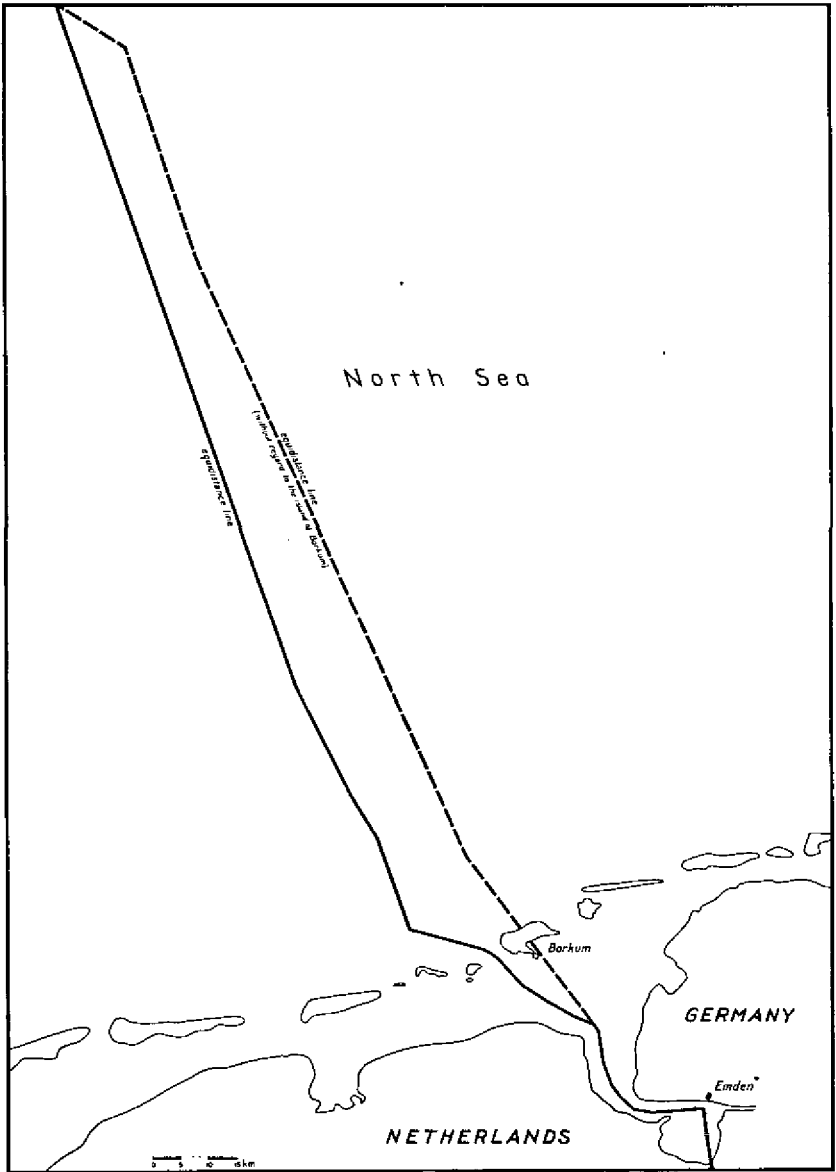
Now, Mr. President and Members of the Court, while it is undoubtedly true that the Kingdom of the Netherlands is responsible for the foreign relations of Surinam, one of its component parts, it is, fortunately, not responsible for everything that is written in books and periodicals published within its territory! Mr. Werners, the author of this note, is in no way a spokesman for the Government of the Kingdom of the Netherlands.

There is little doubt that in Surinam itself, the country of origin of Mr. Werners, it is sometimes advocated that, within the framework of the settlement of various other boundary questions, including questions relating to part of the land boundary, a line running 10 degrees eastwards of true north should be established by agreement between the Kingdom of the Netherlands and Guyana as a convenient boundary line between the continental shelves concerned.

But, Mr. President and Members of the Court, the Kingdom of the Netherlands, responsible for the foreign relations of Surinam, has never laid a legal claim to such boundary line, nor even has it as yet made any proposal to the Government of Guyana relating to the establishment by agreement of a convenient boundary line on the continental shelf adjacent to Surinam.

Mr. President, I do not think that I need to spend more of the time of the

¹ See No. 45, p. 388, *infra*.



Court to comment on Mr. Werners' article, which is clearly so totally irrelevant to the present disputes.

Mr. President and Members of the Court, having in this introductory statement recalled a few characteristics of the relationship between the Federal Republic of Germany and the Netherlands and between their respective coast-lines, I may now indicate the order in which we—that is the Agent for the Kingdom of Denmark and I, myself, as Agent for the Kingdom of the Netherlands—would like to present our common arguments. With your permission, Mr. President, Sir Humphrey Waldox will first deal with certain of the legal issues on which your Court is called upon to pronounce in the two disputes. Subsequently, Mr. President, we would suggest that you allow me further to develop the views expressed in Chapter I of our Common Rejoinder and finally permit my colleague Mr. Jacobsen to deal with the question of special circumstances.

ARGUMENT OF SIR HUMPHREY WALDOCK

COUNSEL FOR THE GOVERNMENTS OF DENMARK AND THE NETHERLANDS

Sir Humphrey WALDOCK: Mr. President and Members of the Court, it is, I think, an uncommon experience for counsel to appear in this Court on behalf of two Governments, neither of which is the Government of his own country. Certainly, I feel it a great privilege to have been asked to do so on this occasion by the Governments of Denmark and of the Netherlands and to have the honour of presenting to you their common argument on certain of the legal issues on which you are called upon to pronounce in the two cases now before you.

We imagine that the Court may have been as surprised as we certainly have been about the course of the pleadings in the present proceedings. The two Governments for which I appear, in their respective Counter-Memorials and their Common Rejoinder, have been doing their best, in the teeth of the fiercest opposition from the Federal Republic, to establish the equidistance-special circumstances rule as representing the generally accepted basis for settling disputes concerning continental shelf boundaries.

Even the equidistance part of this rule, our opponents claim, was introduced primarily as a method of achieving an equitable apportionment, as you will see on page 36, *supra*, of the record for the second day. The special circumstances clause, as you will see on page 46, *supra*, of the same record, they claim is designed to cover "all cases where the exigencies of an equitable apportionment would require its application". One might therefore have thought that the Federal Republic would have given its whole-hearted support in this case to the principles in Article 6 for which *we* have so earnestly contended.

We, on our side, think that the equidistance-special circumstances rule was introduced as a method of achieving the equitable delimitation of boundaries in the context of the established rules governing the delimitation of maritime sovereignty. We take strong exception to our opponent's notions of equity and to their interpretation of the equidistance-special circumstances rule. But we do not dissent from the view that, even when correctly interpreted, that rule provides the legal basis for arriving at an equitable delimitation of the continental shelf in the light of the geographical facts. On the contrary, we think it manifest that the Committee of Experts, the International Law Commission and the States at the Geneva Conference, including the Federal Republic, were right in regarding the equidistance principle as intrinsically the most appropriate method of setting about achieving such an equitable delimitation. And we also recognize that the special circumstances clause is designed to cover some harsh

inequities that may arise from certain exceptional types of geographical facts.

To cut the matter short, Mr. President, the equidistance-special circumstances rule would seem to offer the Federal Republic a fully sufficient basis for presenting to the Court any considerations which may properly be advanced in support of a claim that the equidistance principle is not legally the applicable principle for delimiting its boundary vis-à-vis the Netherlands or vis-à-vis Denmark.

What happened? In the written pleadings the Federal Republic did its utmost to run the equidistance-special circumstances rule right out of the case, denying its application to the Federal Republic and trying by every possible argument to undermine its authority. In the Memorial no trace whatever of special circumstances in the Federal Republic's submissions; in the Reply, under pressure from us, just a shy, almost apologetic, quite unexplained little glint of special circumstances in its revised submissions.

At these hearings, Mr. President, you have had the same full-blooded onslaught on the equidistance-special circumstances rule. Only at the end of the learned Agent's address under further pressure from us in the Rejoinder did you hear the Federal Republic grudgingly explain to us for the first time why and how it conceives that it may perhaps have a case of special circumstances.

We have been accused again and again in the written pleadings of trying to impose the equidistance principle upon the Federal Republic. But if anyone is trying to impose anything on anybody, Mr. President, in this case it is the Federal Republic who is trying to impose on us that monstrosity of a Trojan sea-horse, the coastal frontage, wholly unknown to the law. We have throughout been inviting the Federal Republic to do battle on the basis of the equidistance principle versus special circumstances rule and to persuade the Court, if it can, that it really has a case for invoking special circumstances which justify another boundary than the equidistance line. But it has been like drawing blood out of a stone to get the Federal Republic to state its case on this central issue in the proceedings.

Mr. President and Members of the Court, there can be only one rational explanation of the Federal Republic's conduct of its pleadings. It had no confidence whatever of being able to show that its case falls within the ambit of the exception of special circumstances provided for in the Geneva Convention. We think that the Federal Republic had every reason for that lack of confidence in its right to invoke the special circumstances clause. For this is not a case of special circumstances such as is envisaged in the Convention. This case is simply an attempt by the Federal Republic to reconstruct its own geographical coast in order to claim areas of the continental shelf which nature has not given to it, just as in a rather similar way nature has been even less lavish to Belgium and, above all, to Sweden in its relation to the North Sea.

We feel that the Court will have been no less surprised at the complete frankness with which our opponents have asked the Court at these hearings to abandon the accepted law, to abandon the Special Agreements, to abandon its judicial function and to legislate *ad hoc* for this single particular case. Do we exaggerate, Mr. President? I do not think so.

The Court will recall that on the second day the learned Agent said—it is on page 36, *supra*—that he must reject what he described as our accusation that the Federal Republic was asking the Court to recognize the coastal front and sector notions as principles or rules of international law. That is not, in fact, quite how we put it in the written pleadings. We rather charged the Federal Republic with not having the courage to introduce these notions into its submissions because it knows that they have no basis whatever in existing maritime international law.

At any rate, in that context our learned opponent said:

“In our written pleadings we have made it plain from the beginning that criteria of this sort were not principles or rules of general application. We regard them only as a standard of evaluation as to what method of delimitation would be equitable under the special geographical situation in the North Sea.”

True, he explained on the same page that apportionment by sectors on the basis of the coastal front notion is a “natural consequence of the application of the continental shelf concept to the special geographical situation prevailing between the Parties in the North Sea”. Then, having said that geographical configurations differ from each other—a point of which we may suspect the States at the Geneva Conference were not unaware—he went on:

“. . . and each situation may call for a new appreciation of special factors that have to be taken into account. It is therefore not surprising that the standard which is called for in the concrete case of the North Sea between the Parties may have no precedents in other parts of the world. Therefore the absence of such precedents is not an argument and cannot be an argument against the propriety of this standard.” (*Supra*, p. 37.)

That, Mr. President, is quite strong meat for anyone accustomed to think in terms of law. But there is more to come. On page 41, *supra*, the learned Agent returned to the point:

“Here again, [he said] I must stress the fact that we do not want to propose a rule of general applicability to the effect that any State in any geographical situation may claim a share of the continental shelf equivalent in size to the length of its coast. We only suggest that in this particular geographical situation, where the continental shelves of States constitute, by virtue of their geography, converging sectors, the breadth of the coastal front would be a proper standard of the size of the share that each State should get if our equitable apportionment were to be achieved.

Now, what is all this, Mr. President, but a request to the Court for an *ad hoc* decision allowing Germany to achieve her ambitions in the North Sea and depriving Denmark and the Netherlands of their right to have the generally accepted principles and rules of international law applied to the delimitation of their continental shelves? The Federal Republic presents this as equitable apportionment. To us it has more the look of simple opportunism.

My learned friends, the two Agents, will each be asking the Court to look more closely into these aspects of the Federal Republic's case later on. I shall therefore confine myself to pointing out briefly how extremely artificial is the Federal Republic's case.

First, the Court will certainly have observed the painful anxiety with which the Federal Republic seeks now to shut out of the Court's mind the continental shelves of all the other North Sea States, in order to reduce the focus to the so-called south-east corner of the North Sea.

Secondly, in order to create a plausible area for the Court's *ad hoc* venture into equitable distribution, the Federal Republic has notwithstanding to bring into the picture the boundaries of Denmark and the Netherlands with two other North Sea States, boundaries which are no concern whatever of the Federal Republic.

Thirdly, the so-called particular geographical situation, with continental

shelves constituting converging sectors, is far from unique. In the North Sea, you only have to look westwards to the Netherlands, Belgium and the United Kingdom to find another such situation. In the northern part of the Persian Gulf there is yet another such situation, and one infinitely more complex. In both these cases we have already some precedents—precedents of the clearest kind of the application of the equidistance principle. So, not only is the Federal Republic's case not unprecedented, but the decision which it requests from the Court conflicts with the precedents. I may add that, if converging sectors is the criterion, there would seem to be plenty of other convergences in other parts of the world.

Fourthly, we ask, Mr. President, whether anything would ever have been heard of coastal frontages and converging sectors if nature had advanced the German North Sea coast just a little farther to the north. Does not this case arise simply because nature and history have been less generous in the coast which they have assigned to the Federal Republic, as also to Belgium and Sweden in relation to the North Sea, and indeed to many others elsewhere in the world?

Fifthly, the very terms in which the so-called coastal front criterion was put to the Court on page 41, *supra*, of the record of the second day show the completely *ad hoc* and opportunist character of the Federal Republic's thesis. Our opponents, Mr. President, have asked you to look at many diagrams, but they did not draw you in black and white their version of the coastal frontages. The learned Agent seemed to have quite an open mind as to what your decision should be concerning the coastal frontages. "But you may take what you like", he said on page 41, *supra*. Take it or leave it is what, Mr. President and Members of the Court, he seems to be saying to you with regard to his various coastal frontages. But what has that to do with the principles or the rules of international law or with judicial settlement according to law?

I must not overlook that our opponents have sought to encourage the Court to embark on its *ad hoc* legislative task by referring to a statement in an Order made by the Permanent Court in the *Free Zones* case reported in *P.C.I.J.*, *Series A*, No. 22, at page 13. Observing that judicial settlement is simply an alternative to the direct and friendly settlement of international disputes between the parties, the Court there said: "Consequently it is for the Court to facilitate, so far as compatible with the Statute, such direct and friendly settlement." That was the quotation relied on by my learned opponent.

Now the point to which that statement was directed was rather different from the point concerning the Court's function which is raised in the present case. There the Court was being asked by *both* parties to depart from its normal procedure and to indicate to the parties, in advance of any judgment, the results of its deliberations, with a view to facilitating friendly settlement. More relevant in the present connection, we think, is another pronouncement of the Permanent Court at a later stage of the same *Free Zones* case reported in *P.C.I.J.*, *Series A*, No. 24, at page 10. In effect, France had claimed that the Court could and should settle the regime to be applicable in the *Free Zones* without strict regard to the existing rights of the Parties. Switzerland contended that the Court was authorized to settle it only on the basis of then existing rights, in which context the Court said:

"Even assuming that it were not incompatible with the Court's Statute for the Parties to give the Court power to prescribe a settlement disregarding rights recognized by it and taking into account considerations of pure expediency only, such power would be of absolutely exceptional character,

could only be derived from a clear and explicit provision to that effect, which is not to be found in the special agreement.”

There is clearly not a word in the Special Agreements in the present cases which could authorize the Court to decide upon any other basis than the existing legal rights of the Parties. For the Court is specifically asked to decide the applicable principles and rules of international law to govern the respective delimitations.

There is one further general observation which I should like to make in these introductory comments on the Federal Republic's case.

It seems to us, Mr. President, that the concept of the equitable apportionment of areas, as it has been developed by our opponents, is really an attempt to go behind the work of the Geneva Conference and in another form to bring back into the law which resulted from the Conference part of its own rejected thesis of the resources of the continental shelf as common. It asks you not to approach this case from the point of view of the delimitation of the exclusive rights of the coastal State as contemplated in the Convention. It asks you to approach the case from the point of view that the area enclosed between the arms of the Danish-Norwegian boundary and the Netherlands-Belgian boundary are, in principle, a common area to be shared out equitably between the Federal Republic, Denmark and the Netherlands.

This approach we believe to be completely opposed to the system envisaged at Geneva. We cannot see any trace in the Convention, and we cannot recall any trace in the records of the Conference, of a concept which would make the area in which the Federal Republic is entitled to delimit its boundary in any way dependent on the positions of the boundaries delimited between Denmark and Norway or between the Netherlands and Belgium. That is why we feel that the Federal Republic is really asking you on this point to undo to some extent the decisions of the Conference and in some measure to rehabilitate its own rejected thesis.

In order to encourage the Court to undertake this revising task, our opponents confronted you with the spectre of the awful consequences which may follow in the deep oceans if you apply the equidistance-special circumstances rule in the manner intended by Article 6. Here again, Mr. President, they were, if more discreetly, inviting you to take the legislator's and not the judge's view of your task.

We, of course, recognize that the general problem of the regime of the deep oceans is an important one, and my friend, the learned Netherlands Agent, will speak more of it later. But, as we have pointed out in our written pleadings, it is a distinct question which arises out of the open-ended definition of the external limit of the continental shelf; and it is a question which is already under active consideration in the United Nations with a view to a possible solution in a law-making convention.

Furthermore, it is a question of limiting the exclusive rights of all coastal States in the deep oceans, not of re-adjusting the rights of coastal States as between themselves. Nor will it have escaped the Court that the question does not touch the North Sea at all—that sea which our opponents so often say is not as other seas.

If I may, Mr. President, I will now outline for the convenience of the Court, in a few words, the way in which we put our own case. We rest it on three separate and autonomous grounds.

First, we contend that if the principles and rules embodied in Article 6, paragraph 2, of the Convention are excluded from consideration, then the

continental shelf boundaries of the respective Parties are to be determined on the basis of the exclusive rights of each Party over the continental shelf adjacent to its coast and of the principle that the boundary is to leave each Party every point of the continental shelf which lies nearer to its coast than to the coast of any other Party.

Secondly, we contend that the principles and rules embodied in Article 6 of the Continental Shelf Convention are an expression of the generally accepted law governing the delimitation of continental shelf boundaries; that as coastal States we are competent to delimit the boundaries of our continental shelves; that delimitations made bona fide in application of the principles and rules in Article 6 are prima facie valid *erga omnes*; and that the Federal Republic is therefore bound to respect our delimitations unless it can establish a better legal ground of claim to any areas comprised within our delimitation.

Thirdly, we contend that the principles and rules embodied in Article 6 have, today, the character of general customary law and have become such in a manner which renders them binding on the Federal Republic.

The first of these contentions, Mr. President, is the basis of our additional submission presented in our Common Rejoinder, while the second and third are the basis of the three submissions presented in our respective Counter-Memorials. I have put our contentions in the order in which I propose to deal with them later in my address. This order, if it does not correspond with the order of our submissions, seems to us the most logical, for the legal considerations on which the first contention is founded are of a fundamental character and also underlie the other two contentions. Indeed, the second and third contentions may be regarded as the application of these legal considerations in the particular context of the continental shelf.

The Court adjourned from 4.15 p.m. to 4.35 p.m.

When we adjourned, Mr. President, I had just listed the three contentions that we put to the Court on the main legal issues in the case. I should like, having done that, to take the opportunity of relieving our opponents of an anxiety which the learned Agent seemed to express on pages 43 and 44, *supra*, of the second day's record, in regard to our first contention on which, as I said, our fourth submission is based. He interpreted our silence in this submission on the point of special circumstances as meaning that we excluded any possibility of special circumstances being invoked outside the principles and rules expressed in Article 6. This is not so, Mr. President. We recognize that the exception of special circumstances may operate in connection with our first contention in the same way as in connection with our other contentions.

If we did not mention special circumstances specifically in our fourth submission, it was because we do not think that the facts provide any justification whatever for the operation of the exception in the present cases. In truth, Mr. President, we felt that in our submissions concerning Article 6 we had already done enough in the way of providing our opponents with the necessary basis for presenting the Federal Republic's arguments on special circumstances which they were so very reluctant to advance themselves.

Having cleared the ground a little, Mr. President, by these preliminary observations, I now propose to enter upon my main argument, and I feel that it may be convenient to the Court if I indicate in broad terms the order in which I have in mind to present it.

I propose to begin by a brief examination of the Special Agreements and then of the Partial Boundary Treaties. After that I shall touch upon the legal attitudes

adopted by the respective Parties prior to the proceedings. Next I shall deal *seriatim* with the three contentions on which our own cases are founded, taking up such of our opponents' criticisms as seems useful. I shall then turn to certain aspects of our opponents' case as an introduction to the more detailed arguments of my learned friends, the Agents for the two Governments for which I appear.

I turn therefore, Mr. President, to the Special Agreements, and the Court will perhaps recall that we are indebted to our opponents for having reproduced the text of one of these agreements in the introduction to the Memorial.

In the case between Denmark and the Federal Republic, the question submitted to the Court for its decision is the one specified in the Special Agreement concluded between those two countries on 2 February 1967, namely:

"What principles and rules of international law are applicable to the delimitation as between the Parties of the areas of the continental shelf in the North Sea which appertain to each of them beyond the partial boundary determined by the above-mentioned Convention."

That is the question formulated in the Special Agreement and it is the only question which has been put to the Court by Denmark and the Federal Republic.

Furthermore, when the Danish-German *Compromis* here speaks of "the delimitation as between the Parties of the areas of the continental shelf in the North Sea which appertain to each of them", it is perfectly clear that the words refer exclusively to the delimitation as between Denmark and the Federal Republic of the areas which appertain respectively to each of these two countries. And it is no less clear that when the *Compromis* speaks of areas "beyond the partial boundary determined by the above-mentioned Convention", the words refer specifically to the areas of continental shelf in the North Sea which appertain respectively to Denmark and the Federal Republic beyond the inshore boundary already fixed by these two countries bilaterally in their Convention of 9 June 1965.

In short, the wording of the *Compromis* unequivocally limits the question put to the Court to the principles and rules of international law applicable to the delimitation bilaterally as between Denmark and the Federal Republic of the areas of continental shelf which appertain to each of them further to seaward of the most northerly point of the existing 1965 partial boundary; and the Court can now see on the big map¹ behind me the places of the terminals of the partial boundaries of the two countries.

The *Compromis* contains no mention of a request to the Court to determine the principles and rules by which an area of the North Sea is to be distributed, shared out, between the three States, Denmark, the Netherlands and the Federal Republic.

The terms of a Special Agreement, as has repeatedly been held by the Permanent Court and by this Court, define the task entrusted to the Court in a manner binding both upon the parties and the Court. In consequence, in a case instituted by a Special Agreement, it is not the submissions of the parties but the terms of the Agreement which determine the questions for decision by the Court. This was emphasized by the Permanent Court in the *Lotus* case, where it said—the case is so famous I need not refer in detail to it—*P.C.I.J., Series A, No. 10*, at page 12:

"The Court, having obtained cognisance of the present case by notification of a special agreement concluded between the Parties in the case, it

¹ See footnote 1 on page 32.

is rather to the terms of this Agreement than to the submissions of the Parties that the Court must have recourse in establishing the precise points which it has to decide."

Similarly, having declared in the *River Oder Commission* case that the questions on which it was asked to give judgment were quite clear, the Permanent Court said: "These questions cannot be changed or amplified by one of the Parties." That, Mr. President, is on page 18 of the Judgment in *P.C.I.J., Series A, No. 23*. Other cases in which pronouncements to the same general effect were made are mentioned in *Rosenne's Law and Practice of the International Court*, Volume II, page 586, footnote 3.

The Federal Republic, it follows, cannot unilaterally, by its own submissions change or amplify the question which the *Compromis* of 2 February 1967 empowers the Court to decide.

I now turn, Mr. President, to the other case in which the Parties are the Netherlands and the Federal Republic. This case also was referred to the Court by notification of a Special Agreement and the Special Agreement, apart from the difference in the Parties and the mention of a different partial boundary, is couched in precisely the same terms as those in the other *Compromis*. Accordingly, *mutatis mutandis*, the points which I have just made in regard to the other *Compromis* apply in the same manner and with precisely the same force in this case.

In short, the question put to the Court in the second case is exclusively the delimitation as between the Netherlands and the Federal Republic of the areas of continental shelf in the North Sea which appertain to each of them beyond their existing partial boundary fixed in a bilateral Convention of 1 December 1964. And this question the Federal Republic again cannot change or amplify by any merely unilateral declaration.

The three Governments, it is true, drew up a protocol in which they agreed that after the notification of the two Special Agreements to the Court they would ask for the two cases to be joined. But the protocol, Mr. President, did not alter in any way the nature or scope of the questions formulated in the two Special Agreements.

In our view, therefore, the legal position is crystal clear. There are two individual cases before the Court, which concern the delimitation of two different continental shelf boundaries between two different pairs of States. In the first, the Court is called upon to decide the principles and rules of international law applicable to the delimitation of the Danish-German boundary in one designated part of the continental shelf in the North Sea. In the second, the Court is called upon to do the same thing with respect to the Netherlands-German boundary in another designated and quite distinct part of the continental shelf in the North Sea. In consequence, it is, from a purely procedural point of view, perfectly open to the Court to prescribe certain principles and rules as applicable to the delimitation of the Danish-German boundary but somewhat different principles and rules as applicable to the Netherlands-German frontier in the event that the geographical facts might involve a different interpretation of Article 6.

We do not, in fact, think that there is any element in either case which could lead the Court to prescribe different principles for the delimitation of the two boundaries. But this is only because the Danish and the Netherlands Governments believe that in their respective cases it is the general principles and rules of international law which are applicable, and because they are of one mind as to what those general principles and rules are and their proper interpretation and application.

If I may seem to labour a little the precise formulation of the two Special Agreements and their application to two different and individual cases, I ask for the Court's indulgence. For these questions are at the very root of the differences between the Federal Republic and the two Governments in the present proceedings, as is apparent from their respective submissions and from the arguments which have been presented to the Court.

The submissions of the Danish Government are addressed directly and exclusively to the question which the Danish-German *Compromis* has entrusted to the Court's decision, as are also those of the Netherlands Government to the question in the Netherlands-German *Compromis*. In each case the submissions of the Government for which I appear concern the principles and rules of international law applicable to the delimitation, as between it and the Federal Republic, of the areas of the continental shelf in the North Sea which appertain to it and to the Federal Republic beyond their existing inshore partial boundary.

The submissions of the Federal Republic, on the other hand, are addressed, or at any rate, one must now say, primarily addressed, to a quite different question: to supposed principles for apportioning the continental shelf in the North Sea among the coastal States. In the Memorial this was made very clear, both in the submissions and in the conclusions which preceded them. In the Reply, the submissions, although elaborated, still demand from the Court not a delimitation as between two States of the areas appertaining to each State, but an equitable apportionment of an area, unspecified, of the North Sea continental shelf between the three States. Now this demand appears to us to travel outside the scope of the Special Agreements.

Nor, in our view, is it made any less incompatible with the Special Agreement by reason of the fact that at the present hearings, as I have already mentioned, the Federal Republic has now appeared to define quite precisely the area which it asks the Court to apportion. On the contrary, this only renders even clearer the fact that the demand which the Federal Republic has submitted to the Court does not concern principles of delimitation but a request for the apportionment of an area not defined in the Special Agreements, and parts of which are wholly outside the areas through which the partial boundaries are to be completed.

The Federal Republic has complained, in Chapter I of the Reply, that, in its view, we are making:

"the rather artificial verbal distinction between the 'delimitation' and the 'sharing out' of areas of the continental shelf, although it is evident [they say] that any delimitation between two States necessarily allots each of them a certain share of the shelf so divided". (I, p. 394.)

But the two Governments for which I appear, Mr. President, had already anticipated and answered this argument in Chapter I of their Counter-Memorials, where they pointed out that the point is far from being merely an artificial verbal distinction and goes to the whole substance of the dispute. You will find that in paragraph 50 of the Danish and paragraph 44 of the Netherlands Counter-Memorials, and the point is taken up again in paragraph 18 of the Common Rejoinder.

The process of determining the boundary between the continental shelf areas appurtenant to one coastal State and the continental shelf areas appurtenant to another coastal State is fundamentally different from the process of sharing out a continental shelf amongst a number of coastal States.

At any rate, the two Special Agreements to which the Federal Republic has put its hand speak of delimitation, and the word "delimitation" is a well-

established legal expression. The *Dictionnaire de la terminologie du droit international*, at page 195, gives as the general meaning of "délimitation":

"Action de délimiter à leurs points de contact les territoires de deux Etats, de déterminer la ligne qui les sépare."

And the other meanings there given for the word denote even more strictly the process of giving definition to the boundary between the existing territories of two States.

Moreover, the delimitation is stated in the Special Agreements to be not of areas to be allocated to the coastal States in question but of the areas of continental shelf which appertain to each of them, and these words can only be understood as referring to areas which in principle are existing appurtenances of one or the other of the States concerned. In short, these words unequivocally confirm that the Special Agreements are concerned with the determination of boundaries and not the distribution of submarine areas or resources.

Even if one stops there, Mr. President, the natural meaning of the words in the *Compromis*, in our view, leaves no room for argument. The principles and rules with which the Court is here concerned are exclusively principles and rules governing the delimitation of the boundaries between the areas of the continental shelf appurtenant to each State in question.

But the Special Agreements do not stop there. As I have already emphasized, they designate as the zones to be delimited the areas which appertain to each State beyond the already existing partial boundary. In other words, they make it clear that what the Court is concerned with in each case is the completion of the delimitation, already begun, of the continental shelf boundary between the States in question.

Distribution of the continental shelf between the coastal States by reference to an alleged principle of equitable and just shares does not, therefore, seem to us compatible with the function entrusted to the Court in the Special Agreements, and, Mr. President, if we had ever had any doubts upon this score, they would have been totally removed by the frank explanations of the Federal Republic's case at the present hearings, to which I have already referred in my opening observations.

As I then said, we consider the demand for equitable apportionment, as presented by the Federal Republic, to be incompatible alike with the Special Agreements and with the judicial character of the Court.

I may add, that even if it were to be considered compatible with the Special Agreements and the Court's judicial function, it would still, in our view, be incompatible with the very basis of the delimitation of territorial and jurisdictional boundaries in international law. Our reasons for this view were given in Chapter I of the Common Rejoinder and as my learned colleague, the Agent for the Netherlands, said in his opening, he will be developing the point later in our address.

I cannot leave the Special Agreements, Mr. President, without also recalling a point which we have emphasized in our written pleadings and most recently in paragraphs 6 and 7 of our Common Rejoinder.

This is, that both the Special Agreements expressly record that the respective Parties are in disagreement in regard to the further course of the boundary which could not be settled by detailed negotiations. Those are the words. This disagreement and deadlock in the negotiations is the very basis of the Special Agreements, the objects of which were to obtain decision from the Court as to the principles and rules applicable to the delimitations. We therefore think that the final submission in the Federal Republic's Reply, by calling upon the Court

to lay down that "the delimitation is a matter which has to be settled by agreement" again travels outside the terms of the Special Agreements for the reasons which we have given, more extensively, in the Common Rejoinder.

As I informed the Court, Mr. President, I propose next to ask you to look a little more closely at the two partial boundaries mentioned in the Special Agreements, and then, more generally, at the attitudes of the respective Parties prior to the proceedings.

I shall begin with the Netherlands-German Treaty, since this is, in fact, the earlier in date. The Court will find an English translation in Annex 3 A of the Memorial, and will there see that the Treaty, concluded on 1 December 1964, describes itself in its title and preamble as concerned with the lateral delimitation of the continental shelf near the coast.

Article 1 speaks simply of "the boundary between the German and the Netherlands parts of the continental shelf of the North Sea up to the 54th degree of latitude" and specifies three points as determining the line of the boundary to seaward from a given starting point within the territorial sea.

The three points which delimit the line of the partial boundary are all points equidistant respectively from the baseline of the Netherlands coast and the baseline of the German coast. In short, the partial boundary is an orthodox illustration of the rule which applies to the delimitation of a continental shelf boundary under Article 6 of the Convention in the absence of a contrary agreement.

There is no trace in this Treaty of "equitable and just shares", there is no trace in this Treaty of the breadth of the coastal front of each State as an "objective standard of evaluation". On the contrary, the Federal Republic has, as the learned Agent for the Netherlands has already shown the Court, had no hesitations or scruples about using the German island of Borkum and the low-tide elevation of Hohe Riff, both of which lie off the mainland front of the Netherlands, as base points for delimiting the partial boundary.

We make no complaint about that, Mr. President, for it was in accordance with what we believe to be the general rules of international law governing the delimitation of the continental shelf. We merely note that these general rules of international law are acceptable enough to the Federal Republic so long as they operate in its favour.

Annex 4 A of the Memorial also gives the text of joint minutes prepared on the completion of the draft of the treaty. These joint minutes equally appear to envisage the function of the treaty as simply the delimitation of a boundary and actually characterizes it as constituting an agreement in accordance with paragraph 2 of Article 6 of the Continental Shelf Convention. True, they specify that it is an agreement in accordance with the first sentence of paragraph 2, but they nevertheless characterize it as an application of Article 6.

The joint minutes record the disagreement of the two delegations with respect to the boundary line beyond the 54th degree of latitude and, in consequence, their inability to "determine by agreement the full length of the common boundary on the continental shelf".

The Netherlands delegation, for its part, maintained that the further course of the boundary must also be determined by application of the principle of equidistance.

The German delegation, on the other hand, reserved its position with respect to the boundary line beyond the 54th degree of latitude, saying that the line would not necessarily follow the same direction as that of the partial boundary.

In addition, the German delegation announced that it was seeking to bring

about a conference of North Sea States "with a view to arriving at an appropriate division of the continental shelf situated in the middle of the North Sea, in accordance with the first sentence of paragraph 1 and the first sentence of paragraph 2 of Article 6 of the Geneva Convention on the Continental Shelf".

Precisely what the German delegation meant by an appropriate division was not specified and, in any case, nothing more was ever said by the Federal Republic to the Netherlands Government about its intention to call an international conference.

The Court will, however, again observe that the Federal Republic made its announcement of that intention expressly within the framework of Article 6 of the Convention.

I now turn to the Danish Treaty. The Danish-German Treaty, concluded in June 1965, equally describes itself as concerned with the delimitation of the continental shelf boundary near the coast, as can be seen from the text in Annex 6 A of the Memorial. Article 1 prescribes that the boundary shall run in a straight line from a given point at the outer limit of the territorial sea to a point in the high seas defined by co-ordinates. This point, which is some 30 nautical miles out to sea, is again an equidistance point delimited from the respective baselines of the Danish and German coasts; another orthodox illustration of the rule which applies under Article 6 of the Convention in the absence of a contrary agreement.

The German baseline, it may be added, is here formed by the Island of Sylt, about half of which stretches across the front of the mainland coast of Denmark.

In this case also, on completing the draft of the Treaty, the negotiating delegations recorded their inability to agree upon the further course of the boundary and reserved their positions in regard to the principles to be applied. They did so in a joint press communiqué of 18 March 1965, the text of which is given in Annex 8 A of the Memorial. At this time the German delegation made no mention of any intention to convene an international conference "with a view to arriving at an appropriate division of the continental shelf situated in the middle of the North Sea". On the contrary, the communiqué merely states: "The German delegation has proposed that negotiations on the further course of the boundary be resumed in the near future." In other words, it contemplated a resumption of the bilateral negotiations.

I should add that the reservation of the positions of the two Parties was repeated in a short Protocol attached to the Treaty itself, the text of which is reproduced in Annex 7 A of the Memorial.

So much, Mr. President, for the partial boundaries which are mentioned in the Special Agreements and the principles for extending which it is your task to decide. You may, perhaps, wonder why this case has come before you without anything more having been heard of the Federal Republic's proposal for an international conference to divide up the middle of the North Sea, and you may think, as we do, that the most probable explanation is that the Federal Republic, on further reflection, concluded that its ideas about an "appropriate division of the continental shelf in the middle of the North Sea" would not commend itself to the other North Sea States. At any rate, the Federal Republic clearly decided that it would be more prudent not to put these ideas to the test in an international conference.

In order to complete the context in which the two cases come before the Court, I would now ask the Court to consider more generally the legal attitudes adopted by the respective Parties prior to the proceedings. I can be quite brief, as we have already drawn the Court's attention to the salient points in the written pleadings. The main passages are Chapters 2, 3 and 4 of Part I and

Chapter 3 of Part II in the Counter-Memorials, and paragraphs 92 and 103-107 of the Common Rejoinder.

Prior to the Geneva Conference, Mr. President, the Governments for which I appear both gave their general support, as you have indeed heard, to the proposals of the International Law Commission recommending the recognition of the exclusive rights of the coastal State over the continental shelf adjacent to the coast, as they did also to its proposals concerning the delimitation of the continental shelf between opposite or between adjacent States.

On the latter point, in a Note Verbale commenting upon the Commission's proposals in 1952, the Danish Government expressed the view that, where an area has to be divided between three or more countries, the solution should be to refer to "planes forming the locus to the points which are closer to one of the countries than to any of the others".

Moreover, it illustrated this solution with a sketch map of Denmark's continental shelf contiguous to her coasts in the North Sea and in the Baltic. If the Court glances at that map, which is reproduced in the Danish Counter-Memorial, I, page 243, it will see that in the Baltic, Denmark's boundary with the Federal Republic is already shown on the map as following an equidistance line, just as it has since been agreed between the two countries in their Protocol of 9 June 1965. It will also see that in the North Sea and the Skagerrak the Danish boundary was already shown on the map as following an equidistance line, just as it has since been agreed between Denmark and, respectively, Norway, the United Kingdom and Holland, and has been delimited by Denmark vis-à-vis the Federal Republic. Part of it, as we have just seen, has even been agreed with the Federal Republic. Indeed, the North Sea part of the map corresponded exactly with the Danish boundaries as they have confronted the Court on the big map¹ which the Parties and the Court have been using during the hearings.

As to the Netherlands Government, commenting upon the final report of the Commission in a letter of 17 October 1957—and this of course was in the records—it said:

"As in the case of the boundaries of the territorial sea . . . the Netherlands Government supports the principles embodied in article 72 with regard to the delimitation of the continental shelf."

Article 72, the Court will recall, was the Commission's text of what is now Article 6 of the Continental Shelf Convention. Having thus endorsed the equidistance-special circumstances rule, it went on—and this is important:

"The Netherlands Government would like to emphasize the necessity of an internationally accepted rule for these delimitations, together with adequate safeguards for impartial adjudication in the case of disputes, as it will not be sufficient simply to express the hope that the States concerned will reach agreement on this matter."

At the Geneva Conference the two Governments both voted in favour of all the articles of the Continental Shelf Convention, and both afterwards signed the Convention without any reservation. Both Governments, having obtained the necessary authority from their respective parliaments, proceeded to ratify the Convention, again without any reservations. Denmark did so in 1963 and the Netherlands in 1966. Both have promulgated legislation concerning their continental shelves on the basis of the Convention and both have consistently

¹ See footnote 1 on page 32.

applied the principles of the Convention in their agreements with other States, including the Federal Republic, for the delimitation of continental shelf boundaries. In the written pleadings they have likewise consistently maintained that it is by reference to the principles embodied in the Convention that the Court should arrive at its decision in the present cases.

Such, Mr. President, is the legal posture in which the two Governments for which I address you now appear before the Court.

The Federal Republic, not being a Member of the United Nations, did not have the opportunity to comment on the work of the Commission until after the final report had been completed. Invited to do so by the Secretary-General in a letter of 25 March 1957, the Federal Republic submitted its comments in a Note Verbale of 18 September 1957 which is reproduced on page 85 of Volume I of the *Official Records* of the Geneva Conference.

On the problems of the continental shelf and territorial sea, however, it merely reserved the right to comment at a latter stage, pleading insufficient time for study of the proposal. At the Conference itself the Federal Republic put in a memorandum to the Continental Shelf Committee—the Fourth Committee—opposing “the whole conception of the Commission’s proposals for the continental shelf” and those were the words that were actually used by the Federal Republic. Instead, it advocated the free utilization of the natural resources of the continental shelf for everyone, subject only, and this is of interest, Mr. President, subject only to certain controlling rights for the coastal State closest to the installations in question. The memorandum will be found, Mr. President, in the *Official Records* of the Conference, in Volume VI at page 125.

When the Federal Republic saw that the Conference would not have its own admittedly very idealistic proposal, and was nevertheless set upon adopting the Commission’s proposals, it participated fully in the discussion of the articles and in the voting. In the Fourth Committee it voted in favour of the article which is now Article 6, and did so again at the ninth meeting of the plenary when the article was adopted by the Conference. We have already drawn the Court’s attention, in our Counter-Memorials, to the illuminating character of the explanation of its vote given by the Federal Republic in the Fourth Committee. After emphasizing that it would have preferred a Venezuelan proposal which would have left the delimitation of boundaries entirely to the agreement of the Parties, the delegation of the Federal Republic said that it had accepted the views of the majority of the Committee, subject to an interpretation of the words special circumstances as meaning that any exceptional delimitation of territorial waters would affect the delimitation of the continental shelf. In this interpretation of special circumstances the Court will find no reference to apportioning the shelf, no reference to just and equitable shares, no reference to coastal frontages and none to what the Federal Republic calls, in the Reply, I, page 424, “the almost rectangular bend in the German coastline”.

At the end of the Conference, it is true, the Federal Republic voted against the adoption of the text of the Convention as a whole. But again the explanation which it gave of its vote is significant. Its negative vote, it said, was because it objected to the criterion of exploitability in the definition of the continental shelf, and because it could not support the Convention without a provision for compulsory submission of disputes to adjudication. In short, its reservation was concerned with the external limits of the continental shelf; not a word of criticism or reservation with regard to the provisions for the delimitation of the continental shelf in Article 6.

At this point, Mr. President, I must return for a moment to the Danish Note Verbale of 1952 and to the map depicting the boundaries envisaged by Denmark

as resulting from the principles expounded in that Note Verbale. The map, as you will recall, Mr. President, was more or less what you see behind me depicting the Danish boundaries. Now the Note Verbale was entirely explicit as to the principles which Denmark considered should govern the delimitation of continental shelf boundaries; the median line and, in cases where three or more States are concerned, the proximity principle because that is all that was meant by that *loc* plane or locus of points, which I mentioned just now. Now the text of that Note was reproduced in full in the *Yearbook* of the Commission, while the map depicting Denmark's equidistance boundaries was obtainable from the United Nations Secretariat and in any case received full publicity in the Danish press. We stated these facts with some emphasis in our respective Counter-Memorials, and in the Reply the Federal Republic seems to have thought it wiser to let the matter of its own knowledge of Danish and Dutch positions in regard to their continental shelf boundaries pass without comment. Instead, it made to us the surprising assertion that the Federal Republic could not possibly know in 1958 that the equidistance-special circumstances rule would be interpreted by Denmark and the Netherlands in the way which they have done. Naturally, therefore, we again drew attention to the Danish Note Verbale and map and commented that the Federal Republic had not made any suggestion that it was unaware of either of these documents.

The learned Agent for the Federal Republic seemed clearly a little embarrassed when he came to this point in his speech on the opening day, and you could almost hear him choosing his words. He said, it is on page 25, *supra*, of the record:

"It was, as you see, a rather hypothetical comment and, moreover, this map has never been published in the official documents of the United Nations, nor has it come to the official knowledge of the German Government."

The Court must, we feel, have been as struck as we were by the phraseology of this statement. At any rate, is it really thinkable that the Legal Department of the Federal Republic, its Ambassador in Copenhagen and its delegation at the Geneva Conference were all so lacking in interest or so negligent in the discharge of their functions that the German delegation went to the Conference wholly unaware of the position adopted by Denmark and also by the Netherlands on the question of the continental shelf?

Nearly six months later—after what was obviously the most careful consideration—the Federal Republic changed its mind and signed the Convention. I said careful consideration, because it was signed on the penultimate day open for signature and it could equally well have acceded later. Now in signing, it made a special interpretative declaration with respect to the effect of Article 5 in preserving fishing rights, but again it made no reservation nor any other form of declaration with respect to the provisions of Article 6 governing the delimitation of continental shelf boundaries.

Extensive German scientific exploration of the North Sea continental shelf took place between 1957 and 1963 from which, no doubt, information was obtained as to the more promising areas for exploitation. At any rate, as the Federal Government prepared for ratification of the Convention, it began to consider actively the problems of its boundaries with its neighbours. Meanwhile, in a Note to the Federal Republic of 21 June 1963—this is in Annex 8 of the Netherlands Counter-Memorial—the Netherlands had explained her view of the continental shelf boundary which she thought should apply between the two countries. This is the term of the Note:

"In connection with the proposed ratification of the Convention on the Continental Shelf signed at Geneva on 29 April 1958, the Royal Netherlands Government wishes to state that the part of the continental shelf of the North Sea over which it exercises sovereign rights in conformity with the said Convention is delimited to the east by the equidistance line beginning at the point where the thalweg in the mouth of the Ems reaches the territorial waters."

To this the Federal Republic answered in a Note of 26 August 1963, and this is Annex 9 A of the Netherlands Counter-Memorial:

"The Federal Government does not share the Royal Netherlands Government's views on the delimitation between the Federal Republic of Germany and the Netherlands. The Federal Republic holds the view that there are historical reasons and other special circumstances that justify adoption in the area of . . . a delimitation line, the position of which differs in more than one respect from that claimed by the Royal Netherlands Government."

And it added that "the Federal Government too is preparing for the ratification of the Convention on the continental shelf". Here, once more, Mr. President, there is no trace of any idea on the part of the Federal Republic that it could base the delimitation of its continental shelf boundaries on principles outside the Convention, and in particular Article 6. On the contrary the language of that note is consistent only with a claim to invoke the special circumstances exception in Article 6.

Indeed the note itself expressly envisages the Federal Republic becoming a party to the Convention quite shortly. And, Mr. President, I need hardly say there is no trace of coastal frontages or of equitable apportionment in that Reply, which in some degree sought to challenge the Netherlands' ideas as to the delimitation of its continental shelf.

The Federal Republic's intention to proceed to ratification was reiterated in its proclamation of 20 January 1964. This is in Annex 10 A of the Netherlands Counter-Memorial. In the proclamation the Federal Republic referred to "the development of general international law as expressed in recent State practice and in particular in the signing of the Geneva Convention on the Continental Shelf". We do not see, Mr. President, how the Federal Republic could have recognized more clearly than by these words both the part played by the signature of the Geneva Convention in consolidating—to use a neutral term—the law of the continental shelf and the character of the Convention as an expression of general international law. In the proclamation the Federal Government went on to proclaim its exclusive sovereign right to the exploration and exploitation of the submarine areas adjacent to the German coast.

It then said that the "detailed delimitation" of the German continental shelf vis-à-vis the continental shelves of other States "would remain the subject of agreement with other States".

Here again, Mr. President, there is no trace of apportionment nor of just and equitable shares nor of coastal frontages. In this proclamation the Federal Republic clearly envisaged the German continental shelf simply as the area adjacent to the German coast, the boundaries of which raised only a problem of their detailed delimitation. Some four months later, on 15 May 1964, the Federal Republic submitted a continental shelf bill to the Federal Parliament, in the *exposé* describing it (*exposé des motifs*) as "the municipal supplement to the effects of the proclamation in the field of international law".

The *exposé des motifs* again stressed the significance of the Convention in the

development of the law, and it stated expressly that the contents of the Federal Republic's sovereign rights conform to those established for coastal States by the Geneva Convention.

The Federal Republic sought in the Reply to suggest that this statement referred only to the contents of the rights as defined in Articles 1 and 2 of the Convention. But, as we pointed out in paragraph 92 of our Common Rejoinder, the *exposé des motifs* itself spells out the obligations attaching to those rights under Articles 3 and 5 of the Convention and is not, therefore, limited to Articles 1 and 2 in its recognition of the régime applicable to the Federal Republic's continental shelf.

Thereafter, Mr. President, the Federal Government's ardour to ratify the Convention cooled. Its negotiations with the Netherlands, and later with Denmark, resulted in the delimitation of the partial boundaries near the shore. But they also made it clear that both the Netherlands and Denmark were adamant in finding no valid reason for not applying the equidistance principle to the whole of their boundaries with the Federal Republic.

Then, Mr. President, the Federal Republic turned its back upon the Convention, and looked for other grounds upon which to base its claim. In its Memorial, as the Court knows, the Federal Republic placed all its weight on a supposed principle of apportioning just and equitable shares of the continental shelf of the North Sea to each coastal State, and sought to exclude altogether, as I have said earlier, the application of the principles contained in Article 6. This position, as I already explained, it maintained in its Reply, although adding a subsidiary submission lest the Court should hold that the principles in Article 6 are applicable.

What the Federal Republic did not do in either of its pleadings, and has not yet done, is to explain just how, after 1964, such a change could have taken place in the legal basis for the delimitation of its continental shelf boundaries.

Such, Mr. President, is the legal posture adopted, it would seem, very much as an afterthought, in which the Federal Republic appears before the Court.

The Court rose at 6 p.m.

FIFTH PUBLIC HEARING (29 X 68, 10 a.m.)

Present: [See hearing of 23 X 68.]

Sir Humphrey WALDOCK: I begin this morning, as I indicated, with our first contention, and for the convenience of the Court I will recall how I formulated it in my opening observations. We contend that if the principles and rules embodied in Article 6, paragraph 2, of the Convention are excluded from consideration, then the continental shelf boundaries of the respective Parties are to be determined on the basis of the exclusive rights of each Party over the continental shelf adjacent to its coast and of the principle that the boundary is to leave each Party every point of the continental shelf which lies nearer to its coast than to the coast of any other Party.

Mr. President and Members of the Court, our starting point is the exclusive sovereign rights possessed by Denmark and by the Netherlands, as coastal States, over the continental shelf adjacent to their respective coasts for the purpose of exploring and exploiting its natural resources. These exclusive sovereign rights were recognized by the Geneva Conference of 1958 as appertaining today to every coastal State *ipso jure* and independently of any occupation of the continental shelf and of any express proclamation. The Federal Republic itself recognizes that these rights now attach to every coastal State as general customary rights, indeed, it claims them for itself expressly on that basis; and it further recognizes that these rights find their authoritative expression and definition in Articles 1 and 2 of the Continental Shelf Convention. On this aspect of the case, Mr. President, the three Governments before you are in complete agreement; and I need only add, in passing, that Denmark and the Netherlands are also contractually bound, as between each other, to apply the law stated in those Articles.

Accordingly, it would appear to be common ground between the Parties in the cases before you that today, just as certain rights with respect to internal waters, with respect to the territorial sea and with respect to the contiguous zone, appertain *ipso jure* to a coastal State simply in virtue of its coast, so also do exclusive rights with respect to the continental shelf. Manifestly, in each one of these cases it is the geographical relation of the maritime area in question to the coast which generates the rights of the coastal State over the area. In one case—internal waters—it is the close links of the area with the land domain which constitute the legal basis of the coastal State's rights. In the others—the territorial sea, contiguous zone and continental shelf—it is the adjacency of the areas in question to the coast which is the legal nexus creating the coastal State's rights. These criteria of the coastal State's rights find formal expression in the Geneva Conventions: in Article 4, paragraph 2, of the Territorial Sea Convention for internal waters; in Article 1 of that Convention for the territorial sea; in Article 24 of that Convention for the contiguous zone, if in a more indirect manner, and in Article 1 of the Continental Shelf Convention for the continental shelf.

Two elements, therefore, form the basis of the maritime rights of a coastal State: its possession of a specific physical coast and, secondly, the geographical adjacency of the maritime areas in question to that coast. I should hardly have considered it necessary, Mr. President, to say anything about the first element, the coast, so clear is the law on the point. But the Federal Republic has in-

roduced into the cases that novel and rather shifting concept of a "coastal frontage"; and I must, therefore, say a brief word about the coast of a coastal State.

The very purpose of Articles 3 to 13 of the Territorial Sea Convention was to give definition to the legal concept of the "coast" of a coastal State by codifying the rules for determining the baselines for delimiting the territorial sea. Article 1 refers to the coastal State's sovereignty over a "belt of sea adjacent to its coast", and then Articles 3 to 13 lay down a series of rules for determining, in a number of different situations, what is to be considered the baseline of the coast. If those Articles define the legal concept of the coast specifically with reference to delimitation of the territorial sea, Article 24, paragraph 3, of the Convention clearly assumes that the baselines which those Articles 3 to 13 prescribe constitute the legal coastline of a State for other maritime delimitations, for the baselines of the territorial sea are there incorporated, by reference, into the delimitation of the contiguous zone. Similarly, Article 7, paragraph 5, of the Convention on Fishing and Conservation of the Living Resources of the High Sea assumes the general relevance of the territorial sea baselines both as constituting the legal coast of a State and as determining the legal relation of a coastal State to a given area of the high seas. The Continental Shelf Convention itself is completely explicit on the point, for Article 6 expressly incorporates the baselines of the territorial sea in the rules which call for the application of the equidistance principle. Furthermore, the four Geneva Conventions were drawn up together, as connected parts of a general codification and progressive development of the law of the sea, prepared by a single body, the International Law Commission.

Accordingly, in our view, it is unthinkable that the words "adjacent to the coast" in Article 1 of the Continental Shelf Convention should be given any other meaning than adjacent to the baseline of the coast as legally defined in the Territorial Sea Convention. Under customary law, as well as under the Geneva Conventions, it is the baseline of the coast which constitutes the coast for legal purposes and the point of departure for delimiting the various maritime areas over which the coastal State exercises rights in virtue of its coast.

The two Governments for which I appear merely ask the Court to apply the orthodox principle that they are entitled to the maritime areas—in this case of the continental shelf—which are adjacent to the baselines of their respective coasts. The Federal Republic's concept of "coastal frontages", on the other hand, has no place whatever in the accepted legal order governing the delimitation of maritime sovereignty or of maritime jurisdiction.

Our position is, we believe, equally orthodox in regard to the second element—geographical adjacency to the coast. We contend that proximity to the coast is, necessarily, the primary criterion for determining the adjacency of any given maritime area to one State rather than to another. The element of proximity is inherent alike in the concept of adjacency to a coast and in the concept of a State's being the coastal State with reference to a given maritime area. It is, indeed, the very root of the special rights accorded in maritime areas to the coastal State as against other States. It is therefore absolutely logical that when it is a question of the claims of more than one coastal State, Article 12 and Article 24, paragraph 3, of the Territorial Sea Convention, Article 6 of the Continental Shelf Convention and Article 7, paragraph 5, of the Fishing and Conservation Convention should prescribe the equidistance principle as the basic rule.

In this connection, Mr. President, I should like to refer the Court to an article on "Submarine Boundaries" in the *International and Comparative Law*

Quarterly of 1960 by D. J. Padwa, of the New York Bar. Having observed that in the absence of a conventional undertaking States are not obliged to adopt a specific mode of conduct with respect to submarine boundaries, Padwa says on page 639:

“Nevertheless, the theory of equidistance is not without relevance, for as is now suggested, if a State acting in good faith makes a unilateral determination of its submarine boundary based on the principle of equidistance, it is extremely difficult to see how another State, adjacent to the same continental shelf, can allege a *better* claim to submarine areas which are in greater proximity to the first State. The traditional view that a territorial delimitation can ‘not be achieved by norms belonging to the legal order of one State, since every such order is limited in its validity to the territory and people of that State’ is in no sense violated by this conclusion, for the principle of equidistance is not a norm belonging to the legal order of a single State. It is, rather, a norm inherent in the international law of the sea.”

That is the end of my quotation from Mr. Padwa.

That proximity to the coast is such a norm inherent in the international law of the sea is well illustrated by paragraph 5 of Article 7 of the Fishing and Conservation Convention. The object of Articles 6 and 7 of that Convention was to recognize and make provision for the special interest of a coastal State in the conservation of the living resources “in any area of the high seas adjacent to its territorial sea”. Paragraph 5 of Article 7, which was introduced at the Geneva Conference as part of an 11-power proposal, seeks in effect to designate the coastal State to which that special interest attaches in cases where coasts of more than one State are involved, and paragraph 5 expressly provides that “the principles of geographical demarcation as defined in Article 12 of the Convention on the Territorial Sea” shall apply. In other words, in the absence of a contrary agreement or of special circumstances, it is the equidistance principle—the principle of greater proximity—that is to determine the coastal State which has the “special interest”.

In that Convention, as the Court will recall, it was not a question of exclusive rights of the coastal States but simply of special rights in regard to conservation measures. Yet the Conference thought it natural, in delimiting the areas of those special rights, to apply the equidistance principle—the norm of proximity.

When you turn, Mr. President, to the Continental Shelf Convention itself, you are confronted with the recognition of exclusive rights in the coastal State; and then *a fortiori* it is indicated to apply the norm of proximity. This point also is well put by Mr. Padwa in the article to which I have referred. On page 639, he points out that as between two States which have embraced the doctrine of the continental shelf, both are logically committed to the proposition that any given area of continental shelf appertains to a single State, so that the question is only one of deciding which State shall have exclusive use. He then goes on:

“This fairly approximates the question of where the submarine boundary is located as between the two States. As suggested, while the principle of equidistance does not apply automatically, nor as an indispensable condition, its *bona fide* invocation may be an advisable and valuable procedure; for the other party—committed to exclusivity—cannot put forward a *better* claim. In the absence of other factors, such as the existence of special circumstances, proximity would be the test; for the idea of ‘appurtenancy’ is at the core of the theory of the continental shelf.”

On the next page, Mr. Padwa re-emphasizes that the proximity test is implicit in much of what we know concerning the law of the sea. In this context he says:

“... the idea of proximity or distance from the shore operates as a fundamental norm. It is not necessary to consider whether this idea of proximity is the best of legal considerations, the point being that it is a well accepted one.”

At the bottom of that page he then continues:

“If proximity is not the criterion for determining a submarine boundary (and if the parties are unable to agree on another line), then the only natural alternative is that of joint or shared ownership over the area in question. However, those States proclaiming the validity of the doctrine of the continental shelf have, by their very acts, rejected such a construction and have expressed their commitment to *exclusive* use by the coastal State. This being the case, the principle of equidistance must be utilized to determine which is the ‘coastal’ State with respect to a given area of sea-bed and subsoil.”

He goes on:

“This would suggest that States may to some measure preserve certain rights by unilaterally and in good faith invoking a boundary based on the principle of equidistance. This line of reasoning has the effect of saying that as between parties accepting the basic principle of the continental shelf, the provisions of Article 6 are merely declaratory of a reasonable and logical consequence.”

In other words, Mr. President, according to this writer, the equidistance principle is implicit in Articles 1 and 2 of the Convention as well as being explicit in Article 6.

We do not, of course, ask the Court to base itself on this article in a legal journal. We merely cite it as an independent exposition of the principles governing continental shelf boundaries on lines which are not dissimilar from those we have ourselves stated in our written pleadings. In our Counter-Memorials and in our Common Rejoinder, as the Court knows, we have emphasized the logical and legal link which exists between the equidistance principle prescribed in Article 6 and the recognition in Articles 1 and 2 of the coastal State's exclusive rights *ipso jure* over the continental shelf adjacent to its coast. The Court will find our arguments on that point in paragraphs 115 and 116 of the Danish and paragraphs 109 and 110 of the Netherlands Counter-Memorials and developed further in paragraph 17 of Chapter 1 and paragraphs 119 to 121 of the Common Rejoinder.

Moreover, in our Common Rejoinder we have expressly submitted that, if the principles expressed in Article 6 of the Convention are not applicable, then the boundary should in each case be determined on the basis of the exclusive rights of each party over the continental shelf adjacent to its coast and of the principle that the boundary should leave to each party every point which lies nearer to its coast than to that of the other party.

Now this submission we rest upon what we, like Mr. Padwa, conceive to be a fundamental norm of maritime international law: the principle of proximity or of greater nearness to the coast. We contend that the principle is inherent in the very concept, as I said, of a State's being a coastal State with respect to a given maritime area and also in the very concept of a coastal State's exclusive rights over areas adjacent to its coast. This contention we have also supported by

showing the large use made of the proximity principle in the State practice regarding the delimitation of several forms of maritime boundaries, its endorsement by the International Law Commission and by the Geneva Conference for several forms of maritime boundaries, its specific use in the delimitation of continental shelf boundaries since the Geneva Conference both by States which are parties and by States which are not parties to the Continental Shelf Convention, and that includes amongst the States that are not parties, the Federal Republic.

Now the almost hostile attitude adopted by the Federal Republic in the present proceedings towards the proximity—the equidistance—principle seems to us somewhat surprising. It is surprising not only because of the fundamental character of the principle in maritime international law, but also because of the Federal Republic's own apparent acceptance of it outside these proceedings.

We pointed out in our Counter-Memorial that, even at the 1930 Codification Conference, Germany went on record as endorsing the median line as the boundary in straits, and it appears to have done so on the basis that this was the existing customary law.

At the Geneva Conference, as we have reminded the Federal Republic, it voted in favour of the incorporation of the equidistance principle in Article 6 of the Continental Shelf Convention. Equally, there is no trace that we have found in the records of the Conference of the Federal Republic's having opposed the incorporation of the equidistance principle in Articles 12 or 24 of the Territorial Sea Convention, or in Article 7, paragraph 5, of the Fishing and Conservation Convention.

Furthermore, the Federal Republic has itself, since the Conference, applied the proximity—the equidistance—principle in the delimitation of its continental shelf boundary in the Baltic and its partial continental shelf boundaries in the North Sea, as well as its fishery boundaries under the European Fisheries Convention.

All this we have shown *ad nauseam* in the written pleadings.

In addition, Mr. President, the Federal Government seems too easily to have forgotten that, in its memorandum on the continental shelf submitted to the Geneva Conference, the Federal Republic pressed upon the Conference the application of the proximity principle for determining the coastal State responsible for ensuring observance of the law of the continental shelf in any given area. The main proposal of the Federal Republic, as I have already indicated, was that the continental shelf should remain open for exploitation by any person of any nationality. At the same time, however, it advocated that rules should be laid down to regulate exploitation in order to protect the interests of those exploiting the shelf and to safeguard the exercise of the other freedoms of the high seas.

Then, dismissing the suggestion of entrusting the exploitation of the continental shelf to the United Nations, or to a specialized agency, as not in present circumstances practical, the Federal Republic said that a solution suited to the peculiar nature of the activities in question must therefore be sought elsewhere. This other solution it formulated as follows:

“As the installations employed in the exploration and exploitation of submarine areas are comparatively immovable fixtures, it does not seem proper to subordinate the observance of the international rules to the principle of the personal law, i.e., the law of the nationality of the operator. By reason of the nature of these installations the more logical course would be, rather, to vest responsibility for securing observance of the agreed

rules in the coastal State closest to the installation in question, that State to act on behalf of the international community. The functions of that State would be:

- (a) to satisfy itself that the operator fulfils the necessary conditions qualifying him to carry out the proposed work;
- (b) to supervise the concerns engaged in prospecting and exploitation;
- (c) to delimit the prospecting and exploitation areas of each operator."

It is true that the Federal Republic's memorandum contemplated as a possibility that regional conventions might afterwards be concluded and that in such cases joint bodies might be established to perform the supervisory functions in place of the coastal State. But, as the passage which I have read to the Court makes perfectly clear, the Federal Republic then considered that the natural course was to attribute to the coastal State the responsibility for securing observance of the régime agreed for the exploitation of the continental shelf and to designate the State nearest to the areas in question as the coastal State entrusted with this responsibility.

Under the doctrine of the continental shelf the coastal State is not only given exclusive rights. It is also placed under specific obligations, which are spelt out in Articles 3 to 5 of the Convention and are designed to ensure respect for the rights of others on the high seas or in the airspace above. In short, in the words of the Federal Republic's memorandum, the coastal State is invested with "responsibility for securing the observance of the agreed rules". If the Federal Republic considered prior to the Conference that this responsibility should be entrusted to the nearest coastal State under a régime where exploitation of the continental shelf would remain free to all, this solution would certainly seem even more natural and logical under a system of the coastal State's exclusive rights over the continental shelf adjacent to its coast.

The Federal Republic, in paragraph 59 of the Reply, has sought to distinguish between the relevance of propinquity in the contexts of the territorial sea and the contiguous zone on the one hand and in the context of the continental shelf. It there contended:

"There might be justification in regarding the distance from the nearest point of a coast as an essential element in the delimitation of territorial waters or of the contiguous zone because the main function of the width of these zones is to secure the protection of the coast and the enforcement of the laws of the country. There is much less justification in regarding the nearest distance to a coastal point as an essential element in the delimitation of the continental shelf because here the main function of the rights over the continental shelf is not to secure some power of control from the coast but to reserve its natural resources to the coastal State."

The supposed difference between the continental shelf and the other two cases seems to us here to be put much too high. In the first place, a coastal State does have actual sovereignty over the territorial sea and therefore exclusive rights over all the natural resources both below and above the seabed. Secondly, while the doctrine of the continental shelf certainly reserves its natural resources to the coastal State, one of its underlying premises is the need of the coastal State to secure the protection of its own coast and maritime interests. Thus, "self-protection" was one of the four principal reasons given by the United States in the original Truman Proclamation in justification of its continental shelf claim. "Self-protection," said the Proclamation, "compels a coastal State to keep close watch over drilling and mining operations off its shores"; and,

Mr. President, not only immediately off its shores but farther out to sea today the need for this "close watch" has certainly not lessened since those words were uttered in 1945.

Again, as I pointed out a little while ago, the coastal State is invested with responsibility, vis-à-vis other States, for the protection of their rights of navigation and fishing, etc., on the high sea. Moreover, in the development of the continental shelf doctrine one of the justifications put forward for giving exclusive jurisdiction and control to the coastal State was the need to secure the orderly exploitation of the resources of the seabed and subsoil in the interest of mankind.

This being said, Mr. President, we of course recognize that in the case of the continental shelf larger areas come into question. But this is a fact of life of which the Geneva Conference was very well aware and yet, as we know, it applied the equidistance-special circumstances formula both to the territorial sea and the continental shelf. It may be, Mr. President, that in the narrower areas of the territorial sea some exceptional geographical features may, more often than in the case of the continental shelf, produce almost negligible effects and be disregarded by the Parties on the principle of *de minimis*, and in that way it may be that propinquity may sometimes be a little more decisive in the case of the territorial sea. But this does not detract anything from the general importance of propinquity in the régime and in the delimitation of the continental shelf.

Accordingly, Mr. President and Members of the Court, we have found nothing in the arguments of the Federal Republic to make us depart in any way from our contention that, altogether independently of Article 6 of the Convention, the equidistance principle—the proximity principle—is applicable as between the Parties in the present cases.

Clearly, the Federal Republic is not contractually bound by the provisions of Article 6. We think, however, that the principles embodied in those provisions express what is now the generally accepted law of the continental shelf and are, in consequence, binding upon the Federal Republic. I shall deal with that question a little later on. But the Federal Republic utterly repudiates the idea that those principles form part of the general law of the continental shelf today. And it contends that you will be bound to return a *non liquet* in the present cases unless you have recourse to paragraph (c) of Article 38 of your Statute and apply, as a general principle of law recognized in national legal systems, its alleged principle of the just and equitable share. There are several reasons why, in our view, this contention must be rejected, and I shall come to them at the end of my speech when I deal with the Federal Republic's case. Here I want to confine myself to our own cases concerning the law which we think that the Court should lay down in response to the questions put to it in the two Special Agreements.

The point which I am now seeking to stress on behalf of the two Governments is that even if Article 6 is left entirely out of account, there is no question whatever of a *non liquet*. No question whatever, that is, of a total gap in the law capable of being filled only by introducing into the existing fabric of maritime international law a new principle taken from national legal systems. In the very nature of the customary rights at issue in the present cases, the Court has a fully adequate basis for laying down the principles and rules to govern the delimitation of the continental shelf boundaries as between the respective Parties: in their character as exclusive rights; in their character as rights appertaining to that State which is the coastal State vis-à-vis any given area; in their character as rights over areas adjacent to the coast of the coastal State; in

their character as rights constituting an extension of the sovereign rights of the coastal State over the contiguous submarine area.

Furthermore, Mr. President, we submit that the Court is not only entitled but bound to consider and apply the exclusive rights of coastal States under the doctrine of the continental shelf in their context as an integral part of the general corpus of the rules of international law governing maritime sovereignty and jurisdiction.

Although the doctrine of the continental shelf is comparatively new, its emergence in State practice, in the International Law Commission and the Conference formed part of a general development and codification of maritime international law. Accordingly, whether the principles and rules embodied in Articles 1 and 2 are viewed as treaty provisions or as an expression of customary rules, their interpretation and application must, we believe, take account of the corpus of principles and rules of which they form only a part.

Therefore, if need be, the Court is, in our opinion, fully warranted in having recourse to the fundamental norms of maritime international law in order to find the principles applicable to the delimitation of the continental shelf in the present cases, and in then designating "proximity" or "contiguity" as the relevant norm calling for the application of the equidistance principle.

I now propose, Mr. President, to pass to our second contention. This contention, as the Court may recall, is a little long in its formulation and it may be convenient to the Court if I again recall the words which I used yesterday.

We contend that the principles and rules embodied in Article 6 of the Continental Shelf Convention are an expression of the generally accepted law governing the delimitation of continental shelf boundaries; that as coastal States we are competent to delimit the boundaries of our continental shelves; that the delimitations made *bona fide* in application of the principles and rules in Article 6 are *prima facie*, valid *erga omnes*, and that the Federal Republic is therefore bound to respect our delimitations, unless it can establish a better legal ground of claim to any areas comprised within our delimitations.

That, Mr. President, is the substance of our contention. The Federal Republic takes the position that it is not enough for us to show that these principles and rules embodied in Article 6 are an expression of the generally accepted law and that we must show that they have been established in such a manner as to become binding on the Federal Republic. I will deal with that point in a moment. But, first, I must briefly recall the considerations on which we base our contention that Article 6, paragraph 2, is an expression of the generally accepted law.

We have set out these considerations fully in Chapter III of Part II of each of our Counter-Memorials and again in Chapter II of the Common Rejoinder. We do not think that the Court will wish us to go all over the ground again, and we therefore respectfully ask the Court on this part of our cases to refer to what we have said in our written pleadings, and especially in the Common Rejoinder, I, pages 474 to 503.

At this stage I propose simply to summarize and recall the main elements of the cases by which we justify our contention, supplementing this summary with some incidental further observations.

Following a logical order, the first element is the State practice evidencing the wide use of the equidistance principle in the delimitation of sea and fresh-water boundaries in contexts other than the continental shelf.

This evidence we drew attention to in paragraphs 84 to 112 of the Danish, and paragraphs 78 to 106 of the Netherlands Counter-Memorials and in their corresponding Annexes. We expanded our treatment of it in the Common

Rejoinder, I, pages 488 to 491, where we also rebutted certain criticisms by which the Federal Republic had sought to dispose of the evidence in its Reply.

The second element is the report of the Committee of Experts in 1953 which, for the territorial sea, approved the median line in the case of opposite States and recommended the equidistance principle as the lateral boundary in the case of adjacent States and which further stressed the importance of the formula for drawing the international boundaries in the territorial sea being such as could be used also for the continental shelf.

The third element is the endorsement of the proposals of the Committee of Experts by the Special Rapporteur of the International Law Commission and his formulation of rules for the continental shelf in terms of the equidistance principle producing a median line boundary between opposite States and a lateral equidistance boundary between adjacent States.

The fourth element is the adoption of the equidistance principle for the continental shelf by the Commission itself in 1953 both in its median line and in its lateral form, and the Commission's adoption of this principle both for the territorial sea and the continental shelf in its final report on the law of the sea submitted to the General Assembly in 1956.

In connection with the Commission's adoption of the equidistance principle in 1953, we underline the emphasis placed by the Commission in its commentary on the equidistance principle as the "general rule" and the "major principle" in the law governing the delimitation of continental shelf boundaries. The Court will find the relevant passage of the commentary, Mr. President, set out conveniently in the Danish Counter-Memorial, I, page 181, and in the Netherlands Counter-Memorial I, pages 334 and 335. Equally, of course, we recognize that the Commission expressly made allowance for exceptional cases where there are special circumstances which justify another boundary line. My friend, the distinguished Agent for Denmark, will be addressing you later on that aspect of the case.

The fifth element is the apparent acceptability in general to Member States of the United Nations of the Commission's proposals regarding the equidistance-special circumstances rule when asked to comment upon its draft. And here I should like to recall what I have already said about the express acceptance of these proposals prior to the Conference by both Denmark and by the Netherlands.

The sixth element is the whole-hearted endorsement of the equidistance-special circumstances rule by the Geneva Conference itself, which adopted the provisions which are now Article 6 of the Continental Shelf Convention by the overwhelming vote of 63 in favour with none against and only two abstentions. As the Court knows, all three Parties to the present proceedings voted in favour of the adoption of Article 6.

The seventh element is the signature of the Convention by a considerable number of States, including all the Parties now before the Court, and its ratification by no less than 39 States, including Denmark and the Netherlands but not ultimately the Federal Republic. I say "ultimately" because, as I have already pointed out, the Federal Republic seems to have come to the brink of ratification, only to draw back when it realized that its ambitions in the North Sea could not be satisfied within the framework of Article 6.

In the Reply, the Federal Republic sought to play down the quite considerable number of the States which have taken the formal steps necessary to establish definitively their acceptance of the Convention. The dilatoriness of States in carrying out the formal procedure for acceptance of treaties, by ratification, accession, etc., is much too familiar to this Court to need any explanations from

counsel. Indeed, so far as codification treaties are concerned, this point was the subject of some discussion at the last session of the International Law Commission on the basis of a paper submitted by Professor Ago, whose article on this matter in the volume recently published in honour of Professor Guggenheim may be known to the Court. Professor Ago, it hardly needs to be said, is chairman of the Vienna Conference on the Law of Treaties. Clearly, Mr. President, all who have the codification of international law at heart must wish to see some acceleration of the final stage in the codification process. But it remains true that the 39 acceptances of the Continental Shelf Convention which have taken place in a decade represent very solid evidence of the general acceptance of the principles of the Convention by the international community. The actual number is not only considerable but almost the same as the number for the High Seas Convention which is, *par excellence*, a convention expressive of general customary law. Moreover, as Professor Ago emphasized in that article, the acceptances of these two Conventions, the Continental Shelf and the High Seas Convention, even if not too numerous, "sont heureusement assez représentatives des différents groupes de membres de la communauté internationale". In other words he stressed that the acceptances of these Conventions include a satisfying geographical distribution of the parties amongst the different regions of the world. I should add, Mr. President, that the number of acceptances was 37 when the Common Rejoinder was filed, so that there have been two further acceptances even since that stage in our pleadings.

The eighth element, Mr. President, is the State practice in the application of the Continental Shelf Convention which has occurred since the Geneva Conference. This practice we have set out in the written pleadings; and I would ask the Court to refer to the Danish Counter-Memorial, I, pages 192 to 198, and the Netherlands Counter-Memorial, I, pages 346 to 351, and especially to the Common Rejoinder, I, pages 488 to 503, where we examined this practice in some detail. The picture presented by this practice is one of the repeated and expanding application of the equidistance-special circumstances rule. In case after case in the Baltic, in the North Sea and in other parts of the world, continental shelf boundaries have been delimited, by agreement or unilaterally, on the basis of the principles expressed in Article 6. In several of these cases one of the States concerned was not a party to the Convention when it made the delimitation and some of them, like Norway, Belgium and Iraq, are still not parties. The Federal Republic itself, though not a party, has made delimitations, in the Baltic and in the two partial boundaries, which also are in accord with the principles of the Convention. No doubt there may be one or two special cases as the instance of Chile, Peru and Ecuador, where by agreement and for special reasons, a different system has been adopted, but the picture presented by the State practice remains clearly one of the general acceptance of the principles of the Convention as the law applicable to the delimitations of the continental shelf. I know that our opponents have sought to impugn the value of this practice as evidence of the general acceptance of the principles of Article 6. I will deal with their criticisms, which seem to us to be misconceived, a little later on, because here, Mr. President, I want to present our own view of that practice.

The Court adjourned from 11.20 a.m. to 11.40 a.m.

When we adjourned I was summarizing for the Court the various elements on the basis of which we contend that the principles and rules expressed in Article 6

are an expression of the generally accepted law governing the delimitation of continental shelf boundaries. And I may, perhaps, remind the Court that I am doing this not in the context of custom, but simply on the point as to whether these are the generally accepted principles governing delimitation of continental shelf boundaries. I had listed eight elements and I am almost at my last.

The ninth element is the position adopted by the Federal Republic itself in regard to Article 6 right up to 1964. I need not repeat all that I have already said in describing the legal posture in which the Federal Republic comes before the Court. It is clear, in our view, from what I then said, that on the documents right up to 1964 the Federal Republic was conducting itself on the basis that the principles and rules in Article 6 constitute the generally accepted régime for determining continental shelf boundaries. I may add that even in the first stages of the negotiations the Federal Republic was still talking the language of special circumstances. True, it was then invoking grounds, such as historic reasons and the comparative needs of the respective countries for fuel resources, which it seems since to have recognized that it would be quite unable to sustain before the Court. Only when confronted with the firm positions of Denmark and the Netherlands in regard to the equidistance principle did it take a hard look at its own case on special circumstances and assess the prospects of that case being considered to fall within the concept of special circumstances in Article 6 as envisaged in the Geneva Convention. Only then did the Federal Republic hurriedly turn its back on the régime of Article 6 and begin to fashion the elaborate and novel framework for its claims which our learned opponents so interestingly explained to you last week.

Well that, Mr. President, completes my list of the several elements which go to compose our case on the status of the principles and rules embodied in Article 6 as the generally accepted law governing the delimitation of the continental shelf. The formation of customary law is a composite process, and all the elements which I have given to you link together and form a coherent chain, from the wide use of the equidistance principle in other forms of sea and fresh water boundaries, from the work of the Committee of Experts and the International Law Commission, through the comments of governments and the work of the Geneva Conference to the subsequent State practice showing, as we think, the recognition by States of the principles embodied in Article 6 as the generally accepted law.

One may suspect, Mr. President, that the weight of State practice applying Article 6, which is already very substantial, will become even more formidable within quite a short space of time. No less than 22 of the acceptances of the Convention have come in the past five years and, as I have mentioned, two have come even since July. More acceptances are, without doubt, in the pipeline, Nigeria being one, of which we ourselves have information. Similarly, quite a number of the agreements negotiated under the aegis of Article 6 have appeared within the past four years and others, like those between Belgium and the Netherlands, and between Sweden and Finland, are well advanced.

Nor, Mr. President and Members of the Court, are there lacking other indications of the general recognition of the principles embodied in Article 6. It is well known, our opponents have referred to it, that continental shelf boundaries have been under discussion in various regions of the world. I myself have personal knowledge of negotiations in at least six such questions. And what do you find, Mr. President, in negotiations of this kind?

In my experience you invariably find the parties, whether or not they have ratified the Convention, talking the language of Article 6: equidistance, special circumstances, baselines. Then, if their negotiations run into difficulties, what

are the reasons? The reasons, Mr. President, nearly always are islands, especially small ones, situated outside the territorial sea of the mainland; and the contest is about whether they should be given full or some value as basepoints for the equidistance line or whether they should be treated as special circumstances and left with only their own territorial sea at best.

Moreover, and this is quite frequent, as often as not a small islet, hitherto little regarded, has now become a pearl of great price owing to its position in relation to a possible equidistance line, and its sovereignty is suddenly placed in dispute. You do not find, Mr. President, the equidistance principle being banished from the scene in the manner demanded by the Federal Republic. What you find is an argument about the points of departure for its application, or a bargaining about its modification after counter-balancing the various pieces which either side can find on the chessboard in the particular area concerned; and in almost every case the real difficulty complicating the negotiations is the fact that exploration of the shelf has preceded the negotiations and the parties know where the oil structures are or are likely to be. But the framework of the negotiations is still the principles and rules embodied in Article 6.

The recently initialled agreement between Saudi Arabia and Iran mentioned by Professor Oda seems to be very much of this kind. Complicated negotiations took place covering the merits of various islands as basepoints, methods of applying the equidistance principle and a dispute as to the sovereignty of certain islands. An early agreement was initialled delimiting a form of equidistance line—an agreement that was not ratified because too much was known concerning the whereabouts of the oil structures. The agreement recently concluded is thus only the final compromise in negotiations in which the principles in Article 6 have been the common currency of the discussion.

I now pass, Mr. President, to the conclusions which we ask the Court to draw from the case which we have presented concerning the principles embodied in Article 6, and I must first put right what seems to have been a misunderstanding on the part of our opponents as to our propositions. On the opening day the learned Agent—it is on pages 14 and 15, *supra*, of the verbatim record—seemed to suggest that on this issue we are putting our case exclusively in terms of a customary rule of international law binding the Federal Republic to accept the equidistance line or, as we would put it, the equidistance-special circumstances rule. Indeed, he also suggested on page 15, *supra*, that in our Counter-Memorials we had claimed that the equidistance principle, pure and simple, is binding on the Federal Republic as a customary rule, and in this connection he spoke of our having taken “a very important step back”. He further said that we had discarded a supposed former contention that the equidistance principle, pure and simple, has acquired the status of a generally accepted principle of law. All these changes of position he appeared to deduce from paragraph 39 of the Rejoinder. As paragraph 39 is simply a summary restatement of the argument in our Counter-Memorials, we wonder how we can have given the impression of having altered our ground.

At any rate, I can assure our opponents that we did not intend anything of the kind. Nor did we ever mean to divorce the equidistance principle from the special circumstances exception. It was the Federal Republic itself which persistently did this in its written pleadings in order to give some appearance of plausibility to its attacks upon Article 6.

There remains, however, the misunderstanding about our conclusions.

We have put, Mr. President, and we continue to put, our case on this issue in two distinct ways. The first of these ways is that we maintain that the principles

and rules embodied in Article 6, independently of the Federal Republic's own relation to that Article, have acquired the status of the generally accepted law governing the delimitation of the continental shelf, and that a delimitation made bona fide in accordance with these principles and rules is in consequence prima facie legally valid and binding on all other States, including the Federal Republic. We found this contention—this way of putting our case—on three considerations:

One is the authoritative statement of this Court in the *Norwegian Fisheries* case concerning the position of a coastal State in the delimitation of maritime jurisdiction. This statement, the Court may recall, we expressly invoked in Chapter 2 of Part II of our Counter-Memorials, and in paragraph 81 of our Rejoinder we have again reiterated our reliance upon it. And in view of the misunderstanding it seems desirable that I should again put clearly this basis of our contention. In the *Norwegian Fisheries* case, and this is, I fear, too well known to the Court, but it may be useful to have it on the record, the Court said:

“the delimitation of sea areas has always an international aspect. It cannot be dependent merely upon the will of the coastal State as expressed in its municipal law.

Although it is true that the act of delimitation is necessarily a unilateral act, because only the coastal State is competent to undertake it, the validity of the delimitation with regard to other States depends upon international law.”

And, as we emphasized in our Counter-Memorials, the Court did not in that passage say that the validity of a delimitation by a coastal State vis-à-vis another State depends on the will of that other State. What it said was that the validity of the delimitation with regard to other States depends upon international law.

Our second basis for this contention is the very nature of the coastal State's rights over the continental shelf as exclusive rights to the continental shelf adjacent to its coast and as rights which appertain to it *ipso jure* and do not, in the words of the International Law Commission, depend upon occupation, effective or notional, or on any express proclamation. Now the Court will find our argument on this point in paragraphs 82 to 89 of our Rejoinder, and, of course, in the context of the first contention I have already said something of this to the Court today.

We have pointed out that the basic purpose of the Convention, and in particular Articles 1 and 2, which the Federal Republic itself wholeheartedly endorses, was to recognize to all States generally exclusive sovereign rights over the adjacent continental shelf as inhering in them *ipso jure* in virtue of their sovereignty over the coast. Clearly, neither the Commission nor the Conference envisaged these rights as being valid only between particular contracting States, and the Federal Republic, which claims these rights, is certainly in no position to deny that the coastal State's rights were intended to be and are rights valid *erga omnes*.

The inherent legality of a delimitation of such rights made in conformity with the generally accepted principles and rules of international law applicable in the matter is therefore our third basis for this contention—the inherent legality of a delimitation by a coastal State of such exclusive rights made in conformity with the generally accepted principles and rules of international law applicable in the matter.

No doubt, Mr. President, such a delimitation may be challenged, if it can be shown not in fact to conform to those generally accepted principles and rules.

No doubt also, it might be challenged by a particular State on a particular ground, such as a pre-existing treaty right or the principle of preclusion. But it has, we contend, prima facie legality and validity *erga omnes*. Otherwise, what becomes of the recognition of the coastal States' rights as exclusive and valid *erga omnes*?

In short, Mr. President, we contend that the Federal Republic is bound to respect a delimitation made in accordance with the principles and rules embodied in Article 6—principles and rules overwhelmingly endorsed in the Geneva Conference—unless it can establish a better legal title to areas of the continental shelf which, in these cases *ex hypothesi*, are nearer to the coasts of our two countries than they are to the coasts of the Federal Republic.

There remains our third contention, and this in brief I will recall. We contend that the principles and rules embodied in Article 6 today have the character of general customary law and have become such in a manner which renders them binding on the Federal Republic. We think the Court will appreciate that the previous contention which I have submitted to the Court makes it superfluous for us to establish this point. But it is certainly also our view that the principles and rules embodied in Article 6 are now accepted as customary law and, as such, are binding on the Federal Republic.

Our argument on the issue of "custom" is before the Court in paragraphs 96 to 106 of our Common Rejoinder. However, I must add some further observations in deference to our opponents.

Essentially we base ourselves on the same several elements as in our previous contention, those nine elements which I have so recently summarized for you.

As to the formation of the customary rule, we have stressed in our written pleadings, and we again stress here, that the United Nations processes of codification and progressive development of international law facilitate the comparatively rapid recognition of a customary rule, especially when that rule is implicitly discernible in State practice and is also indicated by the very nature of the matter in question. Just as the work of the Commission, the observations of governments, the debates in the Sixth Committee and the work of the Geneva Conference brought about the general recognition of the exclusive rights of the coastal State, so also they facilitated and brought about the general recognition of the equidistance-special circumstances rule.

Again, Mr. President and Members of the Court, the Continental Shelf Convention indisputably has the character of a general law-making convention. If not, strictly speaking, a codifying convention, its very purpose was to bring about the general recognition of the emerging right of the coastal State to the continental shelf and the consolidation of the general law and régime of the continental shelf.

Now, this being so, this being the context, the 39 acceptances of the Convention and the considerable State practice delimiting continental shelf boundaries, in conformity with the principles of Article 6, would seem to us to constitute the best possible evidence of *opinio juris* of the recognition by the general body of States as law of the rules embodied in the Convention.

Here, Mr. President, the conduct of the Federal Republic itself in relation to the Convention is also significant. I do not mean simply that it signed the Convention or that it went quite a long distance towards ratification. These acts, though they represent a certain movement towards the Convention, are not obviously definitive expressions of *opinio juris* either on the plane of contract or of custom. But the Federal Republic, which had previously repudiated the whole doctrine of the continental shelf, reversed its position—and no discredit to it—and by formal proclamation claimed the exclusive rights recognized in

Articles 1 and 2 of the Convention. In doing so, it referred expressly to the signature of the Convention by 45 other States and the acceptance of the Convention by 21 States, as it then was, and formally laid claim to the coastal State's exclusive rights.

It said, and these are the words:

"In view of the development of general international law as expressed in recent State practice and in particular in the signing of the Geneva Convention on the Continental Shelf . . ."

and it then, in its very next breath, referred to the detailed delimitation of the German continental shelf vis-à-vis the continental shelves of other States as remaining subject to agreement with those other States. In its reference to the development of general international law it made no distinction between Articles 1 and 2 and the other articles of the Convention. Moreover it had already, in a formal diplomatic note to the Netherlands Government, invoked the special circumstances exception in language strongly indicative of Article 6. I mentioned the terms of that note earlier in my speech. And, a few months after it had issued the proclamation, in the declaration made jointly with the Netherlands to which I have previously referred the Federal Republic spoke of the Partial Boundary Agreement as "constituting an agreement in accordance with the first sentence of paragraph 2 of Article 6". Nor did it fail to mention Article 6 in announcing its intention of promoting the convening of a multilateral conference of all the North Sea States, a conference which never happened.

The learned Agent for the Federal Republic argued (on pp. 25 to 26, *supra*, of the record of the first day) that the Federal Republic had not entered into any legal commitment to accept the equidistance method in the delimitation of its boundaries. But that, as we have so often to remind our opponents, is not the question. The question is whether the equidistance-special circumstances rule embodied in Article 6 is now expressive of customary law and binding on the Federal Republic. No doubt, the Federal Republic has not entered into any legal commitment with respect to that rule on the contractual plane—on the plane of the Convention itself. But we contend that, on the plane of customary law, the Federal Republic did by its conduct and by its formal acts commit itself to the recognition of the law in Article 6 as customary law.

At this point, Mr. President, by way of introduction to the question of reservations, I should like to say a little more about the formation of customary law under the influence of a law-making convention. The Draft Convention on the Law of Treaties has an express provision on the point. Articles 30 to 33 of the Draft set out what I may compendiously refer to as the law governing the relation of third States to treaties, and notably two fundamental rules:

First, that an obligation arises for a third State only if the parties intend the provision to be the means of establishing the obligation and the third State has expressly accepted it.

Secondly, that a right for a third State arises only if the parties intend to accord that right to it or to a group of States to which it belongs, or to all States, and the State in question assents thereto. And here there is a presumption of the State's assent unless a contrary intention is indicated.

I ask the indulgence of Members of the Court who were formerly my colleagues on the Commission and who will be all too familiar with this matter.

These rules, which I have slightly abbreviated in stating them for the Court, are then followed by Article 34 which, in the Vienna text, reads:

"Nothing in Articles 30 to 33 precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law, recognised as such, or as a general principle of law."

Now, of course, the very object of this provision was to safeguard the process of the formation of customary law upon the framework of a convention, especially of a general law-making convention, notwithstanding anything in the rules of treaty law governing the relation between third States and treaties. Article 34, in short, distinguishes clearly between the position of third States under treaty law and under customary law.

The Federal Republic does not claim to have acquired its exclusive rights over the continental shelf by having assented to Articles 1 and 2 of the Convention in accordance with the provision that I have just recalled concerning the rights of third States. It is interesting to see what would have happened if it had acquired its rights in that way.

If one were to regard the recognition of the rights of the coastal States in rather the same manner as treaties conferring rights on all States' passage through water-ways, etc., what would be the position? Well, the third State that acquires its right by assent is, under an express provision of Article 32 of the Vienna Convention, bound to comply with the conditions attaching to the exercise of those rights.

The Federal Republic claims that the State practice plus the numerous signatures of the Continental Shelf Convention established the exclusive rights of the coastal State as rights under customary law. And it is on that basis that it claims these rights. At the same time it totally rejects the idea that it is in any way bound by the treaty to comply with the conditions attaching under the treaty to the exercise of its rights. In short, it must place itself emphatically on the plane of custom, and not that of treaty.

How then can it conceivably, whether directly or by analogy, invoke a right to make a reservation, actual or notional, to Article 6 of the Convention? The right to make a reservation is a contractual right, exercisable only in connection with becoming a party to the treaty and at the very moment of definitively expressing consent to be bound by the treaty. Nor does the law of treaties admit that a State which has accepted a treaty without reservation may afterwards modify its acceptance by introducing a reservation. It is on the plane of custom that the Federal Republic first claimed its right over the continental shelf and it is on this same plane that it has claimed its rights before the Court.

Accordingly, we who are Parties to the Convention without any reservations whatever are entitled to insist that the Federal Republic shall have its rights adjudged on the plane of custom which knows no reservations.

I now turn, Mr. President, to what the learned Agent called his most convincing argument against the alleged customary law character of the law in Article 6: the fact that Article 12 expressly allows reservations to all articles other than Articles 1, 2 and 3. We have already dealt with this point in our written pleadings and ask the Court to refer especially to paragraphs 99 to 103 of our Common Rejoinder. In brief, we pointed out that a wide freedom to formulate reservations is quite normal in general multilateral treaties and that such major codifying conventions as those on the territorial sea, high seas and diplomatic relations contain no clause restricting the making of reservations, and that notwithstanding you find some reservations to those conventions. We further pointed out that the records show that in the present instance the reservations clause was introduced in Article 12 more for the purpose of prohibiting reservations to Articles 1, 2 and 3 than of authorizing reservations to

Articles 4 to 7, and that its introduction cannot be understood as evidence that these Articles were not considered to be an integral and important part of the Convention. In addition, we pointed out that a reservation made to Article 6 which is incompatible with the fundamental provisions in Articles 1 and 2 would in any case be inadmissible. Thus, we said it could not be assumed from Article 12 that the Geneva Conference intended to allow a total freedom to contract out of the equidistance-special circumstances rule.

Our opponents, on pages 18 to 20, *supra*, of the first day's record, have invoked certain provisions of Articles 16 and 17 of the Draft Convention on the Law of Treaties. Article 16, paragraphs (a) and (b), they say, provides that a State may formulate any reservation not expressly or impliedly prohibited by the Treaty; this is a slight paraphrase but that is the effect they give to those provisions and that, since under paragraph (c) the express condition of compatibility with object and purpose is attached only to cases where the treaty is silent upon the matter of reservations, it is irrelevant in cases where the treaty does contain a provision regarding reservations. This contention, Mr. President, is only a half-truth. Article 16 (a) excludes altogether the formulation of reservations which are prohibited by the treaty, and the reason is that, by their prohibition, the parties have themselves completely foreclosed the question of whether the reservation is compatible with the object and purpose of the treaty. And this, of course, is precisely what they have done in Article 12 of the Continental Shelf Convention with reference to Articles 1, 2 and 3. Any reservation, therefore, excluding or varying the legal effect of Article 1, 2 or 3, is wholly inadmissible by reason of Article 12 of the Convention.

Clearly, the reservation is no less inadmissible if, although attached in form to another article, it in fact excludes or varies the legal effect of Articles 1, 2 or 3. In short, the express prohibition of reservations to Articles 1 and 2 may and does place a limit upon the kind of reservations which may properly be formulated with reference to Article 6. In our view, this limit would be passed by a reservation which sought to negative altogether the operation of the equidistance-special circumstances rule in the application of the Convention, for the equidistance—proximity—principle, adapted where necessary to take account of special circumstances, seems to us inherent in the concept of the coastal State's exclusive rights over the adjacent continental shelf.

It is significant, Mr. President, that no reservation has been made by any State denying in principle the application of Article 6. The four reservations that have been made to Article 6 all concern the interpretation and application of the special circumstances exception in particular cases. The learned Agent for the Federal Republic mentioned the reservations of two States from which he claimed to derive particular support.

One was that of Yugoslavia which he said means that Yugoslavia does not want to recognize any exception to the equidistance line under the title of "special circumstances". No doubt this is so—but Yugoslavia did not deny the relevance in principle of special circumstances. Carefully adapting her language to that of Article 6, she said: "in delimiting its continental shelf Yugoslavia recognizes no special circumstances which should influence that delimitation". If the Court will turn for a moment to our Common Rejoinder, I, pages 563 to 565, it can see at a glance the kind of delimitation apparently now envisaged by Yugoslavia. This, as we have shown in our written pleadings, is an equidistance line modified to take account of, to use a neutral expression, special factors constituted by particular islands.

The second reservation was that of France, the wording of which the learned Agent described as very significant. This reservation, as the Court will recall,

states that in the absence of a specific agreement, France will not accept that any equidistance boundary shall be invoked against it if it lies in areas where, in the opinion of France, there are special circumstances within the meaning of Article 6 and then the Bays of Biscay and Granville, the Straits of Dover and the North Sea off the French coast are specified as the areas concerned.

It is not for us, Mr. President, to go into the question of the validity of this reservation, which has attracted categorical objections from four States, two of which have not the remotest connection with the areas to which it relates. We merely point out that it contains the most explicit invocation of the special circumstances exception in Article 6. It does not deny but affirms the applicability in principle of Article 6 in the delimitation of the continental shelf. Nor will it escape the Court that France has other coasts elsewhere to which her acceptance of the Convention applies, unclouded by any form of reservation in regard to Article 6. Our opponents have indeed drawn attention to the islands of St. Pierre and Miquelon and there, Mr. President, if I may use a homely phrase, the boot is very much on the other leg in regard to the equidistance-special circumstances rule.

A reservation, even when established, modifies the operation of the provision to which it relates only to the extent of the actual reservation. A reservation such as that of France cannot, in our view, have the effect of dictating to other States the view which they must take of the extent of their own exclusive rights over the continental shelf, as the learned Agent almost seemed to suggest. That would be a gross violation of the principle of the equality of States. Moreover, those exclusive rights are by their very nature, as we have emphasized, rights attaching *ipso jure* to the coastal State and valid *erga omnes*. In addition, what constitutes special circumstances within the meaning of Article 6 is not a matter of opinion, it is a matter of law or, Mr. President, the present case would not be before this Court.

What is the precise legal effect of such reservations as those of France and Yugoslavia, we do not think we are really called upon to say in this case. We are called upon only to show that the faculty of making reservations to Article 6, admitted by the Geneva Conference, is not incompatible with the crystallization of the equidistance-special circumstances rule under the influence of the Convention as a rule of customary law governing the continental shelf. It is our respectful submission that this we have done.

I should add that, in any event, the reservations question touches only our contention regarding the status of the equidistance-special circumstances rule as customary law. It is wholly irrelevant to our previous contention regarding its character as the generally accepted law and, of course, to our other argument arising from the *erga omnes* validity of the exclusive rights of the coastal State over the continental shelf adjacent to its coast.

Before finally leaving the question of reservations I should like, because of its wider implications, to deal with a point made by the learned Agent about Articles 1 and 2. It is on page 19, *supra*, of the first day, where he sought to argue that there can be no question of a reservation to Article 6 being incompatible with Articles 1 to 3. He then said that Article 1 had no other purpose than to define and delimit the continental shelf in its juxtaposition to the territorial sea, on the one hand, and the open sea, on the other. He also said that Article 2 recognized the sovereign rights of the coastal State before their coasts without using the term adjacent in this context and without attempting to decide conflicting claims of two or more States to the same areas of the continental shelf which each of them might consider to lie before its own coast and to the natural continuation of its territory. He then insisted that it was the

purpose of Article 6 alone to provide a rule for resolving conflicts in the delimitation of continental shelves. And, recalling the phraseology in Article 6 "where the same continental shelf is adjacent to the territories of two or more States" and, in paragraph 2, "adjacent to the territory of two adjacent States", he concluded that any attempt to draw from the term "adjacent" used in Article 1 a confirmation of the principle of equidistance must fail. On this basis, he concluded that reservations to Article 6, excluding the application of the equidistance method in certain areas, could not possibly be incompatible with Articles 1 to 3 of the Convention.

We cannot share our opponents' interpretation of Articles 1 and 2 of the Convention, since it appears to us defective in at least two respects. The first is that the learned Agent's paraphrase of Article 1 hardly seems to do justice to its meaning, and the second is that, in our view, their interpretation clearly offends against the cardinal rule of treaty interpretation that a treaty must be read as a whole.

Article 1, in the nature of things, could not fail to define and delimit the continental shelf in juxtaposition to the territorial sea, on the one hand, and the open sea, on the other, for that is precisely what has to be done to fix the meaning in law of the term "continental shelf". It is also true that Article 1 is essentially a definitions article, for it begins with the words "For the purpose of these articles, the term continental shelf is used as referring", etc. But, Mr. President, this only makes it the less excusable that our opponents should not interpret the term "continental shelf" in Article 2, paragraph 1, by reference to the meaning given to it in Article 1.

The definition of "continental shelf" in Article 1 is really a good deal more significant than our opponents would have you believe, Mr. President. In the High Seas Convention the Geneva Conference had to define the term "high seas" and it did so in Article 1 by saying that the term means "all parts of the sea that are not included in the territorial sea or in the internal waters of a State". Article 1 of that Convention makes no mention of the coast or of adjacency. And, since the continental shelf is, in principle, simply the seabed and subsoil of the high seas up to 200 metres or to the limit of exploitability, it would have been perfectly possible and much simpler to define the continental shelf in a similar way, if that was all that the Conference had in mind. Article 1, however, now all too familiar to the Court, defines the term "continental shelf", as used in the Convention, as "the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea". If Article 1 had been intended to be a definition of the continental shelf merely in the abstract, the references to adjacency and to the coast would have been entirely superfluous and even illogical. But it was not a definition purely in the abstract; what it was of course, was a definition of the continental shelf in its relation to the coast. And the purpose of the reference to the adjacency of the submarine areas to the coast can only have been to express their propinquity or contiguity to the coast.

We think all this to be almost too clear for discussion, but I hope that the Court will bear with me if I briefly do what our opponents ought to have done, namely read the meaning given to "continental shelf" in Article 1 into Article 2, paragraph 1. The result, of course, is that this provision now recognizes that:

"The coastal State exercises over the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea sovereign rights", etc.

In short, the notion of propinquity or contiguity is an integral element in the recognition of the sovereign rights of the coastal State.

I have, of course, already addressed the Court today generally on the question of adjacency and propinquity, and I respectfully submit that what I have just said about our opponents' arguments and our opponents' interpretation of Articles 1 and 2 only serves to reinforce what I have previously said on this whole question.

The Court rose at 1 p.m.

SIXTH PUBLIC HEARING (30 X 68, 10 a.m.)

Present: [See hearing of 23 X 68.]

Sir Humphrey WALDOCK: When the Court adjourned yesterday morning I had nearly finished my presentation of our own case, and today I would only wish to add a few comments on the State practice in answer to the argument of Professor Oda, for it was he who focused your attention on certain of the precedents. I should have been only too happy to find myself in agreement with my learned opponent, so graceful was his address to the Court. Unfortunately, however, we are in rather profound disagreement with him in his reading of some of the State practice.

I begin by referring, as I have already done, to our full and careful analysis of the continental shelf precedents in paragraphs 58 to 75 of our Common Rejoinder. And I say at once that our opponents' arguments do not seem to us to have shaken in any way the account which we there gave of the State practice.

The learned Agent, on pages 20 to 22, *supra*, of the first day's record, was concerned to argue that all the agreements for the delimitation of the continental shelf on the basis of the equidistance principle are really almost worthless as evidence of a general obligation for all States to accept the equidistance line as the only or the general rule. He complains, in effect, that they are agreements, maintaining that they only show that the parties were agreed that the equidistance line would produce an equitable apportionment in the particular case.

In the present instance, several of the agreements, those in the North Sea in particular, are manifestly based directly and expressly on the principles of the Convention, a general law-making Convention. Others are settlements of disputes arising from differing interpretations of their respective rights, or of the respective rights of the parties under the principles expressed in the Convention. These agreements, in our view, are no less clearly valid evidence of the general acceptance of those principles.

As to unilateral acts, Mr. President, they are the most characteristic form of evidence indicating the *opinio juris* regarding a practice generally accepted as law. Our opponents have in the present case sought to depreciate the value of the unilateral State practice which we have presented. But when, for example, in the present context, you have parallel unilateral acts of two States relating to the same boundary, both of which accord with the principles laid down in a general law-making convention to which neither of them are parties, is that not the highest possible evidence of *opinio juris*, of no less value than an agreement expressly based on the recognition of the law in the convention? This, we shall find, Mr. President, is precisely the position in regard to the Kuwait-Iraq boundary.

I mentioned earlier in my speech that there are one or two special precedents of an exceptional character and we have duly noted them in our written pleadings. Our opponents at the present hearings have recalled the Chile-Peru-Ecuador delimitations by reference to parallels of latitude and the Senegal-Portuguese Guinea rectilinear delimitation.

As to the South American delimitations, we pointed out, in paragraph 68 of our Common Rejoinder, that the decrees of the three States in question form part of highly special understandings and agreements between the three States concerned. That this was indeed the case can easily be seen by referring to

Whiteman's *Digest of International Law*, Volume 4, pages 1089 to 1092, where it also appears that the agreements were primarily concerned with the resources of the superjacent seas, the seabed and subsoil being regarded by those States as being included in the larger claim. They are dated 1952, before the development of the law of the continental shelf by the International Law Commission.

The Senegal-Portuguese Guinea delimitation is reproduced in our Counter-Memorials from the same volume of Whiteman's *Digest* at page 335. The information in the *Digest* concerning it is very scanty and we know nothing of the considerations which inspired this delimitation. However that may be, it seems pertinent to point out that both Senegal and Portugal have since ratified the Geneva Convention without any reservation whatever to Article 6 of the Convention.

Before I return to the Kuwait-Iraq boundary, Mr. President, I must ask your indulgence in allowing me to say a few words about the well-worn argument of our opponents that all median lines must be left aside as precedents, and that almost every lateral boundary between adjacent States must be classed as median lines except those between the Federal Republic and its neighbours. I ask for the Court's indulgence because it has seen this argument rather thoroughly hammered by both sides in the written pleadings. We dealt with this matter with some thoroughness in paragraphs 41 to 47 of our Common Rejoinder and we are content to rest upon that comprehensive and detailed rebuttal of what we believe a completely unjustified attempt to drive a sharp wedge between the equidistance principle in its median line form and the equidistance principle in its lateral form.

I take the matter up again only to make a few comments on the references to the Soviet-Finnish and Norwegian-Swedish delimitations. The former is one of those cases where, at its starting point, the line is, beyond question, a lateral boundary through territorial waters. Our opponents concede that the line may for some distance be considered a lateral boundary but then they say it loses this character and becomes one of those worthless median line precedents. They emphasize that the lateral part of the boundary is not an equidistance line. Well, we pointed out, in paragraphs 102 of the Danish and 96 of the Netherlands Counter-Memorials that the inshore non-equidistance part of the boundary is the result of a highly special circumstance, namely the Soviet-Finnish Peace Treaty, the date and the circumstances of which will be perfectly familiar to the Court. Professor Oda, on page 60, *supra*, of the third day's record, conceded the existence of the special circumstance which we had mentioned but he still claimed that on balance this is "a negative precedent as to the equidistance method". We can only leave that aspect to the Court.

In truth, Mr. President, we think this precedent more interesting for the way in which, in the hands of our opponents, this lateral boundary changes its character as it approaches the open sea and becomes a boundary between States with opposite shores. Then it receives from our opponents that benediction of "just and equitable apportionment" which, it seems, they accord to all median lines.

Our opponents, on the same page of the record, now give their benediction to another lateral boundary—between Norway and Sweden—which, in their hands, suffers a change of personality almost before it has left the shore and quickly achieves that blessed state of oppositeness and median legality.

We referred to this precedent in our Common Rejoinder, I, and, as Professor Oda said, you will find a map on page 553 of that document. He seeks to deny this precedent any relevance. "For one thing", he said, "this line looks very much indeed like a median line, since the relevant coastal fronts of both lie

almost opposite each other"; while we still think this a lateral boundary in narrow waters. But, we emphasize, whether lateral or median it remains a perfectly good example of the application of the principles of Article 6. But we also ask the Court to note that the coastal fronts on the two sides of this somewhat less than rectangular bend are, in the Federal Republic's view, to be characterized as opposite States.

The progress of our opponents' thoughts on this matter, Mr. President, awakens our interest; for we are wondering whether we too may not be entitled to receive the benediction of oppositeness and our common boundary—the Danish-Netherlands boundary of the 1966 Treaty shown on the map in Court—achieve this blessed median state of legality. By no stretch of imagination can we be called adjacent States and we are, and this appears even better in the map in the Danish and Netherlands Counter-Memorials which shows the different territories in colour, if rather slantingly, opposite each other on the shores of a somewhat more than rectangular bend. Why should not the two lateral boundaries now before you, as they get farther and farther from their points of departure, suffer a sea-change in strict accordance with our opponents' doctrine and happily merge together in a state of median legality? After all, in the Memorial—you can see it on the chart at I, page 24—the Federal Republic did write against the line showing the Danish-Netherlands boundary the magic words "median line".

The Kuwait-Iraq boundary has not yet been pronounced a median line and, in consequence, comes in for criticism. Professor Oda dealt with the Kuwait concession and the Iraq unilateral delimitation separately and he did not explain why or how it should come to pass that the unilateral Iraqi line and the unilateral Kuwaiti indication of its approximate boundary in a concession should coincide in an equidistance line. The independent, parallel acts of these two States, neither of them a party to the Convention, recognizing the principle of equidistance is, as I said a little while ago, cogent evidence of the generally accepted character of the principles embodied in Article 6, and it is all the more cogent in that the boundary is unmistakably a lateral one, while Iraq is in an infinitely more disadvantageous position than the Federal Republic.

Professor Oda, on page 59, *supra*, of the third day's record, seemed to imply that we have presented the Kuwaiti-Shell concession to the Court as a treaty, but need I tell the Court that we do no such thing, it is the parallel, unilateral acts of Kuwait and Iraq on which we especially rely.

Professor Oda himself, on the same page—page 59—seeks to extract a good deal from the branch of concessions in this complex area of the Persian Gulf. He there observed that Kuwait, which he said shares sovereignty over the neutral zone between it and Saudi Arabia, granted a concession touching upon the coastal front to the Arabian Oil Company in 1958, and that this latter concession overlaps, significantly, into the Shell concession delineated on the map in the Common Rejoinder. He claims that this means that the lines indicated on the map cannot be regarded as final and, further, that it greatly reduces the Shell concession as a precedent for the employment of the equidistance method involving long distances offshore.

Continuing on the same page he observed:

"To complicate the situation depicted by this misleadingly simple map even further, it should be noted that the Government of Iran has granted two other oil companies concessions which again significantly overlap and intrude upon the Kuwait-Shell concession areas depicted. When this is taken into account, I would submit that, as an example of a continental

shelf allocation achieved by the strict and undisputed application of the equidistance method, this precedent becomes next to valueless. If this is not enough, while we are on the subject of this example brought forth by our opponents, it should be noted that a provision in the Kuwait concession to the Arabian Oil Company stated that demarcation should be finalized by negotiation with a view to a determination on equitable principles."

Now, Mr. President, these observations call for a number of comments.

The first, some exception might be taken to the statement that Kuwait and Saudi Arabia share the sovereignty over the neutral zone, for their relation to the neutral zone is and has been a good deal more complex. But I pass over the point because I do not think that it need trouble the Court. What is true, however, is that the existence of the so-called neutral zone is an enormous complication in the tangled skein of continental shelf boundaries at the northern end of the Persian Gulf.

Consider for a moment, Mr. President, what this means. Somehow and some day there have to be determined no less than seven boundaries in that comparatively crowded area: 1. the Iraq-Kuwait boundary with which we are familiar and which both States have independently assumed to be the lateral equidistance line; 2. the Iraq-Iran boundary; 3. the northern boundary of the neutral zone with Kuwait; 4. the Kuwait-Iran boundary; 5. the neutral zone-Iran boundary; 6. the southern boundary of the neutral zone with Saudi Arabia; and 7. the Saudi Arabia-Iran boundary of which the Court has heard something in the present proceedings. Add to this a number of strategically placed islands belonging to some of the parties and the challenging in one or two cases of the sovereignty of the islands and you have a jigsaw-puzzle difficult enough even for objective solution by a court. You could, indeed, also add one or two strategically placed low-tide elevations.

In such a situation, the fact that an Iranian concession overlaps a Kuwait concession means nothing more than that these two States are in dispute as to how and where their median lines should be delimited, and this is complicated by the problem of the neutral zone-Iranian boundary. But, as I said earlier in my speech, the framework is the principles and rules in Article 6. How can it then be said that this dispute affects the value of the Kuwait and Iraq precedents for the delimitation of their mutual, lateral boundary. As to the Arabian Oil Company concession, this would seem to be affected by the neutral zone complication and certain arrangements exist as to this concession and the Shell concession.

Neither the Kuwait Government nor the further concessions mentioned by our opponents are before the Court. Even if our opponents' observations were to be accepted at their face value, they would not touch the relevance of the Kuwait-Iraq precedents of parallel delimitations of a lateral boundary on the principle of equidistance.

In so far as our opponents may be suggesting to you that Kuwait's position in regard to the principles contained in Article 6 of the Convention is equivocal or indefinite, I am bound to say that according to my information this is certainly not the case.

Prior to her independence Kuwait acted on the advice of the Legal Department of the United Kingdom Foreign Office, and the United Kingdom, as the Court knows, adheres solidly to the principles and rules contained in Article 6.

According to my understanding, since independence Kuwait, in seeking the solution of the boundary problems which have arisen between her and some of her neighbours as a result of the complexities to which I have referred, has taken her stand upon the principles and rules in Article 6.

In concluding my comments on our opponents' observations on the State practice, I must ask you, Mr. President, to give your attention for a moment to Professor Oda's remarks on what he refers to as "solutions attempted by means of unilateral State acts". Stating that there are few such instances, he finds only four that he considers as falling substantially within this category, namely first Iraq, which we have discussed in paragraphs 71 and 72 of our Common Rejoinder; Belgium, which we discussed in paragraph 104 of the Danish and paragraph 98 of the Netherlands Counter-Memorials, and which we reviewed at length in paragraphs 61-63 of our Common Rejoinder; the Soviet Union's Decree of 6 February 1968, which we discussed in paragraph 66 of our Common Rejoinder, and Australia's Petroleum (Submerged Lands) Act of 1967, which again we reviewed at length and illustrated in paragraph 69 of our Common Rejoinder. Those are the four instances.

We feel, as I have already indicated, that he should at least have added the Kuwait grant of a concession indicating the Iraq boundary to their list of unilateral acts.

Learned counsel for the Federal Republic suggested to you on page 61, *supra*, that you can discard all these cases as having no relevance whatsoever to the issues which you are called upon to decide. This summary disposal of what we think are, together with the Kuwaiti precedent, decidedly important elements of State practice, he thought would be justified on three grounds.

First, he said, there is, of course, no assurance that the parties who unilaterally acted will in the future maintain their respective positions. Well, we feel that we can safely leave that argument to the appreciation of the Court. If this possibility were to be treated as a relevant factor, we wonder how so many customary rules could have come into being in international law.

Secondly, our learned opponent says that the States which have thus unilaterally acted are presumably well content with a solution they themselves have chosen. This seems to us, Mr. President, very much to beg the question, seeing that those four cases include the cases of Belgium and Iraq.

Thirdly, he said, "to our knowledge at the present time, the boundary solutions enunciated unilaterally, apparently do not seem to present inequitable situations to the adjacent States concerned". We think this the wrong way of putting the matter. For the obviously pertinent point is the opposite one: that, in the case of Iraq and Belgium, the solutions adopted are manifestly dictated by an *opinio juris* as to the principles in Article 6, because otherwise the States concerned might have been expected, like the Federal Republic, to look for grounds upon which they might try to lay claim to larger areas.

In general, Mr. President, we maintain our account of the State practice and the conclusions which we ask the Court to draw from it. We believe that these, our accounts and conclusions, withstand all the criticisms that have been directed at them by our learned opponents.

I now pass, Mr. President and Members of the Court, to the final stage of my address, in which I propose to touch on certain aspects of our opponents' case as an introduction to the more detailed arguments of my colleagues, the Agents of the two Governments for which I appear. I can be comparatively brief, as I have already presented to the Court our general observations on our opponents' case.

I leave aside the massive onslaught launched by our opponents on the equidistance-special circumstances rule, which we believe is sufficiently answered by the statement of our own case and by what we have said in our written pleadings. Looking, therefore, only at the affirmative part of our opponents' case, we understand that they now base themselves on two main propositions.

First, if the principles and rules embodied in Article 6 are excluded by the Court as not being applicable as between the Parties, then the Court should decide that, in their words, "the governing principle is that each coastal State is entitled to a just and equitable share".

Secondly, if the principles and rules embodied in Article 6 are applicable as between the Parties, then the Court should decide that there exists with respect to the Federal Republic's North Sea coast a case of special circumstances constituting an exception to the equidistance principle within the meaning of Article 6.

I should add, Mr. President, that my formulation of our understanding of the second proposition is subject to the reservation that we are still not clear as to the meaning attached by the Federal Republic to the words in Article 6—"another boundary line is justified by special circumstances".

In their first proposition, our opponents say, in the manner so lucidly explained by Professor Oda on pages 61 and 62, *supra*, of the third day's record, that in the present cases neither a treaty nor a customary law basis can be found from which to deduce the principles and rules applicable to the delimitation of the boundaries, and that in consequence the Court must have recourse to paragraph (c) of Article 38 of the Statute of the Court. In short, they ask you to apply the principle of the "just and equitable share" exclusively in the character of a general principle of law recognized in national legal systems.

We dealt with this proposition, Mr. President, in paragraphs 19 to 25 and 108 to 120 of our Common Rejoinder, to which I respectfully ask the Court to refer. The way in which I believe that I can best help the Court on this point, at the present stage of the proceedings, is to state succinctly to you the principal objections which we advance against our opponents' plea for recourse to paragraph (c).

First and foremost, we do not think that there is any question of a gap in the law or of a *non liquet*. We believe that in our third contention you have a customary rule applicable directly and specifically to the question at issue. We believe that in our first contention you have a clear basis for your decision in the fundamental rules of maritime international law which are inherently of a customary law character. We believe that in our second contention you also have a clear basis for your decision, in a judicial decision of this Court and in the competence of a coastal State recognized by customary law to delimit its maritime sovereignty and jurisdiction in accordance with the generally recognized principles and rules applicable in the matter.

Secondly, in so far as the alleged principle of the "just and equitable share" is based on the notion of a division of common resources or a division of a common area of the continental shelf, we consider that it must be rejected as incompatible with the principle of the exclusivity of the rights of the coastal State over the continental shelf adjacent to its coast.

Thirdly, we consider that the alleged principle is incompatible with the principle of the continental shelf as a continuation or extension of the coastal State's sovereignty over the adjacent continental shelf.

Fourthly, we consider that the alleged principle is incompatible with the fundamental principles of international law governing maritime sovereignty and jurisdiction which concern themselves with the delimitation of boundaries in space and not with the sharing out of resources.

Fifthly, we consider that the alleged principle in the form in which it is presented to the Court contains in itself no objective criteria by which to determine its application, and cannot therefore be regarded as a true principle or rule of law within the meaning of the Special Agreements.

Sixthly, the objective criteria to which the Federal Republic proposes that the Court should have recourse in applying the principle are unknown to international maritime law, and conflict with long established principles and institutions of international law.

Seventhly, we consider that the alleged principle of the "just and equitable share" as it is presented to the Court is incompatible with the terms of the Special Agreements, which ask for a decision regarding the principles applicable to the delimitation of particular boundaries over designated areas of the continental shelf.

Eighthly, we consider that the particular application of the principle demanded of the Court by the Federal Republic in the present cases is tantamount to a request to the Court for an *ad hoc* legislative decision or decision *ex aequo et bono* and, as such, incompatible with the Statute of the Court, Article 38, paragraph 2, of which is not applicable in the present cases.

Furthermore, Mr. President, we cannot forbear to point out that our opponents are still resting their appeal to paragraph (c) of Article 38 on their simple assertion as to the self-evident character of the principle. Despite the extreme importance which they give to this principle in the whole of their argument, they have made no attempt to demonstrate to you the existence or nature of the principle in the various national systems nor the legal categories of cases to which it may have application in those systems. I well remember, Mr. President, in an earlier case—the *Right of Passage* case between India and Portugal—the impressive evidence placed before this Court in support of a claim to apply under paragraph (c) an alleged general principle of law recognizing a right of passage to an enclave. But in this case, despite the objection being raised in our Common Rejoinder, the Federal Government has given you nothing to assist you in your appreciation of the merits of the principle, or its scope, or the conditions for its application, or the categories of cases to which it is considered appropriate.

In concluding these general remarks on the question of our opponents' invocation of paragraph (c), we further stress that we know of no decision of this Court or of any other international tribunal which lends support to the application of an alleged "general principle of law recognized by national systems" which is in direct conflict with the specific positive law governing the matter and with the general principles of international law in the context of which its application is requested.

Finally, Mr. President, I come to their second proposition—the special circumstances issue—on which, as I stressed in opening, we have had the Federal Republic's explanations of her position somewhat late in the proceedings. As I also stressed in opening, we recognize that this issue arises in relation to each one of our contentions.

I should also like to recall my observations in regard to the disagreement and deadlock between the Parties being at the very root of the Special Agreements. This point has a particular relevance in connection with the application of the equidistance-special circumstances rule. When the point of disagreement and deadlock is reached and the Parties are before a judicial or arbitral tribunal, the focus narrows to the questions:

- (1) what is the correct interpretation of the exception clause "unless another boundary line is justified by special circumstances"; and
- (2) do the facts of the case—and in this case the geographical facts of the case—exhibit "special circumstances which justify another boundary line" within the meaning of the clause.

The situation has changed a little since we now have some light on our opponents' views concerning the application of the clause in the present case. In this connection we were glad to note that our opponents, at any rate at one point of their address, were in general agreement with us on one of the fundamental aspects of the application of the clause. This is where the learned Agent for the Federal Republic said, on page 45, *supra*, of the record:

"The criterion that the special circumstances clause cannot be invoked if the correction of the boundary is not justified with respect to a State which loses by the correction, is on its face a simple truism; I agree to what they say, [and it is what we say] the correction must also be equitable or just to the losing Party."

His statement relieves me of the need to go further into the general legal aspects of the clause. Necessarily, the detailed application of the clause is essentially linked with the facts and will be the subject of the address later of the learned Agent for Denmark.

I think, Mr. President, at the same time it may be helpful to the Court if I refer you to the main places in the pleadings where we, on our side, have tried to deal with the development and interpretation of the equidistance-special circumstances rule.

We traced the development of the equidistance-special circumstances rule through the records of the Commission and the Geneva Conference in Chapter 3 of Part II of our Counter-Memorials and we considered its meaning and application in paragraphs 126-156 of the Danish and paragraphs 120-151 of the Netherlands Counter-Memorials. We returned to the matter in Chapter 3 of our Common Rejoinder. As I have said, I mention these references simply for the record, that they may be for the convenience of the Court.

There is one point arising out of those pleadings on which I should like to touch. One of the matters debated was whether the equidistance principle is the primary and general rule or whether the two limbs of the rule are of equal rank; and our opponents have indeed argued for almost the primacy of the special circumstances clause, thus excluding the application of the equidistance principle until it is shown that no other boundary line is justified by special circumstances. We submit that in the pleadings we have shown that the equidistance principle was intended to be the general rule and that the natural meaning of the words of Article 6 dictates that interpretation. The very expressions "another boundary" and "justified by special circumstances" would seem to be serious obstacles to any different interpretation.

In conclusion, Mr. President and Members of the Court, I should like simply to underline four points.

1. We maintain that in the determination of any boundary under international law the question at issue is which of the two States concerned has the better claim in law to the areas involved.

2. Denmark and the Netherlands are claiming to delimit their respective continental shelf areas in conformity with the accepted concept of the extension of the exclusive sovereign rights of a State over the continental shelf adjacent to its coast, in accordance with an internationally accepted method of boundary delimitation, and in accordance with the principles and rules of delimitation expressed in the Continental Shelf Convention adopted in 1958 for the purpose of establishing the generally accepted principles and rules of international law governing the matter.

3. The Federal Republic in her case on the just and equitable share is claiming that the Parties shall be directed to agree upon the boundary on the basis of

a supposed principle of the just and equitable share, which is incompatible with the generally accepted principles of international law for determining boundaries, furnishes no objective legal criterion for determining the boundary, and finds no mention in the Continental Shelf Convention of 1958.

4. The Federal Republic in her case on the special circumstances clause is asking you, with respect to two quite distinct continental shelf boundaries off two different stretches of coast, to uphold a claim of special circumstances where neither the Danish-German coast nor the Netherlands-German coast exhibit any exceptional geographical feature such as might fall within the special circumstances clause.

I can only now thank you, Mr. President and Members of the Court, for the patient hearing which you have given me.

ARGUMENT OF PROFESSOR RIPHAGEN

AGENT FOR THE GOVERNMENT OF THE KINGDOM OF THE NETHERLANDS

Professor RIPHAGEN: Mr. President and Members of the Court, under the Special Agreement of 2 February 1967, between the Government of the Federal Republic of Germany and the Government of the Kingdom of the Netherlands, your Court is respectfully requested to decide what principles and rules of international law are applicable to the delimitation as between the Parties of the areas of the continental shelf in the North Sea which appertain to each of them. An identical request is addressed to the Court by a Special Agreement between the Government of the Federal Republic of Germany and the Government of the Kingdom of Denmark.

With your permission, Mr. President, I will attempt to assist the Court in its search for the applicable rules of international law, by indicating briefly the various options which, in abstract theory, are open to an international regulation of the limits in space of sovereign rights of States. I will then describe what, in our view, is the choice between those options, made by the actual rules and principles of international law as they have been developed up to the present day and are still in the process of development.

I intend thereby to demonstrate that the legal approach underlying the submissions of the Federal Republic of Germany is wholly without precedent or foundation in the existing rules of international law.

I will then proceed to analyse the way the Federal Republic elaborates this unprecedented and unfounded legal approach, in order to show the Court the arbitrariness of each successive step by which the Federal Republic attempts to arrive at its ultimate goal: the enlargement of its continental shelf area.

Finally, Mr. President, I intend to indicate the correct legal approach underlying the actual rules and principles of international law relating to maritime areas adjacent to the coast, and its consequences for the delimitation of those areas, in particular for the delimitation of the continental shelf.

The issue before the Court is the delimitation in space of the sovereign rights of a State—for the purpose of exploring and exploiting natural resources—over the seabed and subsoil of the submarine areas adjacent to the coast, but outside the area of the territorial sea, in particular the delimitation in space vis-à-vis other States which also exercise sovereign rights of exploration and exploitation over the seabed and subsoil of submarine areas adjacent to their coasts.

The existence of such sovereign rights and their content are not in dispute between the Parties. Nor is the Court requested to pronounce itself on the question which part of the seabed and subsoil of the high seas should legally be considered as continental shelf.

Indeed, the disputes between the Netherlands and the Federal Republic of Germany, and between Denmark and the Federal Republic of Germany, relate only to an area of the North Sea, the superjacent waters of which are of such a depth that the seabed and subsoil are undoubtedly to be regarded as continental shelf under the definition given to this term in Article 1 of the Geneva Convention.

The only point in dispute, then, is the extent in space of the area over which each of the three Parties in the present disputes exercises the sovereign rights referred to before.

The areas involved are maritime areas, the superjacent waters are high seas.

Now, Mr. President, looking at the question of delimitation purely in the abstract, not taking into account either the Special Agreements through which the disputes are brought before the Court, or the rules and principles of international law elaborated in the course of time, there are three possible starting points for a regulation by international law of the issue of determining the rights of States over a given area, be it land, fresh water, sea water, air, outer space, or seabed and subsoil.

One starting point is to regard the area involved as a *res nullius*, any part of which may be appropriated by any State as an area over which it exercises exclusive sovereign rights.

The second possible starting point of a regulation by international law of the question of determining the rights of States over an area is to consider the area as a *res communis* over which, in principle, all States may exercise non-exclusive rights.

The third possible starting point of a regulation by international law is to recognize the exclusive sovereign rights of a State over a part of the area somehow connected with that State rather than with another State.

Mr. President and Members of the Court, I do not think that there is any need to dwell upon the legal consequences of the first possible starting point, the *res nullius* approach. None of the Parties in the present disputes has ever claimed that the seabed and subsoil under the North Sea are *res nullius* in the sense that every State could incorporate any part of this area within its own territory, or in any other way could establish exclusive sovereign rights over any part of this area by way of occupation or otherwise.

The second and third possible starting points, however—that is, the *res communis* approach and the extension of national sovereignty approach—are, in abstract theory, relevant to the present disputes.

Let us first look at the *res communis* approach, the concept that a particular area belongs in common to all States, is *domaine publique* of the international society. Obviously, this concept implies the right of each State, either directly or through its subjects, to make use of the area for purposes recognized by international law as lawful purposes.

A typical example of this approach is, of course, the international régime of the high seas, providing for the right of every State to use the high seas for navigation, fishing, laying of submarine cables and pipe-lines, and for other lawful activities.

Naturally, this approach not only excludes the reservation of any part of the area involved for future activities of a particular State, but also in principle precludes the actual use of the area by one State in such a way that the lawful

use by another State of the same area is, in fact, hampered or made impossible.

Accordingly, for instance, Article 2 of the Geneva Convention on the High Seas provides that the freedoms of navigation, fishing, etc.—

“... shall be exercised by all States with reasonable regard to the interests of other States in their exercise of the freedom of the high seas”.

Now it goes without saying that this concept of *res communis* may, under particular circumstances, raise delicate problems of priority of one type of activity in respect of another, and even of priority of the use by one State in respect of the use by another State. With regard to the last-mentioned problem, the fact of being *prior in tempore* cannot always justify the legal consequence of being *potior in iure*, though in effect a distribution on the basis of “first come, first served” may well be the factual outcome of the equal rights of everybody to the use of a common area.

Problems of equality of opportunity also arise in the application of the *res communis* approach. To take once more an example from the international régime of the high seas: the exercise of the right of navigation on the high seas by land-locked States obviously requires some privileges to be granted to those States as regards access over land territory of another State to the sea, and indeed such privileges are envisaged in Article 3 of the Geneva Convention on the High Seas. That Article illustrates the penetration of the international régime of the high seas into the land.

The difficulties of the elaboration of the *res communis* approach are particularly apparent in connection with such activities in the common area as by their very nature diminish, at least to some extent, the potentialities of the area as a whole and thereby necessarily affect the use of the area by other States. Thus, in the cautious words of the preamble of the Geneva Convention on Fishing and Conservation of the Living Resources of the High Seas:

“... the development of modern techniques for the exploitation of the living resources of the sea . . . has exposed some of these resources to the danger of being over-exploited”.

Now the solution adopted in that Convention is, in principle, one of equal, that is non-discriminatory, limitation of the equal freedom of every State to engage in fishing on the high seas. But the concept of priority *in tempore* and also the concept of the priority of special interests of particular States is not wholly absent from the provisions of the Convention, even if it applies primarily to the judgment of such State or States as regards the measure of non-discriminatory limitation required by the situation.

Indeed, the Convention preserves the principle of equal access of all States to fishing activities on the high seas and does not distribute the living resources of the high seas among the States of the world by granting exclusive fishing rights over a particular area of the high seas. The factual distribution of those resources on the basis of what in other fields is called “the law of capture” remains. The resources are, in fact, allocated to the one who is first to exploit them.

The fact that, provided there is no over-exploitation, the living resources reproduce themselves and to that extent are inexhaustible, together with the fact that they are not necessarily linked to a particular area, though the location of fishing grounds is fairly constant, take away much of the exclusive character of distribution on the basis of the law of capture and distinguishes this distribution from the distribution by allocation of specific areas of the high seas to specific States for their exclusive use.

However, in dealing with non-living resources, exhaustible and of a fixed, though not necessarily known, location, it becomes in fact more difficult to distinguish between the more or less tacit distribution of resources on the basis of "first come, first served" and the distribution of areas for exclusive exploitation. That the resources are exhaustible virtually makes the exploitation by one exclusive as regards another; that the resources have a fixed location virtually requires a definition of the right of exploitation in terms of geographical space. Indeed, the *res communis* approach becomes an untenable concept, a cloak for a rush to grab the largest and best portions of the common area for what is, in fact, exclusive national use and national benefit. In short, it becomes in effect the equivalent of the *res nullius* approach unless the ultimate consequence of the idea of *domaine public international* is drawn and an international authority to govern and exploit the whole common area for the benefit of all mankind is established.

Obviously, and always speaking in terms of abstract theory, one could imagine another solution still based more or less on the *res communis* idea, but avoiding, as it were, its *res nullius* consequences, avoiding the uncontrolled rush towards what in fact, if not in law, is national occupation of a part of the common area. This theoretical solution would be to divide the common area between the States of the world in such a way that each State would have exclusive rights over a part of the common area. Indeed, in municipal law systems, where common property for some reason or another cannot be kept in that status, a partition is provided for by legislation, contract or otherwise. But it is obvious that such a system of partition can only be a substitute for the original status of common use if and in so far as the benefits of the non-exclusive use of the whole of the common property for each of the participants are susceptible of being more or less adequately transformed into the exclusive use of part of that property. In private law situations this is very often the case since these benefits usually can be expressed in terms of a certain sum of money. But even in municipal legal systems, the situation might be quite different where public interests are involved. Obviously the exclusive use of the part of the public road before one's house is no substitute for the non-exclusive use of the whole road, if one has to use the whole length of the road in order to get from one's house to one's work.

But quite apart from this aspect of the matter, there are even more formidable difficulties attached to a division of a hitherto common area.

The Court adjourned from 11.20 a.m. to 11.45 a.m.

Before we adjourned I indicated a difficulty arising when one wants to partition an area of common use into parts for exclusive use for particular States. The difficulty is then that the exclusive use of part of an area is not at all an adequate substitute for the non-exclusive use of the whole area.

But quite apart from this aspect of the matter, there are even more formidable difficulties attached to a division of a hitherto common area. Even where the exclusive use of part of the common area is an adequate substitute for the non-exclusive use of the whole area, this does not give a solution to the question of how to divide such common area between the original beneficiaries of a non-exclusive right of use. Surely one should "give everyone his due", but this lofty principle covers such widely divergent notions as division in equal parts, division in parts proportionate to everyone's contribution in the development of the common area, and division in parts proportionate to everyone's actual needs.

In short, an international régime applying the concept of "giving every State its due" to the division of a hitherto common area presupposes an ethical or ideological choice with respect to the distribution of wealth among nations.

With your permission, Mr. President, I will now turn to the third possible starting point of an international regulation of the delimitation in space of sovereign rights of States. This third approach starts from the fact of the coexistence of mutually independent centres of power, each situated on a specific land area. The rules of international law, in this approach, recognize this fact and also accept in principle that each Power determines for itself the limits in space of its jurisdiction. The rules of international law do, however, limit the discretion of each State in this respect, both in order to avoid conflicts between States—in particular conflicts between neighbouring States—and in order to retain certain areas in space for the common use of all States.

Accordingly, these rules focus on the determination of the exact boundary lines, where the extension in space of the sovereign rights of one State meets either the common area or the extension in space of the sovereign rights of another State.

In consonance with their starting point, these rules of international law primarily refer to bilateral agreements between neighbouring States for the determination of the boundary line between their respective territories. Such agreements are in any case necessary, since the translation of rules and principles of law relating to boundary lines into the technical description of those lines as they are drawn, so to speak, in the field, requires the application of other fields of knowledge and is usually carried out by experts in those other fields coming together in mixed commissions.

This, incidentally, is why the fixing of a boundary line is never automatic. Indeed, contrary to what the distinguished Agent of the Federal Republic believes to be the point of view of Denmark and the Netherlands—according to page 10, *supra*, of the verbatim record of the first day—both countries, Denmark and the Netherlands, in their respective Special Agreements, have each agreed with the Federal Republic that they shall delimit the continental shelf as between their two countries by agreement, in pursuance of the decision requested from the Court: that is in Article 1, paragraph 2, of the Special Agreements cited in the Memorials, I, page 14.

Furthermore, such bilateral boundary agreements have a particular function, inasmuch as they determine once and for all the course of the boundary line. Accordingly, under Article 6, paragraph 3, of the Geneva Convention on the Continental Shelf, the boundary line—

"should be defined with reference to charts and geographical features as they exist at a particular date, and reference should be made to fixed permanent identifiable points on the land".

Indeed, more generally, agreements fixing a boundary have a more permanent character than other treaties, as appears, *inter alia*, from the rule of international law that the *clausula rebus sic stantibus* cannot be invoked in respect of such agreements. The Court will know that the relevant text of the International Law Commission's draft on the Law of Treaties is in Article 59, paragraph 2, under (a), and that that text found general acceptance in the first round of the United Nations Conference on the Law of Treaties.

Now those bilateral boundary agreements, in their turn, usually reflect the factual situation with regard to the exercise of jurisdiction by the States concerned as this situation has developed in the course of history, unless, of course, they provide for a transfer of territory from one State to another.

In this approach, the rules of international law can limit themselves, in the first place, to an indication of the principles to be followed for the determination of the exact boundary line in areas where the agreement between the neighbouring States refers to natural features such as mountain ranges, lakes and rivers as forming the boundary between those States.

Furthermore, in the second place, in this approach, the rules of international law have to determine directly the limits in space of the extension of the sovereign rights of States into the sea, both *vis-à-vis* the common area and *vis-à-vis* the extension in space of the sovereign rights of neighbouring States. Since this area, the sea, is different from the natural environment of man, the land—there are in the sea itself no natural frontiers, nor settlements of people—since this is the case, geometrical methods of fixing boundary lines play an important role in determining the link of contiguity between the land and the adjacent sea area.

Indeed, in this approach, the extension of sovereignty over land to sovereign rights over the sea area adjacent to the land is necessarily founded upon the fact that land-based power, and land-based social activity do not stop at the coastline but extend into the sea. Since there is no natural limitation to this extension, the rules of international law, as the popular saying goes, have to draw a line somewhere, and generally do so on the basis of the distance from the coastline. Thus, both as regards the boundary line *vis-à-vis* neighbouring States, and as regards the boundary line *vis-à-vis* the common area, the distance from the coast is, in this approach, the typically relevant factor.

Mr. President and Members of the Court, up till now we have considered the issue of determination, by the rules of international law, of the extension in space of the sovereign rights of States purely from the point of view of abstract theory, of the possible approaches, of the "options" open to the rules of international law.

Turning now to the actual rules and principles of international law, as developed in the course of time, we note that the *res communis*, or *domaine public international*, approach, on the one hand, and the extension of national sovereignty approach, are both applied in those existing rules of international law, but each for clearly different spaces.

This is particularly apparent in the rules and principles of international law relating to the sea. Indeed, in this field of the law, we see a gradual decline of the *res communis* concept in favour of the extension of the national sovereignty concept. Surely the freedom of the high seas is still a firmly established principle of international law. But the area of high seas is considerably smaller now than it was when the principle of freedom of the high seas was established, and the recognized rights of the coastal State within sea areas adjacent to its coast have considerably increased.

To give a few examples:

The general recognition of the straight baselines system has enlarged the area of internal waters.

Where beyond those waters the rights of the coastal State were in the doctrines of the past often considered as a bundle of particular rights, Articles 1 and 2 of the Geneva Convention on the Territorial Sea now squarely state that the sovereignty of a State extends beyond its land territory and its internal waters to a belt of sea adjacent to its coast, to the air space over this belt of sea, and to its bed and subsoil.

As to the maximum breadth of the territorial sea there may be no *communis opinio*, but there is certainly a tendency to go beyond what was the fairly general practice of States some 50 years ago.

Certain rights of control of the coastal State in a zone of the high seas

contiguous to its territorial sea are now generally recognized in Article 24 of the Geneva Convention on the Territorial Sea.

Again, in the matter of conservation of the living resources of the sea, special rights are given to the coastal State, again relating to "any area of the high seas adjacent to its territorial sea", that is, under Articles 6 and 7 of the Geneva Convention on this subject.

Finally, the coastal State has exclusive sovereign rights over the continental shelf adjacent to its coast.

All this bears witness to the gradual extension of the sovereign rights of the coastal State into the sea.

On the other hand, and contrariwise, with regard to the deep sea—and I am not using here the technical legal expression of high seas—with regard to the oceans, there seems to be a tendency to affirm and even further develop the *res communis* concept.

Recently the General Assembly of the United Nations has turned its attention to the status of the seabed and subsoil of the sea beyond the continental shelf or—in the terms of the Agenda item itself—beyond the limits of present national jurisdiction. During its 22nd session, on 18 December 1967, the General Assembly established an *ad hoc* Committee to study the various aspects of the peaceful uses of the ocean floor, and a first report of this Committee is now under discussion at the present session of the General Assembly.

Many States Members of the United Nations have presented their views on the matter and, though it is perhaps premature to draw any firm conclusions from the opinions expressed up till now, there nevertheless seems to be a marked tendency to retain for the ocean floor, in contradistinction to the continental shelf, the *res communis* status, also in respect of the exploration and exploitation of its natural resources. Various proposals have been put forward by governments providing for or implying the setting up, under United Nations auspices, of some international body or machinery to control the exploitation of these resources and to ensure that the benefits derived therefrom, or at least a suitable portion thereof, shall serve the purposes of the international community as a whole, including the promotion of economic and social progress of developing countries.

In this connection, Mr. President and Members of the Court, I may perhaps be allowed to refer, briefly and only by way of example, to the views expressed by my own Government on the international régime of the ocean floor. These views are laid down in a United Nations Document numbered A/AC.135/1 containing the comments of the various governments on this matter, and the comments of my Government are at pages 22 to 25.

The main features of the outline of an international régime for the ocean floor as put forward by the Netherlands Government are the following:

First, a fixed and definite boundary line should be determined beyond which a coastal State does not have the exclusive sovereign rights provided for in the Continental Shelf Convention.

Second, the area beyond the boundary line just mentioned should be under the control of the United Nations in order to safeguard the freedom of the high seas and to ensure that the exploration and exploitation of the ocean floor and subsoil serve the purposes of the international community as a whole, such as aid to developing countries, equality of economic access to the natural resources as they become available and a rational relation between government take and private profit, if any.

Third, a fixed part of the government take, being royalties plus taxes, to be paid into a United Nations fund for aid to developing countries:

Fourth, the United Nations to grant concessions to individual States which would act as a sort of administering authority in respect of the exploitation concession they grant to a private or public enterprise.

As I said, Mr. President, I have referred to this proposal only by way of an example of a possible further development of the *res communis* concept towards what we consider to be its logical conclusion, the establishment of an international machinery of a world-wide character to administer the use of and benefit from the common area by and for all States, taking into account the needs of each of these States.

Actually, Mr. President and Members of the Court, whatever form the international régime of the ocean floor and deep sea mining eventually will take, there is little doubt that the *res communis* approach will be maintained for this area of the seas.

The learned Agent of the Federal Republic has, in his address to the Court, repeatedly stressed what he called the "real danger" that the oceans would be, as it were, annexed by the coastal States—the relevant passage of his address is on page 33, *supra*, of the record for the second day. He has solemnly warned the Court—on pages 33-35, *supra*, of the record of the second day—against recognition of the legal approach of extension of national sovereignty in space on the basis of propinquity and equidistance, suggesting that, if the Court would accept this approach in the present cases, relating to the continental shelf under the North Sea, this would inevitably lead to, or at least greatly promote, a national appropriation of the ocean floor as dramatically depicted in no less than three substantially identical maps of the North Atlantic Ocean, which the Federal Republic has thought fit to draw the Court's attention to.

Now this train of thought could only confuse the issue now before the Court. It is, I think, clear that there is and will remain a fundamental difference between the legal régime of the ocean floor and the legal régime of the continental shelf.

Actually, the development of the present-day rules and principles of international law relating to the rights of coastal States over the continental shelf and the development of the legal convictions of the world community with respect to the ocean floor as—to use a current expression—the common heritage of mankind, this double development forcefully illustrates the antinomy of the two possible approaches: on the one hand the extension of the national sovereignty from the land into the sea and, on the other hand, the concept of the sea as *domaine public international*. Obviously the application, side by side, of these two totally different approaches for two different areas of space requires a determination of the boundary line between continental shelf and ocean floor.

On the precise delimitation of those two areas there does not seem to be, as yet, a generally accepted view. Incidentally, the same is true for the precise delimitation as between outer-space and air-space. But the main point, in both cases, is the general recognition that there are two separate areas each having a fundamentally different legal régime.

How far, starting from the deep ocean, the *res communis* régime extends in space, and where exactly it meets the area wherein, starting from the land, the régime of national sovereign rights of coastal States prevails, may be uncertain. But it is not uncertain or open to doubt that the two areas together cover the whole of all the seas, and that there is no third régime applicable to any part of those seas.

Earlier in my speech, in describing the "options" open to the rules of international law, purely in the abstract and without reference to the actual de-

velopment of international rules and practices, we envisaged the theoretical possibility of a system of distribution of a common area between States thus, that each State which had a non-exclusive right of use would receive an exclusive right of use of a part of the area. We recognized the insuperable difficulties connected with such a system, and in view of those difficulties it is hardly surprising that the actually existing rules of international law do not provide us with a single precedent for such a system for any type of area.

Nor is there any serious set of rules *de lege ferenda* which embodies this approach.

It should perhaps be recalled here that there is a fundamental difference between such a system, dividing up a common area into parts, and a set of international rules, or an international machinery, determining, in case of conflicting interests, the relative priority of one type of use as against another or the relative priority of the use by one State as against the use by another State.

The latter systems are rather an affirmation and further elaboration of the *res communis* concept, and do not lead to a sharing out of spaces for exclusive use by individual States. This concept of relative priority and accommodation of the various uses by various States of the area is illustrated by the so-called "Helsinki rules on the uses of the waters of international rivers". It is also illustrated by the proposals concerning an international agency for the control of the exploitation of the resources of the ocean floor.

Under the Helsinki rules, the territorial delimitation of the States, within whose territories the river basin is located, remains exactly the same, as does the status of those territories as national territory subject to exclusive sovereignty. And, again, under the proposals for an international body to supervise the exploitation of the resources of the ocean floor—such as, for instance, the Netherlands proposals referred to before—the ocean floor and subsoil would remain a common area, not subject to national sovereignty or exclusive sovereign rights.

There is, therefore, no precedent whatsoever in the existing rules and principles of international law relating to the delimitation in space of the sovereign rights of individual States in any area, for the approach underlying the submissions of the Federal Republic. The alleged principle "that each coastal State is entitled to a just and equitable share of the continental shelf" is incompatible both with the *res communis* concept underlying the rules of international law relating to the ocean floor and with the concept of extension of national sovereignty underlying the rules of international law relating to the continental shelf.

The incompatibility of that alleged principle with the *res communis* concept is, it seems, obvious. To the extent that the seabed and subsoil are *res communis*, they can only have that status in the same way as the superjacent waters and air space are *res communis*, that is as common to all States, both coastal States and land-locked States.

Accordingly, if the rules of international law, contrary to all precedent, would proceed to a distribution of this common area in just and equitable shares, they could not possibly distribute it only among coastal States, thereby leaving out a great number of States which do have a right to use the common area.

The fallacy of this approach, of sharing out a hitherto common area, becomes even more apparent when one looks at what the Federal Republic of Germany considers to be "just and equitable shares", and the methods it advocates for determining the location of those shares. Not only are non-

coastal States excluded from the distribution of the common area, but the coastal States benefit from this distribution according to criteria which have no relation whatsoever to the location of their coastline.

Admittedly, there is a certain parallellism between the—unprecedented—legal approach of sharing out a common sea area and the geometrical method of doing so advocated by the Federal Republic. If one starts from the legal concept of the sea as an area to be distributed among States, one might just as well start the drawing of the dividing lines from the “middle of the sea”—if one can find such a thing.

The trouble with that is, of course, that the location of the coastlines in the world is such that, though the sea itself is a homogeneous unit, parts of it are partly separated from other parts by land masses. It is therefore impossible to indicate a point which by any stretch of the imagination could be called the middle of the sea.

In order to overcome this difficulty, the Federal Republic divides the sea into separate sea areas, and advocates the sharing out of each of those sea areas between the coastal States lying around such sea area.

Now it would seem to me that the absolute arbitrariness of this method is immediately apparent. After having excluded the land-locked States from any distribution, now even States which have a sea coast are excluded from the distribution of a sea area, if they do not lie around that sea area, even though they undoubtedly have the right to use that sea area as part of an area common to all States. Where this arbitrariness would lead to, is clearly illustrated by the learned Agent of the Federal Republic himself in the final part of his address. There the learned Agent of the Federal Republic expresses himself in the following terms—and I quote from page 66, *supra*, of the verbatim record of the third day. He there said:

“We trust that your Judgment [that is the judgment the Court will deliver in the present cases] will contribute to a just and equitable apportionment of all the uses and resources the North Sea provides for the nations.”

Now, Mr. President, it is clear that “all the uses and resources” of the North Sea do not only cover the use of the continental shelf for exploration and exploitation of its mineral and other non-living resources, but also cover the living resources, the swimming fish, and the use of the North Sea for the purposes of navigation, of laying submarine cables and pipelines, and other lawful activities.

And then, Mr. President and Members of the Court, I must confess that we, for our part, do hope and trust that your Judgment will not contribute to any apportionment—be it just and equitable or otherwise—of the North Sea for the exclusive navigational or fishing use of the coastal States.

Presumably this is not what the Federal Republic wants either. But its whole unprecedented thesis of the sharing out of an originally common area, the sea, between coastal States forces it to such an extraordinary statement. Indeed, the further development of this statement by the learned Agent of the Federal Republic is also highly significant, because it touches upon matters of navigation and fishing on the high seas.

As is well known by now, the Federal Republic would like to see a partitioning of the North Sea as a whole, giving to each coastal State a sector-like part reaching the centre of the North Sea.

Now in the final part of his address the learned Agent of the Federal Republic makes the following remarks, and I quote from page 66, *supra*, of the records of the third day:

"Such an apportionment would also reflect and serve the common interests of the North Sea States. The North Sea cannot be considered as a mere object of mineral exploitation. It is foremost an open sea with important shipping lanes connecting the coastal States with the world."

Now, nobody could take exception to this part of the statement, but for one important element of it. Indeed the North Sea is an open sea and not, as the Federal Republic in other contexts stresses so much, an enclosed sea. Indeed the North Sea is an open sea and comprises important shipping lanes. But those shipping lanes do *not* serve only the interests of the coastal States, but the interests of *all* States, whether adjacent to the North Sea or not. And that is exactly why its legal status is that of an area common to all States and open to the navigation of all States.

The Agent of the Federal Republic then continues as follows:

"The partitioning of the continental shelf between the North Sea States must take cognizance of those facts. There are the difficult problems of reconciling the different uses of the North Sea with each other, of controlling the installations for the exploitation of the subsoil in the North Sea and balancing the needs of economic exploitation with the equal need for providing safe shipping lanes with sufficient depth in the shallow North Sea.

All these problems of common concern to all North Sea States would be better solved if each State which legitimately should have a say in decisions regulating the different beneficial uses of the North Sea, would have control over the continental shelf until the middle of the North Sea. At this point or area all North Sea States meet which have an equal interest in these matters."

Here again, Mr. President, we find this arbitrary and unprecedented limitation to the coastal States. It is simply *not* the law that only the North Sea States are the States which "legitimately should have a say in decisions regulating the different beneficial uses of the North Sea". On the contrary, quite rightly, Article 3 of the Geneva Convention on the Continental Shelf declares that the rights of the coastal States over the continental shelf do not affect the status of the superjacent waters as high seas. And, quite rightly, the same Convention in Article 4, Article 5, paragraph 1, paragraph 6 and paragraph 7, directly protects the interests of navigation, of fishing, and of the laying and maintenance of submarine cables and pipelines. Quite rightly, because those are interests and rights belonging to each and every State.

Again, the method of distribution advocated by the Federal Republic is in flat contradiction to the alleged legal basis of such distribution: the originally common character of the sea.

But the arbitrariness does not even stop there! Having arbitrarily separated what it calls the North Sea from other sea areas, and having arbitrarily limited the group of States entitled to use the North Sea to the States lying around that area, the Federal Republic proceeds to determine the middle of the North Sea in order to draw from there straight lines to the points where the land boundaries meet the sea, or perhaps—the Memorial and the Reply are somewhat vague about this—the points where the boundary lines in the territorial sea meet the high seas, or perhaps even the point where the agreed partial boundary lines on the continental shelf end. That is not very clear in the Memorial and the Reply.

In cases where surrounding States are separated by the sea, as between the Netherlands and the United Kingdom, the United Kingdom and Norway, and

Norway and Denmark, equidistance lines are drawn. The result of this operation is shown in figure 21 in the Memorial, I, page 85.

Now it is obvious, even from this rather roughly drawn figure, that there is no middle of the North Sea. Not only is there not one point which is equidistant from all the points on the coastlines of the surrounding States, because the North Sea is not even roughly circular, but there is not even one point which is equidistant to the nearest points on the coastlines of each of the surrounding States.

If the Court would care to look at the map, we see there a point which is equidistant from the nearest points on the coastlines of Belgium, France and the United Kingdom. There is another equidistance point as between the Netherlands, Belgium and the United Kingdom; there is another equidistance point as between the United Kingdom, Norway and Denmark; there is another equidistance point as between the United Kingdom, Denmark and the Netherlands; and there is another equidistance point as between Denmark, the Federal Republic and the Netherlands. But these five equidistance points are wide apart. It is purely arbitrary to choose one of these five points as the middle of the North Sea.

Indeed, it is purely arbitrary to choose any of these points as the starting point for a sharing-out operation as between all the States surrounding the North Sea. In reality the Federal Republic does not propose to share out the North Sea as a whole between all the surrounding States. What the Federal Republic envisages is to share out the south-eastern part of the North Sea and that is between Denmark, the Federal Republic and the Netherlands only.

If this was perhaps not so clearly expressed in the German Memorial and Reply, the oral argument, presented by the learned Agent for the Federal Republic and by Professor Oda, squarely puts the issue in this way. Thus, to take only one example, Professor Jaenicke stated, and I quote from page 12, *supra*, of the record of the first day:

“I think it to be a more correct approach if we would look at this south-eastern sector of the North Sea which comprises the Danish, German and Netherlands’ continental shelf as a single whole and then ask ourselves how to divide this sector between the Parties equitably. That in my view is the real issue in this case.”

This line of thought is further developed in that part of the address of the Agent of the Federal Republic recorded on page 37, *supra*, of the record of the second day.

Actually, in the part just mentioned, as in Professor Oda’s address, we find this strange tendency to group States together in areas, as if those areas constituted territories of a single State. But international law is interested in boundaries between individual States and not in lines such as, and I now may quote Professor Oda, from page 54, *supra*, of the record of the third day—

“... the median line between the British Isles on one side and the European Continent on the other...”.

Thus, starting from the concept that the high sea as a whole is an area common to all States, the Federal Republic sets apart the North Sea as common to the surrounding States, and finally proceeds to a sharing-out of a part of the North Sea as between a few of the surrounding States only. And to top off this pyramid of arbitrariness, the Federal Republic takes as a starting point for the sharing-out of this area between the Netherlands, Denmark and the Federal Republic, a point which is equidistant from the Netherlands, Denmark and the United Kingdom.

One really wonders how all this could possibly result in something "fair and equitable" under any standard.

But now, having tried to let us believe that the south-eastern part of the North Sea should be shared out in fair and equitable parts between the three countries, the Federal Republic tries to offer us a standard of what is fair and equitable. This standard, then, would be that the total surface of each share should be proportionate to the length of the so-called coastal frontage of each State.

Now, as there is no precedent whatever in the existing rules and principles of international law for a sharing-out of a common area, there is also no precedent in those rules for a distribution in proportion to the length of the so-called coastal frontage. Indeed, the whole concept of a coastal frontage is unknown to the rules and principles of international law. The alleged general principle of law, according to which a common area should be distributed in fair and equitable shares, surely does not gain in credibility by combining it with an alleged principle that the shares should be proportional to the length of imaginary lines!

Indeed, what is this coastal frontage supposed to be?

The Federal Republic has always been, and apparently still is, somewhat reluctant to give a clear definition of, or even simply to exemplify, this nebulous concept. Only one thing is clear and has always been clear about this so-called coastal frontage of a State, and that is, that it has absolutely nothing to do with the actual coastline of a State.

The so-called coastal front of a State is an imaginary line, the direction and the length of which, in the thesis of the Federal Republic, directly determines both the total surface and the exact location of the continental shelf area appertaining to that State in law.

Well, Mr. President and Members of the Court, if that were the case one should at least expect that the Federal Republic would explain to the Court how, under the rules and principles of international law, this all-important line should be established.

The Memorial and the Reply of the Federal Republic, however, leave us completely in the dark, or perhaps I should say in the fog, on this matter.

Even the name of this imaginary line is shifting, we have coastal frontage, contact of the coast with the sea, coastal front, coastal façade, to take only a few of its aliases.

In our Common Rejoinder, that is in figure A in the Rejoinder, I, page 470, we have tried to visualize what the Federal Republic means by coastal front of a State.

On the basis of the scanty information given by the Federal Republic in its Memorial and Reply, in particular on the basis in the Memorial, I, page 76, which mentions the linear distance between Borkum and Sylt as the coastal front of the Federal Republic, and the figures 1, 2 and 3 in the Reply, I, pages 427 and 428, we thought that what was perhaps meant by coastal front was the straight line joining the extreme points of the coastline of a particular State. And when, in the first part of his address, recorded on page 12, *supra*, of the record of the first day, the Agent of the Federal Republic specifically referred to this figure A in order to illustrate what he called "the disproportion between the German part on the one hand and the Danish and Netherlands parts on the other", we felt that we had at least understood what the Federal Republic is talking about when using the term coastal front. But it soon appeared that our imagination was still insufficient to produce this imaginary line.

It seems that, according to the Federal Republic, Denmark and the Netherlands do not "face" the North Sea with the whole length and direction of their actual coastline as that coastline is washed and often menaced by the troubled waters of the North Sea. It also seems that, according to the Federal Republic, Denmark and the Netherlands do not even "face" the North Sea with an imaginary line, a straight line, joining the extreme points of their respective coastlines on the North Sea, as in figure A. of our Common Rejoinder.

No, as the Federal Republic wants it, Denmark and the Netherlands "face" the North Sea with a line the length and direction of which are different still.

According to the latest version of the German coastal front concept, as this version is given on page 41, *supra*, of the record of the second day, and on page 64, *supra*, of the record of the third day—and I would invite the Court to look at the map—the coastal front of the Federal Republic would be a straight line between the end point of the land frontier between Denmark and the Federal Republic and the end point of the land frontier between the Netherlands and the Federal Republic.

Now those two end-points are at least the extreme points of the actual North Sea coastline of the Federal Republic, but the so-called coastal front of Denmark is, in this latest version of the German theory, construed in a very different way. The so-called coastal front of Denmark, with which it is supposed to "face" the North Sea, is a straight line, starting at the end point of the land frontier between the Federal Republic and Denmark, and running from there "roughly"—that seems to be a favourite word in the German pleadings—to the north.

It is obvious that this straight line crosses the actual Danish coastline at a point which presumably is then the other end-point of the coastal front of Denmark. That the actual North Sea coastline of Denmark does not stop at that end point of the "coastal front", but continues in an eastern and north-eastern direction for a considerable distance, is conveniently forgotten.

And then the "coastal front" of the Netherlands: this is supposed to be a straight line running from the end point of the land frontier between the Netherlands and the Federal Republic—and now I quote from page 41, *supra*, of the record for the second day—"to the point where the equidistance line between Great Britain and the Netherlands makes a bend to the west". What presumably is meant is the point numbered as point 9, or perhaps point 10, in Article I of the delimitation agreement between the United Kingdom and the Netherlands. This delimitation agreement is reproduced as Annex 9 in the Memorial, I, page 117. There is also a map in the Memorial, page 120, where the various points where the equidistance line makes bends are indicated. Presumably point 9 or point 10 is the point mentioned by the Federal Republic.

Now, the straight line, thus drawn, crosses the actual coastline of the Netherlands at some point, and that point presumably would then be the other end point of the coastal front of the Netherlands. Again, the fact that the actual North Sea coastline of the Netherlands does not stop at that point but continues for a considerable distance in a south-western direction is conveniently forgotten.

We have now tried to reconstruct what, in the latest version of the German coastal front theory, is supposed to be the coastal front of Denmark, the coastal front of the Federal Republic and the coastal front of the Netherlands.

I must recall here, Mr. President, that, according to the German theory, the direction of these coastal frontages determines the location of the continental shelf areas appertaining to each of the three countries, and the length of those coastal frontages determines the size or total surface of the continental shelf

areas appertaining to each of the three countries. It would, therefore, in the German theory, be all important to know exactly both the precise direction and the precise end points of that imaginary straight line.

But the one and the other are only vaguely indicated by the Federal Republic, and the learned Agent of the Federal Republic is apparently fully aware of the haphazard and arbitrary way these coastal fronts are construed.

Thus, and I now quote from page 64, *supra*, of the record of the third day, he remarks "it would be difficult to know what you would like to call the coastal front of the Netherlands facing the North Sea"; and somewhat earlier he even goes so far as to say about the coastal front, and I now quote from page 41, *supra*, of the record of the second day:

"But you may take what you like. I don't mind whether you take some other line as the coastal front, that would be more favourable to us. I have taken as the coastal front that which is the least favourable to us."

Mr. President and Members of the Court, I submit that everything that the Federal Republic has declared about the coastal front in the Memorial, in the Reply and in its oral pleadings, only serves to illustrate the absolute arbitrariness of this whole concept of the so-called coastal front.

The purposes of introducing this so-called coastal front, this imaginary and arbitrary straight line, are only too clear.

The Federal Republic, even though it builds its whole thesis on the fallacious foundation of a so-called just and equitable sharing out of a common area, cannot escape from the fact that the sovereign rights over a continental shelf area belong to a State only in its quality as a coastal State. Now the actual North Sea coastlines of Denmark, the Federal Republic and the Netherlands are not as the Federal Republic would like them to be. *Ergo*, the Federal Republic has to look for a substitute for the actual coastlines, a substitute line that could fulfil a double purpose:

First purpose: to serve as a baseline for a triangular or sector-like continuation of the land territory in and under the sea towards a particular point which the Federal Republic calls the middle of the North Sea, and up to which point the Federal Republic wants to enlarge its continental shelf area. This is, of course, a question of finding a convenient direction for the substitute line. Second purpose: to serve as a yardstick for the total surface of the continental shelf area, which the Federal Republic wants to have; and this is, of course, a question of finding a convenient length for the substitute line.

To serve this double purpose the Federal Republic has invented a set of straight lines which, perhaps to cover up their total independence from the actual North Sea coastlines, it has called the coastal fronts of the three States.

These coastal fronts, these arbitrary substitutes for the actual coastline, if they have to serve the double purpose mentioned before, are not so easy to find, and that perhaps explains the reluctance of the Federal Republic to get into a definitive and detailed description of those lines.

In the Federal Republic's Memorial, paragraph 78, I, page 77, the coastal frontage of the Federal Republic is indicated as the linear distance between Borkum and Sylt and it is suggested that "the breadth of the Danish and Netherlands coasts were to be ascertained in like fashion". Now this could only mean that the coastal fronts of the three States would run as indicated on figure A in the Common Rejoinder, I, page 470.

But this does not suit the Federal Republic at all. It is easy to see that lines drawn from the middle of each of the three coastal fronts, perpendicular to each coastal front, could not meet in what the Federal Republic persists in

calling the middle of the North Sea. Thus, the first purpose of the Federal Republic would not be served by the direction of those lines we have drawn in figure A in the Common Rejoinder, I, page 470.

Consequently, the Federal Republic has to get away even further from the realities of geography, and so it does in the oral arguments and under the guise of taking a coastal front which is the least favourable to the Federal Republic and fairest to Denmark and the Netherlands.

But the remarkable thing is that the coastal fronts thus taken, with the best of intentions towards Denmark and the Netherlands, also serve best the purposes of the Federal Republic.

Indeed, if the Court would care to look at the map, it is only by changing the direction of the coastal fronts of Denmark and of the Netherlands as originally indicated in the written pleadings, towards the position now indicated in the oral arguments that the Federal Republic could, through perpendicular lines, arrive at the point which it calls the middle of the North Sea.

The Court rose at 12.55 p.m.

SEVENTH PUBLIC HEARING (31 X 68, 10.5 a.m.)

Present: [See hearing of 23 X 68.]

Professor RIPHAGEN: Just before the Court adjourned yesterday I had the occasion to point out the fact that in the oral argument the Federal Republic has presented a new definition of the so-called coastal fronts of Denmark and of the Netherlands, quite different from the one that could reasonably be deduced from the Federal Republic's indications given in its written pleadings.

I also pointed out that this change of the direction of the imaginary line, styled "coastal front", is clearly motivated by the desire to arrive, through the drawing of perpendicular lines, at a point which the Federal Republic calls the middle of the North Sea. But this arbitrary choice of this particular direction of the so-called coastal fronts of Denmark and of the Netherlands is also intended to serve the second purpose of the Federal Republic, a so-called equitable distribution in shares proportionate to the length of the coastal frontage.

Now, it is a simple fact of geometry that if you arrange three straight lines at such angles that perpendiculars, drawn from the middle of each of those lines, cross at one and the same point, then that point is also the centre of a circle going through the end points of the original three straight lines. And if you then draw straight lines from the centre of that circle to each of the end points of the original straight lines, then the surface of the circle is divided in three sectors. The surface of each sector of this circle is then, and this is again a fact of geometry, proportional to the length of each of the three corresponding arcs of circle.

Now this is all very well, but here again, there is no relationship whatsoever to the geographical realities of the actual shape of the North Sea and the actual North Sea coastlines of the three States. A mere glance at the map shows that the surfaces delineated by the triangles or sectors so constructed are in no way congruent with the sea areas divided up by taking the straight lines drawn from the centre of the circle to the end points of the so-called coastal fronts. When one takes those straight lines as the dividing lines of those sea areas, one sees that those sea areas are not in any way congruent with the sectors or triangles.

This, of course, is a natural consequence of the fact that by no stretch of the imagination could one possibly consider the North Sea or even its south-eastern part as circular. Indeed, as already remarked in the Common Rejoinder, I, p. 472, it is, obviously, always possible to choose a point in the sea, as represented on a map, and draw a circle having that point as its centre. But if the map faithfully represents the North Sea, no circle can be drawn that bears any relationship to the actual coastlines of the North Sea countries. And the same is true for the three straight lines which the Federal Republic calls the coastal fronts of the Netherlands, the Federal Republic and Denmark.

All those circles, arcs, sectors, triangles and straight lines are purely arbitrary constructions. They have nothing to do with the geographic realities. They could not possibly be a standard for equitable distribution. And, last but not least, they are completely alien to any existing rule or principle of international law.

To sum up, Mr. President and Members of the Court: first, the concept of sharing-out a common area amongst States has no basis in the existing rules of international law.

Second, the application of this concept to any particular part of the sea to the benefit of only a few States is incompatible with the only possible basis of the concept, and purely arbitrary.

Third, the concept of fair and equitable shares has no basis in the existing rules of international law.

Fourth, the alleged standard of shares to be proportionate in size to the length of imaginary straight lines joining arbitrary points on the coast of a State cannot possibly be a rule of law.

Fifth, the geometrical method of applying this standard by the construction of sectors starting from the middle of the sea is purely arbitrary and has no relation to the geographical realities of the North Sea.

Mr. President and Members of the Court, there is, of course, a reason why the Federal Republic has thought it necessary to present such arbitrary constructions. This reason is obvious.

The continental shelf area over which the Federal Republic exercises sovereign rights under the rules and principles of international law as expressed in the Geneva Convention on the Continental Shelf is relatively small. The Federal Republic wants more and therefore invented the theory of a common continental shelf to be shared out among States. But the seabed and subsoil could only be a common area because the high seas are a common area, and according to the same modalities. This means that the bed and subsoil of the total area of the high seas would be common to all States. Now the attempt of squaring this theory with the exclusive right of each coastal State over the continental shelf adjacent to its coast must, indeed, involve a considerable amount of mental acrobatics.

Actually, it is impossible to explain the exclusive sovereign rights of a State over the continental shelf adjacent to its coast as the result of a sharing-out operation of the bed and subsoil of the high seas by the rules of international law. Indeed, the only possible explanation of these rights is the recognition by international law of the extension of the national sovereignty over the land into sovereign rights over the continuation of the land under the sea contiguous to the coast. The common area is not distributed but reduced by this recognition of exclusive sovereign rights.

This explanation is in conformity with the whole body of rules of the international law of the sea as those rules are elaborated through the practice of States and through the codification and progressive development by world-wide conferences.

This body of rules of the international law of the sea shows the interpenetration of two radically different régimes: the high sea régime of an area for the common use of all States, and the land régime of exclusive sovereignty of each individual State. Indeed, the extension in space of the land régime of sovereignty into the sea is compensated by important limitation of the content of those sovereign rights to the benefit of the high sea régime of common use. Thus, the exclusive sovereign rights over the continental shelf are limited in their contents to the exploration and exploitation of its natural resources. Such exploration and exploitation, in the words of Article 5 of the Geneva Convention on the Continental Shelf:

“must not result in any unjustifiable interference with navigation, fishing or the conservation of the living resources of the sea”.

Thus, also, the sovereignty over the territorial sea is limited by the right of innocent passage. Even the land itself is affected since, as stated in Article 3 of the Geneva Convention on the High Seas, a State situated between the sea and

a State having no sea coast shall, by common agreement with the latter, accord to the State having no sea coast free transit through its territory.

The fact that the sovereign rights which a coastal State exercises over sea areas are an extension of its sovereignty over its land territory has also important consequences for the limits of those rights in space, both vis-à-vis the area under the régime of common use, and vis-à-vis the areas under the régime of exclusive rights of neighbouring States, whether opposite States or adjacent States. It is the concept of contiguity which governs these delimitations.

As regards the delimitation in space vis-à-vis the area of common use, the concept of contiguity is expressed in terms of a maximum distance from the outer limit of the internal waters for the territorial sea and the contiguous zone. And for the sovereign rights of exploration and exploitation of the seabed and subsoil, the concept of contiguity is expressed in the definition of the continental shelf.

As regards the delimitation in space vis-à-vis the opposite and adjacent States, the concept of contiguity is expressed for all three zones in the principle that the boundary is to leave to each State every point of the area which lies nearer to its coast than to the coast of another State.

In all those delimitations the geographical realities of the actual coastline of a State are the basis for the determination of the extent in space of its sovereign rights. Indeed, the principle of contiguity would not admit another solution.

That this is true, even where the drawing of straight baselines is permitted, your Court has made crystal clear in the Anglo-Norwegian *Fisheries* case. That the outer limit of the territorial sea and of the contiguous zone is a line equidistant from the coastline—low water line or straight baseline as the case may be—is also not open to doubt. The outer limit of the continental shelf, though for obvious reasons not determined in terms of maximum distance from the low water line or straight baseline, is also dictated primarily by the geographic realities.

The same is true for the delimitation of all these areas vis-à-vis opposite and adjacent States. Here again the principle of equidistance is the expression of the concept of contiguity on the basis of the geographical realities of the actual coastlines.

Now, surely this principle of contiguity, and its corollary the principle of equidistance, cannot be applied in a purely mechanical way.

There may be special circumstances which justify a deviation from the equidistance line on particular points. But no special circumstance could possibly justify the jettison of the contiguity-equidistance principle and its replacement by a system of distribution starting from a radically different, even opposite, point of view. What then *are* those special circumstances, and in what way and to what extent may they justify another boundary line than the equidistance line?

Now, here, as in the Anglo-Norwegian *Fisheries* case, we have to look at the geographical realities and their socio-economic corollaries, always in the light of the concept of contiguity. My learned colleague, the Agent for the Government of the Kingdom of Denmark, will further develop this matter. Suffice it for me, as Agent of the Government of the Kingdom of the Netherlands, respectfully to submit to the Court the following short remarks.

There are, in theory, two possible reasons for deviating, at specific points, from the true equidistance line in determining a boundary. One possible reason is that a particular part of the truly equidistant boundary line unjustifiably ignores the unity of a particular sea area by separating it in two parts under a different régime.

The other possible reason is that a particular part of the truly equidistant

boundary line is determined by specific points on the coastline, which cannot justifiably be regarded as forming a unity with the rest of the coast, which is under the same régime.

In both cases there may be said to be an element of artificiality in part of the truly equidistant boundary line.

Now whether, and to what extent, those special circumstances justify a correction of that part of the true equidistance line is a delicate question. Obviously, much depends on the legal status of the area which is to be delimited: internal waters, territorial sea, contiguous zone or continental shelf. It seems, for instance, clear that a continental shelf boundary does not affect the use of a sea lane for international navigation, whereas a territorial sea boundary might do so. Furthermore, international law and practice demonstrate that there are other means of solving the problems arising from the artificiality of boundary lines—other means than the drawing of a different boundary line.

In this connection, I may make reference, by way of example, to the United Kingdom/Netherlands Agreement concerning the exploitation of single geological structures overlapping the boundary line. This Agreement has been reproduced as Annex 12 of the Netherlands Counter-Memorial.

So much for the case that the true equidistance boundary line cuts into different parts a sea area which is a unit.

As regards the other possible reason, one cannot lightly assume that a part of the coast of a particular State is not an integral part of the mainland for the purpose of applying the concepts of contiguity and equidistance.

Now, all this is not directly relevant to the present disputes, inasmuch as the Federal Republic has not indicated any part of the equidistance line as between its continental shelf and the continental shelf of the Netherlands which should be corrected for either of the two reasons mentioned before. Nor has the Federal Republic indicated any part of the equidistance line as between its continental shelf and the continental shelf of Denmark which should be so corrected.

It is rather the combined effect of the two boundary lines which makes the Federal Republic complain and demand a re-distribution of the total area of the continental shelf appertaining respectively to the Netherlands, the Federal Republic and Denmark, as between those three countries.

But, Mr. President and Members of the Court, on the basis of what particular legal bond between those three countries could the Federal Republic possibly consider, that those three countries are obliged to proceed to such a re-distribution?

The general rules of international law certainly do not create such a regional community of a group of States committed to contribute their individual rights into a common fund to be distributed according to some *ad hoc* standard of equitableness. The whole idea is alien to the existing rules of general international law and could only be realized on the basis of a particular explicit treaty concluded between the three States concerned. Obviously, there is no such treaty and the demand of the Federal Republic must fail.

ARGUMENT OF MR. JACOBSEN

AGENT FOR THE GOVERNMENT OF THE KINGDOM OF DENMARK

Mr. JACOBSEN: Mr. President, Members of the Court, as it has been made quite clear, the Danish and the Netherlands Governments of course agree, that if the principle laid down in the Geneva Convention, Article 6, paragraph 2, is

found to be the applicable rule, then the exception of special circumstances may come under consideration. We consider this exception as part of the development of customary law, as Professor Waldock has explained, and we therefore consider it applicable in the context of each of the three contentions on which we base our claim.

As from the outset, there could be no doubt as to the position of the two Governments, at least in principle, it was to be expected that the Federal Republic, wanting a boundary line deviating from the one following from the equidistance principle pure and simple, would rely heavily upon the possible application of this rule of exception. This has not been the case.

The special circumstances clause has been invoked only belatedly and half-heartedly. Before entering upon how the clause should be interpreted, and whether it is correctly interpreted, is applicable in the cases before the Court, it should be pointed out in which way the clause has been invoked by the Federal Republic. The development of this part of the cases tends to raise considerable doubt as to whether the Federal Republic itself really believes that the clause is applicable.

Not a hint of the clause is to be found in the four submissions contained in the Memorial. It would therefore seem that at the time of the Memorial, the Federal Republic did not want to try to base any part of its position on that clause. And it should be remembered that already at that time all facts of the cases, which are quite simple, were fully known to the Federal Republic.

Neither is a trace of the clause to be found in the different conclusions placed at various points of the Memorial. Apparently, no legal consideration was, in the opinion of the Federal Republic, so close to the special circumstances clause that this clause deserved mentioning in the conclusions.

True, the clause was mentioned repeatedly in the text of the Memorial, but with quite a different aim. The Federal Republic wanted to show defects and shortcomings of the main rule, the equidistance principle. And in order to do so it again and again wanted to bring to the attention of the Court that, in certain cases, covered by the special circumstances clause, the general rule of equidistance was to be deviated from.

These arguments refer to the rule of Article 6 of the Convention in general, and do not mean that the Federal Republic invokes the clause as specifically applicable in these cases before the Court. And, Mr. President, I might add that this way of criticizing the general rule of the Convention is not to the point. When the international community has found that the proper way to regulate these matters is to formulate a general rule—the equidistance principle—and to add an exception—the special circumstances clause, the Federal Republic can distract nothing from the value or strength of the main rule by repeatedly maintaining that in some cases covered by the exception, there must be a deviation from the main rule. This has been explicitly provided for in the Convention, and this whole discussion of the general relation between the exception and the main rule is without any bearing on the cases before the Court.

Part II, Chapter III, of the Memorial, under the title "The Special Case of the North Sea", is the last chapter and contains the Federal Republic's various suggestions for another boundary line. These suggestions are based on the concept of coastal frontages, the sector theory applied to the North Sea and, finally, that the boundary should be established by agreement, but there is not one word as to the special circumstances clause.

The only indication in the Memorial that the Federal Republic might want to invoke the clause of special circumstances is to be found in paragraph 72

under a general title "The 'Special Circumstances' in Article 6 of the Continental Shelf Convention". Here, in the course of a discussion on the special circumstances clause, the Federal Republic mentions, in passing, "the North Sea coast contours" "... where the German part is flanked on the one side by the West Frisian Islands of the Netherlands coast, and on the other side by the Danish coast of Jutland"; and it then goes on to say:

"It is obvious that a division of the submarine areas between the three States made on these lines cannot be considered as an equitable result. Geographical situations of such a kind, affecting the course of the equidistance line to such an extent, represent a special configuration of the coast which excludes the application of the equidistance method."

The words of the Convention "another boundary line justified by special circumstances" have apparently been avoided very carefully. By considering the context in which this passage is placed, the two Governments thought they should consider this as at least a preparation for the possible invocation of the clause of exception.

This, on the other hand, is all that can be found in the Memorial regarding special circumstances as a factor of possible importance in the present cases. It does not give the impression that the Federal Republic believes that it can rely, to any great extent, on this clause, and the Court will, I believe, understand that, in this situation when the Federal Republic had only in the most indirect way kept the road open for a possible later development of an argument regarding special circumstances, the two Governments did not find it appropriate, in the Counter-Memorials, to enter into a complete discussion of this clause.

Such a discussion should take place only when the Federal Republic had invoked the clause and at least to some extent explained on what grounds the clause was invoked and to some degree indicated what, in the opinion of the Federal Republic, would be the consequences of the clause being applicable. Therefore the two Governments limited themselves, in the Counter-Memorials, Part II, Chapter V, to strongly denying that in the areas in question any circumstances do exist which could possibly be considered as special circumstances justifying another boundary line within the meaning of the Convention.

At the same time they outlined, in a few words, their understanding of the clause—an understanding which shows that the clause is not applicable in these cases and, in consequence, in their Submission 3, they asked the Court to adjudge and declare that "Special circumstances which justify another boundary line have not been established".

It could reasonably be expected that even these short comments of the Counter-Memorials would have induced the Federal Republic either to declare explicitly that the special circumstances clause was not invoked or to come out with a clear assertion that the clause was invoked, indicating at the same time how the clause, according to the Federal Republic, was to be understood, exactly what circumstances were considered the basis for the clause being applicable, and what other boundary line was assumed to be justified.

The Reply, however, did not fulfil these expectations. Before going into what the Reply has to say regarding special circumstances a few remarks should be made to an argument of the Federal Republic which borders upon the question of special circumstances. In more than one place in the Memorial, and it has indeed been repeated in the Reply, the Federal Republic mentions that the North Sea as such is a special case because the whole seabed is continental shelf.

It is asserted that the apportionment is a joint concern of all the coastal States, that it should be effectuated according to a uniform standard and that "The most appropriate procedure to achieve a generally acceptable apportionment would be a multilateral agreement between all the North Sea States"—that is in the Memorial, paragraph 75.

It has been shown in the Counter-Memorials that, for several reasons, this collective concept is without foundation. At the very end of the Reply, in paragraph 98, the Federal Republic in fact completely abandons this idea of treating the North Sea continental shelves as one unit to be divided up in one operation. It states expressly there "that the shares which the United Kingdom and Norway have actually received by application of the equidistance method are not out of proportion" to the respective coastal fronts of these two States and that these shares are in conformity with the sector concept. That means, in short, in the words used by the Federal Republic, that according to the Federal Republic they are proper and consequently, in the case of a multilateral division, they should be left as they are.

As the Federal Republic apparently has no objection to the impending delimitation of the Belgian continental shelf on the principle of equidistance, this idea of the North Sea as a whole is without content of element, and I may add, that, finally, during the oral proceedings, the learned Agent for the Federal Republic of Germany has, while explicitly upholding everything contained in the written proceedings, declared that he does not want to upset the whole scheme of boundaries in the North Sea—that is on the record of the first day, on page 12, *supra*.

According to the Federal Republic itself the question would now exist only vis-à-vis Denmark and vis-à-vis the Netherlands, as the case may be, these two States being Parties to these two cases.

Consequently there can be no question of the North Sea as such being a special case but only of a possible special circumstances case existing between, on the one hand, Denmark and the Federal Republic and, on the other hand, the Netherlands and the Federal Republic.

Mr. President, I now return to my main theme—the role of the special circumstances clause during the written proceedings. In the Reply, in Submission 2 (c), the Federal Republic expressly invokes the special circumstances clause. But there are some remarkable facts attached to that submission.

According to that submission "special circumstances within the meaning of . . . [Article 6, paragraph 2, of the Convention] would exclude the application of the equidistance method in the present case".

In the same way as in the one short mention of the clause in the Memorial, the wording of the submission is not the wording of the Convention. According to Article 6, special circumstances may justify another boundary line, that is, a positive rule, but the Federal Republic has reduced it to a negative rule that the equidistance method should be excluded. This is already a strong indication that the Federal Republic itself does not believe that special circumstances within the meaning of the Convention do exist in the cases before the Court.

In full conformity with this fact that the submission is formulated as embodying a rule of exclusion of the equidistance line the Federal Republic did not, during the written proceedings, give an indication of how the boundary line should be determined if the Court might follow the suggestion contained in Submission 2 (c).

During his presentation, however, the Agent for the Federal Republic quite clearly declared that Submission 4 covers the situation that the special circumstances clause might be applicable. In that case the full submission regarding

special circumstances would, as a combination of Submissions 2 (c) and 4, read approximately like this: special circumstances, within the meaning of the Convention, would exclude the application of the equidistance method in the present case and consequently, the delimitation of the continental shelf in the North Sea between the Parties is a matter which has to be settled by agreement. This agreement should apportion a just and equitable share to each of the Parties in the light of all factors relevant in this respect. That is, Mr. President, simply a combination of Submissions 2 (c) and 4.

The shortcomings in general of Submission 4 of the Reply have already been commented upon. What is here drawn to the attention of the Court is only that Submission 4 being the Federal Republic's suggestion as to the result if Submission 2 (c) were to be accepted by the Court, this result seems to be quite considerably removed from the Convention. The Geneva Convention, Article 6, speaks in the case of special circumstances of another boundary line justified, and there is no reference to either agreement or a just and equitable share or all factors relevant.

The second striking fact in connection with Submission 2 (c) is the apparent reluctance with which it has been presented. In paragraph 76 of the Reply the Federal Republic rejects the position of the two Governments that if the Federal Republic wants to base any result on special circumstances, the clause of special circumstances must be invoked. The Federal Republic maintains that in Article 6 of the Convention there is no rule to that effect, and it then goes on as follows:

"In any case the arguments to the German Memorial as well as in the present Reply leave no doubt with the Court that the Federal Republic of Germany wants to assert that the special geographical situation in the North Sea excludes a delimitation of the continental shelf between the Parties according to the principle of equidistance, irrespective of whether it may be qualified as a 'special circumstance' within the meaning of Article 6 or not."

In the text here, as well as in the submission, the Federal Republic changes the wording of the Convention from "justifying another boundary line" to "excludes a delimitation according to the principle of equidistance".

Again, a negative rule is set up instead of the positive one of the Convention. And according to the text of the Reply, paragraph 76, it should be expected that, in accordance with the position taken up already in the Memorial, the Federal Republic would not present a submission regarding special circumstances.

Nevertheless, and without any explanation elsewhere in the Reply, Submission 2 (c) has been presented. On these grounds, Mr. President, it seems justified to classify the Federal Republic's invocation of the special circumstances clause as belated and half-hearted. It has, however, been invoked and it has been commented upon during the oral proceedings. It is now part of the two cases.

Having described how the special circumstances clause has been brought into the case by the Federal Republic, I now, Mr. President, propose to turn to the interpretation in general of the clause, taking as my starting point the position of the Federal Republic in this respect.

The Federal Republic does not anywhere in the written proceedings indicate that she is trying to establish a general interpretation of the special circumstances clause with regard to the coastal geographical circumstances which apparently is the only part of the question of relevance in these cases. Such a

general interpretation seems necessary when the Court is asked to decide for the first time upon this clause which is framed in a very concentrated way.

The Federal Republic does, in the Reply, when mainly discussing other questions, mention certain specific geographic configurations which cannot be considered special circumstances within the meaning of the Convention. So far there is no disagreement. But the Federal Republic does not say that this is her interpretation of the clause. On the contrary, at a somewhat later stage she asserts a much wider and in fact quite general interpretation; and it is, of course, this wide and general understanding which must be taken as the starting point for an attempt at an interpretation of the clause.

In the Reply, paragraph 82, the Federal Republic states in general:

“There is every indication that ‘special circumstances’ which may influence the determination of boundaries must be understood in the broadest sense: if geographical circumstances bring about that an equidistance boundary will have the effect to cause an unequitable apportionment of the continental shelf between the States adjacent to that continental shelf, such circumstances are ‘special’ enough to justify another boundary line.”

From what is said here, can be extracted a kind of general understanding of the clause. The assertion is that the clause is applicable if geographical circumstances would bring about that the equidistance boundary causes an unequitable apportionment—that does, of course, not say much. It is in fact only an assertion that the concept of the just and equitable share can be based on the special circumstances clause. If that were so, it would mean that the equidistance rule would be literally without effect, as every conceivable equidistance boundary, according to the Federal Republic, should be put to the test of the just and equitable share and, if it did not pass that test, should be replaced by another boundary line.

It does not seem likely that the International Law Commission should suggest, and the Geneva Conference adopt, a formula indicating equidistance from the baselines subject to a possibility of a correction in case of special circumstances, yet really intended a subjective notion of a just and equitable share.

This general statement is then, in paragraph 83, applied to the two cases before the Court in the words:

“As the map shows, it is the almost rectangular bend in the German coastline that causes both equidistance lines (if such lines were drawn as continental shelf boundaries vis-à-vis Denmark and the Netherlands) to meet before the German coast, thereby reducing Germany’s share of the continental shelf in the North Sea to a disproportionately small part if compared with the shares of the other North Sea States. This geographical situation is certainly ‘special’ enough to come within the meaning of the ‘special circumstances’ of Article 6, paragraph 2, of the Continental Shelf Convention, if that provision were applicable between the Parties.”

The Federal Republic does here, as far as the present cases are concerned, give some explanation of the expression “unequitable apportionment”. It is here mentioned that the special circumstances clause is applicable because the Federal Republic’s share is disproportionately small compared with the shares of the other North Sea States.

As I have already mentioned, these other North Sea States are Denmark and the Netherlands, as the shares of the United Kingdom, Norway and Belgium are considered as proper by the Federal Republic.

It is not said here how the proportionality is to be estimated, but it must be fair to assume that this should be according to the coastal frontages.

Expressed in this way, the Federal Republic interprets the special circumstances clause to the effect that it endorses the concept of the coastal frontage; that, of course, means this concept as it was during the written proceedings. The Federal Republic does in fact a little later, in paragraph 88, proclaim almost directly that any delimitation which is not in accordance with her concept of coastal frontage is based on circumstances which are special circumstances within the meaning of the Convention, and the comments on this interpretation are exactly the same as those just put forward. It would mean a complete negation of the main rule of equidistance because this rule has nothing to do with proportionality according to coastal frontages, a concept completely unknown during the work in the International Law Commission and at the Geneva Conference.

The Agent for the Federal Republic has, during his presentation, given almost a declaration as to his understanding of the clause as this should be generally characterized. This understanding is not quite in conformity with what was expressed in the Reply. I should, Mr. President, like to revert to this understanding at a later stage.

Now leaving aside the fact that the Federal Republic's interpretations of the clause are really repetitions of the concepts of the just and equitable share and the coastal frontage, one may consider the interpretation of the clause as given specifically for these two cases. It is that the clause is applicable if the shares resulting from the equidistance principle are disproportionate in size. Can this interpretation be correct?

A preliminary answer can be found through a look at figure 1 in the Danish Counter-Memorial, I, page 200. It is a figure inserted not to illustrate the interpretation of the special circumstances clause but to show that the Federal Republic is wrong in its assertion as to a difference between median lines and lateral equidistance lines. But the figure serves its purpose here. On this figure 1 in the Danish Counter-Memorial, I, page 200, the coasts of Leftland, Middleland and Rightland are of the same length and practically straight so that the question of proportionality can be considered on the basis of the actual coasts without reference to any version of coastal frontage. The shelf areas of these three States are certainly not proportionate to the length of their coast line. Middleland area is about one-half of that of each of the adjacent States.

It could hardly be expected that the Federal Republic, applying its interpretation of the special circumstances clause based on proportionality of shares, would maintain that the shelf area of Middleland should be increased. If she did, I do not think it would be accepted. The reason is simply that there can be no legal basis for reducing the areas appertaining to Leftland, Rightland and Northland, and here is, in our opinion, the crux of the whole matter.

In considering the shelf delimitations in the North Sea according to the equidistance principle, the Federal Republic looks to its own area, which it finds less satisfying. The conclusion drawn is that the area, being less satisfying, should be increased. In doing so, the Federal Republic overlooks the simple fact that in every question of boundary delimitation two States must be involved, and the legal position of these two States must be the same. Consequently, it is not enough, as does the Federal Republic, to look at her own situation; exactly the same attention must be paid to the neighbour State.

This simple truth is expressed in one word in Article 6 of the Geneva Convention, a word which the Federal Republic has of course seen and automatic-

ally quoted in the written proceedings, but to which she has apparently not paid the least attention. It is the word "justified".

Mr. President, when a world-wide convention, after several years of preparation in the International Law Commission, is adopted after a world-wide conference, it is not likely that a word such as "justified" has been inserted without having any meaning or being of any importance.

It is related to a rule of exception, resulting in a possible deviation for a boundary line laid down on the basis of the main rule—the rule of equidistance. It simply means that such deviation can take place if it is legally acceptable with regard to both States involved. In that case the deviation would be justified, but a deviation based solely on considerations regarding *one* of the States can never be justified.

It should here be remembered that the International Law Commission, in accordance with the wishes of governments, intended to formulate rules of law regarding the delimitation of the continental shelf, and the draft presented by the International Law Commission was accepted at the Geneva Conference without material change.

Considering this it seems legitimate to understand Article 6 of the Convention as a whole, as an expression of rules of law. Such rules cannot be interpreted to the effect that a rule of exception should cause a general redistribution of shelf areas simply because of an assertion that a straightforward application of the main rule leads to a result which one part does not consider satisfying. A rule of law has its effect attached to some facts of legal significance and it does not come into effect simply because one party is dissatisfied. Its aim is to bring about a result which is legally appropriate to both parties. It is dependent upon its result being justified.

In figure 1 of the Danish Counter-Memorial the shelf areas of Lefiland, Northland and Rightland have quite normally accrued to those States simply because they are nearer to the quite normal coast of these States than to the coast of any other State.

It could never be justified to transfer parts of those normal shelf areas to Middleland, no matter how dissatisfying she may find her own shelf area.

It therefore seems apparent that the understanding of the special circumstances clause put forward by the Federal Republic in paragraph 83 of the Reply, the idea of necessary proportionality, is unfounded. On the other hand, it could then, with reason, be asked: what then does the clause mean, in what geographical situations is it applicable? For there is no doubt that it has been meant to have an application and that it was expected that this situation would arise fairly often.

Considering that the circumstances should be special and that they should justify another boundary line, it is not so difficult to see what the clause means. The Danish Government has illustrated this in the Common Rejoinder, I, pages 533 to 535, with three small diagrams.

The situation sketched in figure E on page 533 is, as far as delimitations of shelf boundaries are concerned, really of a special character. There is no doubt as to where the boundary line would run if the small unimportant island in the middle did not exist. Its existence has a considerable effect upon the delimitation according to the equidistance rule. The diagram is, of course, an abstract drawing but the situation could be transferred to the North Sea, as seen on the map on the wall¹, where State A is Denmark and State B the United Kingdom. The effect of the island would here be quite considerable. And if the island were a small

¹ See footnote 1 on p. 32.

sand-bank it would hardly be found reasonable that this quite unimportant bit of coastline, which hitherto had been without any importance, and perhaps by a mere chance long ago had been considered as Danish, should command such considerable areas of continental shelf.

That part of the legal basis for a State having exclusive rights to the continental shelf which is expressed in the way that the shelf area is a continuation of the territory into the sea, would in a case like this not carry sufficient weight.

The reason is, of course, that the island does not really represent the territory of State A but is only an unimportant and incidental prolongation of that territory. It would not be justified to State B that her shelf should be diminished in this way through the existence of this small and unimportant island. State A has not a justified claim to the corresponding extension of her continental shelf.

A correction is justified with regard to both States and is therefore justified within the meaning of Article 6 of the Convention.

Of course, the problem of an island could be illustrated in several other ways. The island could be placed nearer to State B, or it could be far out to sea but in the vicinity of a lateral equidistance boundary as this boundary would be if the island did not exist, as demonstrated, on the map regarding Haiti and the Dominican Republic. In all these cases the situation and the legal position would be essentially the same.

A configuration like this, Mr. President, is special in the context of delimitation of the continental shelf. In this context the coastlines or baselines are decisive points of departure in delimiting the continental shelf on the basis of adjacency or propinquity. And as a coastline, an island like this is quite far removed from the concept of a coast, that is the coast representing the solid territory which is the legal basis for the extension of the sovereign rights of a State into the sea. It depends, of course, among possible other factors, upon the size and importance of the island and probably also upon the extent to which the island influences the equidistance line, whether the island is to be considered a special circumstance under the Convention.

A decision on these matters of fact may often be difficult. But it is essentially geographical situations of this kind which are special circumstances justifying another boundary line within the meaning of the Convention.

The Court is, no doubt, aware that small, insignificant islands are scattered all over the seas of the world, also situated in such a way that they might influence an equidistance line determining the boundary of a continental shelf. It is, therefore, quite natural that the International Law Commission states in its commentary that *the case may arise fairly often*.

The learned Agent for the Federal Republic was of the opinion that if situations like those mentioned constitute the main content of the special circumstances clause, this clause would practically be without application and the equidistance principle would be the only and exclusive rule. The Court knows the geography of the world and will be fully aware of the multitude of small islands which in many parts of the world might interfere with the delimitation of the continental shelf.

Geographical configurations constituting special circumstances within the meaning of the Convention can be of a somewhat different kind. In figure F in the Rejoinder, I, page 534, is shown a long thin peninsula which has the same effect as the island shown in figure E. As shown in figure G, the difference between the island and the peninsula is, in fact, not considerable, and just like the island the peninsula could, of course, be situated in a different way, for instance, close to a lateral equidistance boundary as this boundary would be if the peninsula were not there.

No doubt the problems described will exist far more often with regard to islands than to peninsulas. But the basic legal considerations are the same. Even if the basis for a State's exclusive right to continental shelf is the continuation of that State's territory into the sea, this holds good only as far as the more solid part of the territory is concerned. If highly projecting, materially insignificant parts of the territory should be vested with full rights to continental shelf, injustice would be done to the opposite or adjacent State and the special circumstances clause might then be applicable.

No doubt this interpretation differs considerably from the understanding set forth by the Federal Republic, according to which the clause is applicable wherever geographical circumstances cause the equidistance area, judged by a standard of proportionality between coastal fronts, to be less satisfying to one of the States involved. Here the Federal Republic completely disregards two provisions of the Convention:

First, the circumstances should be special, but the Federal Republic invokes any geographical circumstance if only the result is less satisfying.

Second, the deviation from the equidistance line should be justified, but the Federal Republic disregards any consideration of the rights of the neighbour State to continental shelf.

True, as Professor Waldock pointed out, the learned Agent for the Federal Republic, in the record for the second day, page 45, *supra*, accepted the condition that a deviation should be justified, but he then, in fact, deprived this condition of all content by placing it solely in the context of what he considers equitable apportionment.

The Court adjourned from 11.20 a.m. to 11.55 a.m.

Before the recess I had just finished my presentation of our understanding of the special circumstances clause based on the wording of the Convention and on what we consider ordinary legal considerations.

The interpretation we have put forward here is in full conformity with the *travaux préparatoires*. According to this interpretation, the clause may be applicable with regard to some islands as well as to the exceptional configurations of the mainland coast in the form of some peninsulas, and as the situation of islands which I have described is quite common, the question of application will arise fairly often, as mentioned in the Commentary of the International Law Commission.

If one goes carefully through all reports on the work of the International Law Commission and at the Geneva Conference, it will be seen that the question of the special circumstances clause is mostly treated in quite general terms, but each of the comparatively few times a more specific coastal configuration is mentioned as a possible special circumstance, it is either an insignificant island or a peninsula or promontory. It is nowhere possible to find any indication that a rule of the kind asserted by the Federal Republic has been contemplated. An idea of proportionality based on coastal fronts never occurred to anyone.

The learned Agent for the Federal Republic in his presentation disagreed as to what we have said regarding the *travaux préparatoires*. But unhappily in the record of the second day, page 44, *supra*, he sustains his disagreement only with a reference to the Memorial, paragraphs 50 to 52 and 68 to 72, and there, as far as coastal geographical configurations are concerned, the Federal Republic has not presented, either from the work of the International Law Commission and the Geneva Conference, or in the doctrine from the year 1953, when the clause was formulated in the International Law Commission, any reference to

anything but unimportant islands and peninsulas. The *travaux préparatoires*, as well as simple legal considerations, lead to the conclusion that as far as geographical configurations are concerned the scope of the clause is in the essence the one I have advocated, a scope that gives the clause a fairly wide application.

Before leaving this more general part of the question of special circumstances, I find it necessary to comment on one other general point of the clause. What are the consequences of the clause being applicable?

According to Article 6 of the Convention, the result is another boundary line. The Convention does not indicate directly what the other boundary line should be, but it seems pretty certain that the Convention, in case the clause is applied, envisages that there is another boundary line. It does not seem to envisage that the result is a complete void and that no result is possible on a legal basis. If the clause is understood as maintained by the two Governments, there is a result which, in fact, offers itself. In figure E of the Rejoinder, if the reason for the clause being applicable is that the island is too small and unimportant to represent the territory of State A, the obvious solution would be to disregard the island and delimit the equidistance boundary as if the island did not exist. The result would be a median line based on the two mainland coasts only. In figure F the peninsula should be disregarded in the same way.

These results would be the direct consequences of the reasons in law for the exception being used. This is nothing new. It was suggested at the Geneva Conference by the British delegate, Kennedy, a well-known authority on maritime boundaries and, according to the official records, nobody seemed to disagree. What he said can be found in the Rejoinder, paragraph 128:

“he suggested that, for the purposes of drawing a boundary, islands should be treated on their merits, very small islands or sand cays on a continuous continental shelf and outside the belts of territorial sea being neglected as base points for measurement and having only their own appropriate territorial sea”.

Now, of course, these questions are not always as simple as indicated in the examples cited by Commander Kennedy or the examples shown in figures E, F and G. Considerable doubt may exist whether an island, considering its size as well as its position, should be taken as a special circumstance. In such cases it might be natural in an agreement and, perhaps, in a judicial decision, to give an island part weight and, for instance, determine the boundary as being placed in the middle between two equidistance lines, one taking the island into account and one leaving it out. But even if the result might be a boundary line of this kind, this application of a modified equidistance principle would lead to a result based on legal considerations.

The Agent for the Federal Republic was during his oral presentation strongly opposed to this understanding of the consequences. He based his disagreement mainly on the question: If this were the intention of the Convention why does not Article 6 expressly state that in the case of special circumstances the boundary should be constructed on other baselines? This is in the record of the second day, page 47, *supra*.

This question is, at least to some extent, based on a misunderstanding. Article 6 of the Convention treats special circumstances in general, be it coastal geographical circumstances or special circumstances of quite a different kind.

Here in these two cases we are concerned only with coastal geographical configurations because nothing else has been invoked by the Federal Republic and what I have said has regard to such configurations only. Article 6, covering

all kinds of special circumstances in one single rule, could not very well in that rule indicate expressly the consequences attached to only part of the circumstances covered by the rule.

It should perhaps be added that a boundary delimitation of the kind mentioned by Commander Kennedy has now taken place, although the agreement is not yet ratified. The Italian-Yugoslavian Agreement shown in Annex 7 in the Rejoinder, I, page 559, became known to the two Governments as published at such a time that it could be included in the Annex to the Rejoinder, but could not be commented upon in detail.

The solution here can be seen from chart No. 1 in I, page 563, showing the agreed line of delimitation as a dotted line and a line of delimitation applying the 1958 Geneva Convention as a fully drawn line. This last line represents in fact the equidistance line taking everything into account.

It will be seen that the agreed boundary line on some points deviates from a true and full equidistance line and the reason is simply that some small islands, both Italian and Yugoslav, have been disregarded. Two of these, the Yugoslav island Pelagosa and the smaller island east of it, are situated quite near to this modified equidistance line and they have consequently been given zones of 12 nautical miles, or the maximum territorial sea recognized.

The special circumstances clause is generally in short talked of as an exception from the equidistance rule. But, as I have tried to show, if this exception is applied to coastal geographical circumstances, the boundary line is nevertheless drawn on the basis of equidistance. The special circumstances clause is, however, even in this field, an exception from the equidistance rule, when this rule is seen with its true and full content.

According to Article 6 of the Convention, the rule is that the boundary shall be determined by application of the principle of equidistance from the nearest points of the baselines from which the breadth of the territorial sea is measured. If the exception is applied because some part of the baseline is too special, or perhaps light-weight, to serve as a basis for rights to continental shelf, then the principle of equidistance is maintained but applied to other and better starting-points. It might be expressed in the way that the exception has not regard to the fundamental principle of adjacency or equidistance, but to the geographical facts on which this principle is to be applied.

When these results of the clause, applied within its scope as we understand it, are compared with the results of the clause as understood by the Federal Republic, a marked difference will be seen. It follows of necessity that if the clause is considered applicable in any geographical situation in which the equidistance principle is found to lead to results less satisfying because they are not proportionate, no solution could possibly be at hand. If this were not the case, the Federal Republic would, no doubt, have indicated the boundary line to which she wants to lay claim. There is no indication of this kind.

On the contrary, by formulating Submission 2 (*c*) to the effect that special circumstances exclude the application of the equidistance principle, and in this way basing the invoking of the clause on terms different from those of the Convention, the Federal Republic has directly indicated that when the clause is understood in their way there could be no result forthcoming. And this means, of course, again, in our opinion, that the wording invoked by the Federal Republic is not the wording or the rule of the Convention.

Mr. President, I shall now turn explicitly to the question whether special circumstances within the meaning of the Convention are present in the areas covered by the two cases. The Danish and Netherlands Governments emphatically deny that such circumstances are present, and it seems to be accepted

that it is up to the Federal Republic, who invokes the clause, to indicate and show what special circumstances are invoked.

In this part of my address I shall mainly deal with the question as it was presented by the learned Agent for the Federal Republic, and then return to what is left from the written proceedings.

It has certainly not been easy to follow the lines of reasoning of the Federal Republic, and there has, on our sides, been considerable doubt as to what was in fact indicated as a special circumstance. But in the very last part of the presentation by the learned Agent for the Federal Republic a considerable degree of clarity was obtained. It is, however, necessary to touch upon what seemed to be the position of the Federal Republic almost to the end of the oral presentation.

The Federal Republic has in the written proceedings, and the Agent for the Federal Republic in his presentation, beyond what I have already mentioned, relied on the assertion that projecting parts of the coasts of Denmark and the Netherlands played a decisive part in causing the delimitation which, according to the Federal Republic, is inequitable.

What this really meant was difficult to understand. The direct understanding would be that on the coasts of the Netherlands as well as of Denmark there should be peninsulas affecting the equidistance boundary. The two Governments are of the opinion that some peninsulas are typical cases of geographical circumstances, and exactly the same has been expressed by the Federal Republic in the Reply, paragraphs 59 to 61. The difficulty was that it was impossible to find any such peninsulas on the North Sea coasts of the Netherlands and Denmark.

During the oral presentation it became clear that the Agent for the Federal Republic used the expression "projecting part" also as covering a configuration such as the one on the map showing the coastlines of the Dominican Republic and Haiti¹, a situation where the mainland coasts of two States are lying approximately at right angles to each other. It was here asserted that this configuration caused inequitable diversion of the equidistance line, although it is difficult to see what is wrong with this, apart from the small islands, quite normal distance line. The problem was, however, that nothing having the least similarity with this situation does exist in the relations between Denmark and the Federal Republic, and between the Netherlands and the Federal Republic, or at all in the south-eastern part of the North Sea.

Furthermore, a diagram was produced showing the alleged inequitable diversion of the equidistance line resulting from the existence of what was called a headland. This might be a peninsula, and consequently possibly a special circumstance, or it might be a coastal configuration as the one between Haiti and the Dominican Republic, which is something quite different.

What is really interesting about all this is, however, that it was finally, in the very last part of the presentation, declared, without any qualification, that nothing of this has the slightest bearing upon the two cases before the Court. The learned Agent for the Federal Republic declared on the second day of his presentation, in the record, page 50, *supra*, as revised:

"Suppose you would isolate the Danish and the northern part of the German coast and disregard the existence of all other coasts of the North Sea, as if both countries were facing an open sea. Then it might be possible, under this hypothesis, to regard the areas west of both countries as

¹ See p. 28, *supra*.

a natural continuation of their territories into the sea. The equidistance line could then be regarded as normal and equitable. You could do the same with the Netherlands coast and the adjoining part of the German coast and disregard the other North Sea coasts, just as if both countries were facing an open sea to the north-north west, the areas north-north west of both coasts might then be regarded as a natural continuation of the Netherlands or German territories into the sea. The equidistance boundary might then, in such a case, be regarded as normal and equitable."

This means, Mr. President, that now there is agreement that on the coasts of Denmark and the Netherlands there are no projecting parts influencing the boundary lines, be it peninsulas or configurations like the one regarding Haiti. The Federal Republic does not assert that in any of the two cases seen in isolation there is any inequitable diversion of the equidistance line. In short, the Federal Republic agrees that if there were no Netherlands continental shelf, the Danish delimitation vis-à-vis the Federal Republic is quite correct and cannot in any way be contested by the Federal Republic, and similarly, if there were no Danish continental shelf the Netherlands delimitation vis-à-vis the Federal Republic is correct and cannot be contested by the Federal Republic.

This again means that no special circumstances, within the meaning of Article 6 of the Convention, exist with regard to any of the two delimitations seen in isolation. And it means that everything that has been said or implied as to the equidistance boundary being based on single projecting points has been completely retracted.

This is, of course, no mistake or slip of the tongue on the part of the Agent of the Federal Republic. It has constantly been the position of the two Governments that it is so, and they have tried to show it in two diagrams. It is in the Danish Counter-Memorial, figure 3, at I, page 213, and in the Netherlands Counter-Memorial, figure 4, I, page 366. These diagrams simply serve to show the continental shelf of each country, without comparing it with the German continental shelf.

In the Danish diagram this is done by leaving out the political frontiers on the continent and the corresponding equidistance boundaries, and in the Netherlands diagram by leaving out the German/Danish frontier in the same way. This gives, as a result, the continental shelf of each State isolated from the question of comparison raised by the Federal Republic.

The point of the two diagrams—and here the Federal Republic now completely agrees—is that when the shelf areas of Denmark and of the Netherlands are seen in isolation and not in comparison with that of the Federal Republic, they are completely normal continental shelf areas, lying nearer to the coast of Denmark and the coast of the Netherlands than to the coast of any other State, and delimited by normal and equitable equidistance lines.

So far there is no case at all. On what basis, then, does the Federal Republic invoke the clause of special circumstances?

According to the learned Agent for the Federal Republic—it is in the record for the second day at page 51, *supra*—the Danish and Netherlands coasts are projecting towards the centre of the North Sea, while the German coast curves back. And it is explicitly declared—in the same record on page 51, *supra*—that when the Agent for the Federal Republic talks about projecting parts, he means these general directions of these general coastlines. This seems to be quite far from the usual way of describing these things, but now the situation has been made clear. There are no projecting parts in the usual understanding

of this expression, but the Federal Republic has based its claims on the general direction of the Danish and the Netherlands coasts.

It is claimed that, as a consequence of these directions of the coasts, the equidistance lines on both sides of the German continental shelf area are distorted, so that they meet not far from the German coast. This is a more elaborate way of saying what was expressed in the Reply, paragraph 83, that it is the almost rectangular bend in the German coastline that causes both equidistance lines to meet before the German coast.

Before going further, I should make some comment on the allegation that the equidistance lines are distorted. A line of equidistance always indicates the exact geometrical situation, and in the geometrical sense it cannot be distorted. It might, however, in the legal sense, be justified to talk of distortion in cases where the equidistance line is influenced by geographical factors that must be regarded as special circumstances, with the consequence that the equidistance line should be corrected.

However, reverting to the main line of my argument, here we have complete agreement between the Parties that the Danish/German equidistance boundary, and the Netherlands/German equidistance boundary, when seen in isolation, are completely normal and justified. The fact that these lines, in a legally correct way, indicate what is nearer to each of the three States than to any other, is not in the least influenced by the assertion by the Federal Republic that the aggregate effect of these two equidistance lines should lead to some consequence. There is not the slightest basis for talking of any distortion of equidistance lines.

It is true, as asserted by the Federal Republic in the Reply, paragraph 83, that the almost rectangular bend in the German coastline, or to be more precise a bend of about 100 degrees, causes the two equidistance boundaries to meet. It is also undoubtedly true that, if the geographical situation were quite different and if the aggregate coastlines of the three States were one long, practically straight line, the equidistance boundaries would not meet—at least not in the same point—and the continental shelf area of the Federal Republic would be larger.

But this is something quite different from any question of distortion of boundary lines. It has been agreed, and it is an undeniable fact, that these equidistance boundaries, which have so long been criticized so firmly, have been constructed quite properly on the basis of the Danish/German and the Netherlands/German coasts which are ordinary, more or less straight, coasts. It has been agreed that, seen only in the isolated relations between Denmark and the Federal Republic, and the Netherlands and the Federal Republic, no criticism could be directed against them. How then is it possible for the Federal Republic to maintain that this system of delimitation is contrary to the rules of law as envisaged by the Federal Republic?

I shall here, Mr. President, revert to the general characterization of the special circumstances clause regarding which the Agent for the Federal Republic formulated a declaration in the following wording, which will be found in the record for the second day at page 50, *supra*:

“Any geographical factor which diverts the course of the equidistance boundary between two States in such a manner as to cause the allocation of considerable areas of the continental shelf to one State . . . which is necessarily classified as a natural continuation of the territory of a second State, then such a factor must be regarded as a special circumstance within the meaning of Article 6, paragraph 2, of the Convention.”

On the surface, that seems to be in fact the same understanding as I have advocated on behalf of the two Governments. The problem of special circumstances exists, and can only exist, between two States. The decisive element is a geographical factor which causes some area naturally appertaining to one State to be allocated to the other State.

How could this possibly lead to the equidistance boundaries being corrected because of special circumstances? There is agreement that there are no coastal configurations that could be considered special circumstances. The equidistance lines as such are fully accepted.

The idea here, as well as, in fact, almost the case of the Federal Republic as a whole, is based on a completely new line of thought and argument. True, it has been touched upon in the Reply, but rather as a kind of illustration. It had no existence in the Memorial, but after the closing of the written proceedings it has come into existence as in fact the only basis for the claim of the Federal Republic.

The question here is whether the equidistance boundaries should be deviated from. This might also be expressed to the effect that the question is whether the Danish and the Netherlands equidistance areas are to be reduced in favour of the Federal Republic.

In order to effectuate such an operation, the learned Agent for the Federal Republic quite simply puts up, while interpreting a rule of exception from the equidistance rule, a quite new principal rule of delimitation of continental shelf, a rule to the effect that each State is entitled to what might be called a triangular or sectoral continuation of that State's territory into the sea.

This, of course, is not a very clear concept, seen in terms of boundary delimitation, and therefore the Federal Republic finds it possible to define this concept as it thinks fit. And, as the Court knows, the Federal Republic generally considers the triangle or sector based on the Borkum-Sylt line and stretching to the British/Netherlands/Danish tripoint in the North Sea, as the natural continuation of its territory.

Now having all by herself created a new principal rule of delimitation, the Federal Republic compares the result of this rule with the result of the actual rule of the Convention—the equidistance rule. There is, of course, some overlapping between the German continuation triangle or sector and the Danish and the Netherlands equidistance areas.

According to the understanding of the Convention put forward by the Federal Republic, this is a special circumstance, not to the effect that the continuation triangle must yield, but to the effect that the equidistance boundaries should be corrected in order to respect the triangle.

This is a remarkable way of interpreting rules of law. One might think that some misunderstanding had crept in. But that is not the case.

During the very last part of his presentation—the record for the second day, page 50, *supra*—the learned Agent for the Federal Republic made his position crystal clear. After having said that the case was reduced to the question whether the equidistance boundary follows the true limits of the continuation of the States' territory into the sea, he added:

“As to the situation before the Danish, German and the Netherlands coast, the real question is: What areas have to be regarded as the natural continuation of the one or the other State? That brings us in fact back to the same criteria which we needed for determining the equitable apportionment of the continental shelf between the parties under the non-conventional régime.”

This is the essence of the understanding of the special circumstances clause asserted by the Federal Republic while interpreting this exception from the equidistance rule. The Federal Republic interprets the clause to the effect that if the main rule, the equidistance principle, leads to a result different from one which might have been reached if the equidistance-special circumstances rule did not exist, then that latter rule must prevail. This means, quite simply, that the effect of the special circumstances clause is to negate completely not only the main rule of Article 6—the equidistance principle—but also the whole principle of adjacency or propinquity contained in Articles 1 and 2, to leave a free field for any State wanting to put forth any idea of delimiting the continental shelf.

I do not think, Mr. President, that I can say more than this. The two Governments cannot accept that a rule of exception can be interpreted in this way seen in its relation to a main rule.

As part of these legal positions it is almost asserted that the concept of triangular continuation of the territory into the sea as the only proper rule of boundary delimitation, the concept on which the whole case of the Federal Republic has now been based, is derived from what we consider the fundamental rule in this respect.

True the two Governments have mentioned that the sovereign rights of coastal States to continental shelf are based on the concept of the continuation of the territory into the sea. This was said in order to explain that the question at hand has regard to the extension of the rights of the coastal State and the delimitation of the area involved, as opposed to the German concept of a sharing out of a common area. And the two Governments have, when indicating their understanding of the special circumstances clause, explained that, in special situations when the coast did not truly represent a territory behind, part of a continental shelf would not be a true continuation of a territory and therefore the clause of exception might be applicable.

However true this is, Mr. President, it is something quite different from what the Federal Republic is now asserting. One thing is the basic thought from which a legal institution arises. Quite another thing is the framework of legal criteria within which this institution is brought into the realm of actual law. In this discussion of the special circumstances rule both Parties clearly base themselves on the formula of the Convention, and neither the Convention nor the *travaux préparatoires* give the slightest indication that the continental shelf could be delimited through a general concept of continuation of the territory into the sea, based on lines called coastal fronts. It is clearly laid down that the rights of the coastal States are based on adjacency and propinquity which in Article 6 is formulated in the rule of equidistance.

This position on our sides is clearly expressed during the written proceedings, for instance, paragraph 24 of the Common Rejoinder, to which I here very strongly refer.

The rule of delimitation put forward by the Federal Republic—the concept of continuation of the territory into the sea—apparently lacks any criteria as to the delimitation of the boundary. How could it be decided, if continuation is to be different from propinquity, where the continuations from two coasts meet beneath the sea? The Federal Republic is fully aware of this and has therefore tried to furnish the necessary criteria by setting up the completely new coastal frontages of Denmark and the Netherlands as the basis for the continuation of the territories of each State.

It was our impression, Mr. President, that both the technical basis for and the results ensuing from this geometrical construction would call for searching

comment, but the learned Agent promised to demonstrate, in the second round, the relation between the scheme he envisaged and the scheme envisaged by Professor Oda. We take it for granted that this will be in the form of diagrams, and we therefore feel both bound and entitled to postpone our comments until we have been able to see what these schemes really contain.

The Court will recall that when the Agent for the Federal Republic—the record for the second day, page 50, *supra*—explained how the Danish and the Netherlands equidistance areas would be quite proper, seen in isolation, and if only the continental shelf area of the other States did not exist, he clearly did this in the terms that the maritime areas which in the two hypothetical cases would be free from either Danish or Netherlands sovereign rights would constitute the natural continuation of the German territory. These two areas are certainly not the German continuation area so elaborately explained on the basis of coastal frontages. But where then is the continuation concept at all?

The situation is in fact quite simple. The Federal Republic has at last found it necessary to accept the obvious fact that both equidistance boundaries when seen as the delimitations between Denmark and the Federal Republic and the Netherlands and the Federal Republic are perfectly normal and just and therefore unopposable.

Consequently, the Federal Republic can only rely upon what could be called the combined effect of the Danish and Netherlands equidistance areas, and as apparently the Federal Republic is very well aware that this situation cannot by any stretch of imagination be brought within the special circumstances clause, a completely new approach is made during the oral hearings.

The Federal Republic introduces boldly, while interpreting the rule of the Convention, a completely new main rule of delimitation called the continuation of the territory from coastal fronts. This new rule she construes through the interesting means of coastal fronts to give the result already indicated in the Memorial, I, page 85, but on quite a different basis; and to the extent this new concept of delimitation is in conflict with the actual main rule of delimitation, the equidistance principle, she simply declares that special circumstances are present with the effect that the rule of the Convention based on equidistance must yield and the triangle based on her own rule of continuation shall prevail.

This is the real argument on special circumstances as put forward during the oral presentation and it is on this that the Court has got to decide in this part of the case.

Although what I have commented upon so far covers the legal constructions presented orally here in Court, I shall not pass over the fact that at earlier stages of the cases the Federal Republic has presented its case for special circumstances in a way that had more relation to the existing legal and geographical realities, and the Agent for the Federal Republic has explicitly upheld everything contained in the written proceedings.

In the Reply, paragraph 83, mentioned several times before, where the Federal Republic talks about the bend in the German coastline causing the two equidistance lines to meet, it is asserted that this geographical situation is certainly special enough to come within the meaning of the special circumstances of Article 6, paragraph 2, of the Convention. Here is an invocation of special circumstances without the elaborate constructions which have been built up around it in the oral proceedings.

As the two Governments understand the clause it is clearly inapplicable already, because a correction of the equidistance boundaries could never be

justified. The Federal Republic has now, without any qualifications, accepted that the equidistance areas of both Denmark and the Netherlands, each of these areas considered by itself, are completely correct and just. The reason is, of course, that every square inch of these areas is nearer to the coasts representing the mainland of Denmark or the Netherlands, as the case may be, than to the coast of any other State. Consequently those areas belong to those two States under international maritime law.

When this is so, and on that there is agreement, another boundary line than the equidistance line could never be justified. There could be no reason on a legal basis for reducing any of those two quite normal equidistance areas.

As I have tried to make clear, a correction could only be justified within the meaning of the Convention if circumstances regarding both continental shelf areas did militate in favour of such correction, and whatever the Federal Republic might think of her continental shelf area it seems quite certain that nothing regarding the Danish and the Netherlands areas could give reason for a correction.

At the same time it seems necessary to consider how the demanded correction could possibly be carried out. The Federal Republic has certainly not during the written proceedings indicated another possible boundary line or any kind of principle either in law or in mathematics according to which a deviating boundary line could be construed. I here, Mr. President, disregard the ideas of continuation from coastal fronts. As I just mentioned, we feel bound and entitled to postpone our comments on this until we know what it really means.

And it seems to be a reasonable interpretation of the special circumstances clause that the State invoking special circumstances justifying another boundary line should at least give some indication of this other boundary line. If that State is unable to do so, the invocation seems to be seriously lacking in legal foundation.

But the position of the Federal Republic in this respect is quite natural and easy to understand. For it would be impossible to indicate any kind of principle applicable. What the Federal Republic asks for is a clear *ad hoc* decision in fact *ex aequo et bono*.

That this is so, can be seen from what the Agent for the Federal Republic said in the end of his presentation, the record for the second day, page 51, *supra*. It was here explained that, if the Danish continental shelf did not exist, the Federal Republic would fully respect the equidistance boundary towards the Netherlands and be content with what she got to the north, and vice versa. When this is the position of the Federal Republic, how then is it possible to maintain that there is, as expressed in the *Compromis*, any principle or rule of international law according to which she could be entitled to acquire part of the Danish and part of the Netherlands equidistance areas, the appropriateness of which she has fully recognized.

As far as State practice exists in situations of this kind, it differs from the position taken by the Federal Republic, and a situation like this is certainly not unique.

Iraq, as Professor Waldock pointed out, being in a geographical position of practically the same kind as the Federal Republic, has unilaterally delimited her continental shelf according to equidistance, apparently without imagining that special circumstances could possibly justify another boundary line. And this has been done in an area where mineral resources may be found anywhere.

Similarly, the impending Belgian delimitation of continental shelf according to the equidistance principle fully accepts the rights of the neighbouring

States, although the result for Belgium is very much the same as it is for the Federal Republic, her continental shelf area being strongly influenced by the position and direction of the coasts of the adjoining States, mainly the United Kingdom.

The Court rose at 12.55 p.m.

EIGHTH PUBLIC HEARING (1 XI 68, 10.5 a.m.)

Present: [See hearing of 23 X 68.]

Mr. JACOBSEN: Just before the Court adjourned I had been discussing the allegation in paragraph 83 of the Reply that the bend in the German coastline is a special circumstance within the meaning of the Convention. I found that this could not possibly be the case, mainly because it could not be justified to reduce the Danish and the Netherlands equidistance areas which are, also according to the Federal Republic, each, individually, quite correct and unopposable.

Here I continue the discussion of the invoked combined effects of the two equidistance lines, where I have just one more point. There are, Mr. President, two cases before the Court. In one case, Denmark wants her boundary towards the Federal Republic and towards the Netherlands respected, and in the other case, the Netherlands wants her equidistance boundary towards the Federal Republic and Denmark respected.

In these two cases the dispute exists between the Federal Republic and Denmark, and between the Federal Republic and the Netherlands, as the case may be. Denmark and the Netherlands each wants its boundary line respected by the Federal Republic and what boundary relation the Federal Republic may have towards the other State is outside the question at hand.

According to Article 6, paragraph 2, of the Convention, in the case of adjacent States—

“the boundary shall be determined by application of the principle of equidistance from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured”.

It seems quite apparent that according to the main rule only the baselines of the two States, between whom the delimitation is to take place, are of any consequence. No other factor is taken into consideration, and this is inherent in the principle of equidistance pure and simple.

The rule of exception is formulated in the closest possible connection with the main rule and therefore has regard to possible geographic configurations regarding the coast of one of the States, or both States, involved in the boundary delimitation. But it has regard to nothing more. Especially it does not have regard to a boundary delimitation towards some other State. The boundary delimitation is clearly envisaged as a question between the two States whose continental shelves meet somewhere in the sea, and there does not seem to be the least possibility of introducing a boundary elsewhere, vis-à-vis some other State, into the question of delimitation.

The declaration of the learned Agent for the Federal Republic regarding the general understanding of the special circumstances clause—I have quoted it, it is in the record for the second day, page 50, *supra*—quite clearly expressed that the clause has relation only to the equidistance boundary between two States. I presume that this declaration should mean something.

The idea of a combination of several continental shelf boundaries as a factor of importance is possible only if the delimitation process, as advocated by the Federal Republic during the written proceedings, is viewed not according to the rules of the Convention, but as a question of proportionate division. And even in the light of this construction the result would be complete confusion. Should

Denmark, according to the special circumstances clause, be entitled to compensation from the Federal Republic if Denmark's continental shelf boundary towards Norway might be less satisfying? Or should, in the same way, the Federal Republic be entitled to compensation from the Netherlands in the North Sea if the Federal Republic's boundary in the Baltic towards Denmark were less satisfying?

Such questions must necessarily come up if the line of argument of the Federal Republic were accepted. And the fact that the equidistance boundaries towards the two quite separate States, Denmark and the Netherlands, here intersect is of no legal significance. What makes the Federal Republic complain of the boundary line is, in both cases before the Court, that she finds her continental shelf based on equidistance less satisfying only because of the consequences of the quite separate and independent delimitation of the continental shelf towards another State.

It was never envisaged that a situation like this could be a special circumstance within the meaning of the Convention, when it is apparent and agreed that no such special circumstance exists between the two States whose continental shelf boundaries are in question.

So far, Mr. President, I have treated the question of special circumstances as in the opinion of the two Governments it should be treated, as a question of the meaning of the clause, and a question of whether in these two cases special circumstances in the true meaning of this expression do exist. I hope to have shown that nothing exists that could possibly be considered as special circumstances within the meaning of the Convention. When the Federal Republic, who can hardly be unaware of this, nevertheless invokes the clause of special circumstances, it may be because the Federal Republic views the situation in a different sense.

As far as I can see, the Federal Republic, finding its shelf area delimited in accordance with the equidistance principle less satisfying, more or less throws the Convention overboard and reasons in the following way. Our equidistance area is not equal to, or proportionate with, those of our neighbours: a result like this is not just and consequently the result must be revised. The formal basis for a revision of this kind must be the special circumstances clause.

A line of thought like this might at first sight have some appeal and, although it is clearly outside the positive rules of law of the Convention, it should be shortly commented upon. It is not easy to define what comes within the concept of justice except in the context of established legal ideas. This can be illustrated by a general view of the legal treatment of this new international asset, the continental shelf. I think I can illustrate it in four points.

First, neither as a consequence of the Continental Shelf Convention, nor as a consequence of the rules of international customary law regarding the rights of coastal States—which rules are recognized by the Federal Republic—does a landlocked State acquire any continental shelf.

Secondly, a State which is not landlocked, but has a link with the sea completely disproportionate with its size, as, for instance, and typically, the Democratic Republic of Congo, can acquire continental shelf only on the basis of its short coastline, but nothing more.

These results are indisputable. And I think it is also indisputable that the clause of special circumstances is totally inapplicable in these cases. The landlocked State cannot anywhere acquire continental shelf under the clause, and the large State with the short coastline has no possibility of getting compensation from its neighbours under the clause of special circumstances. I doubt that the Federal Republic would seriously deny this. But if this is so, how can it then

possibly be ascertained that justice in this field necessitates equality or proportionality of continental shelf areas?

Thirdly, the position is exactly the same in a case as shown in figure 1 of the Danish Counter-Memorial, J, page 200. The entire sea area here is continental shelf and the coasts of the three States beside each other are the same length, but Middleland gets only about one half of the continental shelf of its neighbours.

It seems indisputable that this result is final, although there is neither equality nor proportionality in the result. The special circumstances clause is inapplicable because the shelf area of every single State is a true expression of the principle of adjacency based on true coasts representing the solid territory behind.

Fourthly, why then should the result be different in the two cases before the Court? Here also the State in the middle—the Federal Republic—gets less than an equal shelf area. Here, too, the shelf areas of the two neighbour States are fully normal and based on coasts fully representing the territory behind.

If there be any difference from the case depicted in figure 1 of the Danish Counter-Memorial, it is that while in figure 1 the result is caused by the position of another, opposite State, it is, in the two cases at hand, as described by the Federal Republic itself, caused by the bend in the German coastline. If this should make any difference, it must be that here there is even less legal basis for Middleland—the Federal Republic—getting compensation from the neighbour States.

It is, Mr. President, a mistake to think that justice demands some kind of equality or proportionality in the delimitation of continental shelf. The demands of justice are not easy to define generally, but in every part of any legal system these demands are placed in some framework of ideas. If the results of rules of law are in accordance with that framework of ideas, the rules and the results are considered as just.

In the international legal system there is no doubt as to that framework of ideas as far as the rights of States to maritime areas are concerned. During a very long period, such rights have been acquired by the coastal States only, and the right has accrued to the coastal State only on the basis of its coast and with full respect of the similar rights of adjoining States, be they opposite or adjacent. This has always been considered justice within that part of the international legal system.

When the concept of the continental shelf came into being, the international legal community stuck firmly to this well-established notion of justice. The work of the International Law Commission, the outcome of the Geneva Conference and the widespread acceptance of the Continental Shelf Convention, or the principles of that Convention, are ample proof. The only change was that precisely in the interests of justice the special circumstances clause was explicitly inserted into the Convention—as well as into that of the territorial sea—with the aim, as far as geographic circumstances are concerned, of avoiding that insignificant, projecting parts of the coast were vested with rights regarding these new, and sometimes extensive, areas coming within the rights of the coastal States. This was a well-considered clarification of the concept of justice in this field. But otherwise, Mr. President, this concept remained unchanged.

The Federal Republic now, apparently, does not share this general opinion of justice with regard to maritime areas—that they belong to the nearest coastal State, and that the areas accruing to each coastal State are dependent upon, not only the length of the coast, but also upon the way in which the coast is placed in relation to the coasts of other States.

But it should not be forgotten that not long ago, at the Geneva Conference and for quite a long time after the Conference, the Federal Republic of Germany

apparently shared the opinion of practically all other States as to what is justice regarding maritime areas.

REQUEST BY THE COURT AND QUESTIONS BY JUDGE SIR GERALD FITZMAURICE

Le PRÉSIDENT: L'article 49 du Statut dispose notamment: «La Cour peut... demander aux agents de produire tout document et de fournir toutes explications.»

Au présent stade de la procédure, usant du droit qui lui est ainsi conféré, la Cour demande aux agents des Parties de mettre à sa disposition la documentation suivante dans la mesure où ils la possèdent ou peuvent se la procurer:

Premièrement, tous procès-verbaux, notes ou rapports qui indiqueraient les bases sur lesquelles les Parties ont déterminé les délimitations convenues lors des négociations qui ont abouti, respectivement, à l'accord du 1^{er} décembre 1964 entre la République fédérale et le Royaume des Pays-Bas et à l'accord du 9 juin 1965 entre la République fédérale et le Royaume du Danemark, et en particulier les motifs pour lesquels on a fixé les points extrêmes où ils le sont au lieu de fixer des points situés plus près ou plus loin de la côte¹.

Deuxièmement, tous procès-verbaux, notes ou autres documents concernant les discussions qui se sont déroulées au comité d'experts réuni par le rapporteur spécial de la Commission du droit international — rapport du 18 mai 1953 — et qui indiqueraient les motifs et les arguments qui ont pu être avancés avant qu'un accord intervienne sur les recommandations du comité relatives à la détermination des limites latérales dans la mer territoriale de deux Etats limitrophes et à la délimitation des plateaux continentaux².

Naturellement, les Parties pourront prendre leur temps pour préparer cette documentation ou la partie de documentation qu'elles peuvent obtenir.

Sir Gerald FITZMAURICE: I should like to put three questions to the Agents of the Kingdoms of Denmark and the Netherlands, and they are as follows.

First, with reference to the contention advanced on behalf of the Kingdoms of Denmark and the Netherlands, to the effect that the 1958 Geneva Convention on the Continental Shelf embodied already received rules of customary international law, what significance, in the opinion of the two Kingdoms, is to be attached to the following facts, namely:

First, that on the one hand, the preamble to one of the other Geneva Conventions, namely that on the régime of the high seas, recites that the parties desire "to codify the rules of international law relating to the high seas", and that they have adopted the provisions of the Convention as being "generally declaratory of established principles of international law", but that, on the other hand, no corresponding recitals preface the Continental Shelf Convention.

Second, that Article 1 of the Continental Shelf Convention itself opens with the words: "For the purposes of these Articles."

My second question is this, with regard to the contention advanced on behalf of the two Kingdoms as to the meaning to be attributed to the notion of adjacency, is this contention to be correctly understood in the following sense, namely that a given part of the seabed, even if it is near the coast of a particular country, cannot be considered as adjacent to it unless it is closer to that coast than to the coast of any other country?

¹ See pp. 303-363, *infra*.

² See p. 212, *infra*, and No. 50, p. 390, *infra*.

And my third and last question. With reference to the contention advanced on behalf of the two Kingdoms, to the effect that there is no essential difference between the case of median lines and that of lateral equidistance lines, would it be correct to say that there is the following difference, namely that apart from the distorting effects of rocks and islands—which can be met by the application of the special circumstances exception—a median line, as its name implies, does in principle always give to the States concerned areas of the same size, within the limits of their common frontage on either side of the median line, in the sense that in each case the distance from the coast up to that line will be the same for both; whereas lateral equidistance lines often cause the areas thereby attributed to the States concerned to be of different sizes in a way that cannot be accounted for merely by the length of their respective coastlines.

The Court rose at 10.33 p.m.

NINTH PUBLIC HEARING (4 IX 68, 3 p.m.)

Present: [See hearing of 23 X 68.]

REPLY OF PROFESSOR JAENICKE

AGENT FOR THE GOVERNMENT OF THE FEDERAL REPUBLIC OF GERMANY

Professor JAENICKE: Mr. President and Judges of the Court, in commencing the second phase of the oral argument I would first like to give our reply to one of the questions posed by Judge Jessup.

The question was as follows: "Will the Agent of the Federal Republic of Germany, at a convenient time, inform the Court whether it is the contention of the Federal Republic of Germany that the actual or probable location of known or potential resources on or in the continental shelf, is one of the criteria to be taken into account in determining what is a just and equitable share of the continental shelf in the North Sea?"

In response to this question I would like to state the following:

First, the criteria to be taken into account in determining what is a just and equitable share of the continental shelf are primarily, but not exclusively, geographical factors. The consideration of other factors and the weight which should be attributed to them depends on their merits under the circumstances of the concrete case.

Secondly, if, as in the North Sea, there is no reliable information about the actual location of economically exploitable resources of considerable importance, the geographical situation alone determines the equitable apportionment. Once agreement had been reached on the delimitation of the continental shelf, later knowledge as to the location of such resources should not affect the agreed boundary.

Thirdly, economically exploitable resources of considerable importance, located in areas where the boundary is disputed or yet undetermined may, under the principle of the just and equitable share, be taken into account in determining the allocation of areas to one or the other State. This may be accomplished either by changing the course of the boundary line, or by means of joint exploitation if the latter is feasible. Such a case may arise in particular if the boundary line would cut across a single deposit. Since there are no such resources in the North Sea, the delimitation of the continental shelf should be made on the basis of the geographical situation, along the lines suggested by the Federal Republic of Germany.

In this context, I may add that the simplest way to have achieved an equitable apportionment with respect to known or unknown resources would have been to place the areas of the continental shelf of the North Sea situated farther off the coast under a régime of joint control and exploitation. The Federal Republic had advocated such a solution in the earlier stages of the negotiations; since the North Sea States had begun to divide the continental shelf among themselves by boundaries, such a situation seems to be outside the realm of reality. In the present situation, a division by sectors reaching the centre of the North Sea is an effective way to give the Parties an even chance with respect to the potentialities of the continental shelf.

In response to other questions posed by Judge Jessup we have prepared

diagrams showing hypothetical median lines between some of the North Sea States. These diagrams have been distributed to the Members of the Court and to the Parties. In addition, some other diagrams have been prepared and distributed, partly in response to the questions posed by Judge Sir Gerald Fitzmaurice. With the Court's permission I would like to defer my comments on all these diagrams until later.

Turning to the basic issues of the present case, I do not feel that at this time it is necessary to reply to all the arguments which have been advanced by our opponents. This, of course, does not imply agreement with those arguments which I do not specifically refer to. I am of the belief that I can safely leave them to the appraisal of the Court.

I shall first deal with the issue of jurisdiction which all the arguments of our opponents featured so prominently. The learned counsel for our opponents saw fit to issue a warning to the effect that the Court, by following our submissions, would exceed the limits of its jurisdiction under the *Compromis* and, as the learned counsel put it, would even assume the function of legislating *ad hoc*.

I had hoped that I had already made it clear that our submissions are well within the limits of the *Compromis* and do not invite the Court to transcend its judicial function. Since the learned counsel for our opponents has again raised the issue, however, I am compelled to deal with this point for a second time.

We do not deny that the Court is faced with two separate cases, one being the dispute between the Kingdom of Denmark and the Federal Republic concerning the delimitation of the boundary between their respective continental shelf areas, and the second being the dispute between the Kingdom of the Netherlands and the Federal Republic of Germany concerning the delimitation of the boundary between their respective continental shelf areas. But it is equally clear that the Parties to both disputes, from the beginning, were of the opinion that the same rules and principles of law govern the delimitation of their respective boundaries; for that reason the three Parties agreed, in the Tripartite Protocol of 2 February 1967, which accompanied the two Special Agreements of the same day, to request the Court to join the two cases.

The learned counsel for our opponents contended, however, that the *Compromis* in each of the two disputes did not allow the Court to look to the general geographic situation transcending the narrow limits of the area where the disputed delimitation between the Parties should take place. He contended further that with respect to each of the disputed boundaries the Court would not be allowed by the *Compromis* to take cognizance of the fact that by delimiting the boundary, areas of the continental shelf would be divided among the Parties. He said, at page 81, *supra*, of the verbatim record of 28 October 1968:

"The *Compromis* contains no mention of a request to the Court to determine the principles and rules by which an area of the North Sea is to be distributed, shared out, between the three States, Denmark, the Netherlands and the Federal Republic."

But how can the Court, in ascertaining the applicable principles and rules, ignore the consequences the boundary line would have on the allocation of continental shelf areas to one or the other of the Parties? Does not the *Compromis* expressly state that the Court is requested to declare what principles and rules of law apply as to the delimitation of the continental shelf *areas*, not to the delimitation of boundaries?

I trust that the Court will not take so narrow a view of its competence, and will consider all the factors relevant to deciding what legal rule or principle is

applicable between the Parties in the present dispute. I may refer to paragraph 75 of our Memorial, I, page 76, and to paragraph 79 of our Reply, I, page 423, where we have already explained that the delimitation of the continental shelf between the North Sea States cannot be achieved by determining, as an isolated act, the boundary line between each pair of adjacent or opposite States, without taking into account the effect of each boundary on the apportionment as a whole. It is evidently impossible to pass judgment on the equitableness of a continental shelf boundary without considering the whole geographical situation and its effect on the share it apportions to the one or the other State.

The delimitation of the continental shelf within the North Sea is interdependent; each boundary will affect the proportionate size of the share of each North Sea State. In order to decide whether the equidistance method is applicable to a specified delimitation between two adjacent States, it is necessary to evaluate the effect such a boundary line would have on the share of each of the two States. In particular, a judgment whether the delimitation of the German continental shelf, by application of the equidistance method, *vis-à-vis* Denmark or *vis-à-vis* the Netherlands, is equitable, cannot be passed in isolation without regard to the combined cut-off effect which both equidistance boundaries would have on the size of the German share of the continental shelf in the North Sea.

Learned counsel for our opponents contended further that the submissions of the Federal Republic of Germany demanded from the Court not a delimitation as between two States, but rather an equitable apportionment of an unspecified area of the North Sea continental shelf between the three States, and such a demand appeared to him to travel outside the scope of the Special Agreement. But by our submissions we have not asked the Court to distribute a continental shelf area between the Parties, nor could we have asked the Court for a specific delimitation.

To place the issue in proper perspective before the Court I should once again explain the divergent legal contentions of the Parties as to the applicable rules and principles. The Kingdom of Denmark and the Kingdom of the Netherlands contend that the so-called equidistance-special circumstances rule applies according to which the Federal Republic would be obliged to accept the equidistance line as the boundary.

The Federal Republic of Germany contends that the so-called equidistance-special circumstances rule is not applicable between the Parties because it would not apportion a just and equitable share to the Federal Republic. Consequently, the principle of the just and equitable share determines, on the basis of the criteria relevant to the geographical situation in the North Sea, the delimitation to be agreed between the Parties in pursuance of Article 2 of the Special Agreement.

The difference in the legal approach between the Parties is therefore the following. The Kingdom of Denmark and the Kingdom of the Netherlands contend that the Court should declare the equidistance method applicable between the Parties because it is, in their view, equitable *per se*. The Court, it is accordingly alleged, should not be allowed to look beyond the equidistance method for determining whether this method will achieve an equitable apportionment between the Parties. The significance of this would be that the Court would merely put its seal under the result achieved by the equidistance method.

The Federal Republic, on the other hand, contends that the equidistance method cannot apply, neither under general international law nor under the Convention, if it were applicable between the Parties, because it is not established that it apportions a just and equitable share to each of the Parties. It is

the contention of the Federal Republic, and in that it differs from the legal position taken by the opposing Parties, that the Court in ascertaining whether the equidistance method is applicable between the Parties, should pass judgment on the equitableness of the apportionment achieved thereby.

If the applicability of the equidistance method is, as the Federal Republic contends, dependent on the equitableness of the apportionment achieved thereby, it is perfectly legitimate, if not necessary, to offer the Court criteria which determine whether the apportionment is equitable or not.

We could have restricted ourselves to showing that the equidistance method leads to an inequitable result. This, we submit, is already apparent on the face of the map without further comment why such an apportionment is inequitable. We presume, however, that the Court would want to know what criteria we offer as a basis for its judgment and what would be the equitable solution the Federal Republic of Germany envisages.

If the application of the equidistance method leads to an inequitable result the Parties are then placed into the position of having to agree on another boundary line which would have to be in conformity with the principle of the just and equitable share. The considerations which the Court might find pertinent to its judgment on the equitableness of an apportionment will certainly provide a sufficient basis to enable the Parties to come to an agreement on an equitable boundary line.

I cannot see in what respect these submissions and suggestions of the Federal Republic of Germany would be equivalent to asking the Court for legislation *ad hoc*, as the learned counsel for our opponents put it. In his address he mentioned an *obiter dictum* by the Permanent Court of International Justice in the *Free Zones* case. While I think nothing could be said against the substance of this *obiter dictum* of the Court I do not see how it could be pertinent to our case since both Parties to this case, in their submissions, do nothing more than to ask the Court what should be the rules and principles applicable in our case. There is no request for a deviation from the existing law nor is there a request that the Court establish a new régime.

I would like to stress the fact that the sentence quoted by the learned counsel for our opponents was only an *obiter dictum* and was not the legal ground on which this case was decided by the Court. The Court was prepared to go a long way to assist the Parties to reach an agreement and to dispose of the legal issues that had prevented the Parties from coming to an agreement. The Court declined, however, to pronounce a judgment which would be dependent on the consent of the Parties.

I might quote in this context from the same Judgment of the Court of 6 February 1930, published in *P.C.I.J., Series A, No. 24*, page 14:

"... it is certainly incompatible with the character of the judgments rendered by the Court and with the binding force attached to them by Articles 59 and 60, paragraph 2, of the Statute, for the Court to render a judgment which either of the Parties may render inoperative".

This opinion was upheld by the Court in its final judgment in this case, published in *P.C.I.J., Series A/B, No. 46*, at page 161.

To conclude this point, I respectfully submit that none of our submissions in its substance travels outside the limits of the Special Agreements and that we do not ask thereby the Court to exceed the limits of its judicial function.

I shall now turn to the second principal issue of the present case, the contention of our opponents that the Federal Republic had to accept the application of the equidistance method in the delimitation of her continental shelf.

Our opponents assert that the equidistance method is equitable *per se*; they assert that the equidistance method is the only rule that could be followed in the delimitation of the continental shelf, and they assert that any delimitation founded on the equidistance method is valid *erga omnes* against any other State.

Of course, they do not say so expressly. Presumably due to the pressure of our arguments against the general applicability of the equidistance method they make the concession of calling it the equidistance-special circumstances rule. But, if we look at the narrow interpretation which they give to the conceded exception of special circumstances, as outlined by the learned Agents for the Netherlands and Denmark last week, the equidistance method will in effect remain the only rule. The Court may have observed that in all their arguments, the Kingdom of Denmark and the Kingdom of the Netherlands utilized the phrase that it was an accepted rule of international law that any area of the continental shelf which is nearer to the coast of a particular State than to any other coast appertains by right to that State; that is to say that the coastal State has an *ipso jure* title to all areas which are nearer to some point of its coast than to any other coast. Since the equidistance method is but the geometrical expression of such a rule, this means in effect that our opponents regard the principle of equidistance as being the only rule.

The main arguments of our opponents are based on this assumption. First, the argument that a reservation to Article 6 is inadmissible if it touches the rule of equidistance, could only be maintained under the assumption that proximity alone is the basis of the right of the coastal State to its continental shelf.

Second, the argument that the equidistance method is also binding on third States which have not ratified the Continental Shelf Convention, could only be maintained under the assumption that proximity is the only rule governing the allocation of continental shelf areas under general international law.

Third, the argument that a State may unilaterally delimit its continental shelf by application of the equidistance method validly *vis-à-vis* other States can only be maintained under the assumption that mere proximity confers a title under international law.

Fourth, the argument that special circumstances could not exclude the application of the equidistance method but could only have the effect of moving the basepoints for the construction of the equidistance line back to another point can only be maintained under the assumption that proximity is the only rule governing the delimitation of the continental shelf.

When the learned Agent for the Danish Government at the end of his address on Friday last—*verbatim record*, page 161, *supra*—referred to the concept of justice underlying the delimitation of the continental shelf which each State, including the Federal Republic of Germany, should respect, he specifically mentioned proximity to the nearest State as the concept of justice which determines the allocation of maritime areas.

Thus, if it cannot be proved that the principle of proximity, as understood by our opponents, is the controlling principle as to the allocation of continental shelf areas, the whole structure of the arguments of our opponents breaks down.

Is the so-called principle of proximity, that is to say, the rule that any area of the continental shelf which is nearer to some point of the coast of one State than to the coast of another State appertains by right to the first State, really a recognized rule of international law?

I do not think that our opponents have been able to prove this. They would

have done well to do so because this principle of proximity is the very basis on which all their arguments rest.

In our Reply, as well as in my first address to this Court, we have already voiced a strong objection against such a legal assumption. May I refer in this respect to paragraphs 56-61 in our Reply, I, pages 413-415, and to pages 38-39, *supra*, of the verbatim record of the public sitting on 24 October. However, as this seems to be one of the principal issues between the Parties, I feel that I am obliged to deal with this question once again.

It has long been an established principle of international law that extension of sovereignty cannot be founded on mere proximity; I need only refer to the well-known dictum of Max Huber in the *Palmas* arbitration case, where he said that contiguity as a method of deciding questions of territorial sovereignty is wholly lacking in precision and would lead to arbitrary results. The award can be found in the *Reports of International Arbitral Awards*, Volume II, page 855.

The learned counsel for our opponents will, I hope, permit me to cite his own lecture before the Grotius Society in 1950 on the legal claims to the continental shelf, wherein he said the reasons for refusing to accept bare continuity as a legal title have not lost any of their force. This statement is published in the *Transactions of the Grotius Society*, Volume 36, 1950, page 139. Of course his remarks were meant as an argument against the *ipso jure* title of any coastal State to the continental shelf before its coast, which later was accepted by State practice and doctrine. In any event, however, his remarks show that he himself at that time did not recognize proximity as a reliable basis for the extension of sovereignty. Thus, it seems very doubtful whether the principle of proximity had any relevance to the delimitation of continental shelf areas.

When the continental shelf doctrine that each coastal State has an *ipso jure* title to the continental shelf before its coast was recognized by the International Law Commission, and later embodied in Article 2 of the Continental Shelf Convention, no indication whatever was manifested that mere proximity was thought to be the basis of such a title.

The alleged rule that an area of the continental shelf which is nearer to some point of the coast of one State than to any other coast appertains to that State, was never mentioned in the discussions of the International Law Commission on the concept of the continental shelf. Rather, it was the idea that the continental shelf could be regarded as the continuation of a State's territory into the sea before its coast that was held to be the basis of the *ipso jure* title of the coastal State to those areas. There is no trace in the discussions of the International Law Commission that the principle of proximity in the narrow sense, as understood by our opponents, was an integral part of the concept of the continental shelf.

To demonstrate this, it may be sufficient to quote the following sentences from paragraph 8 of the commentary of the International Law Commission to Article 68 of its 1956 Draft, which later became Article 2 of the Convention:

"The Commission does not deem it necessary to expatiate on the question of the nature and legal basis of the sovereign rights attributed to the coastal State. The considerations relevant to this matter cannot be reduced to a single factor."

After referring to other factors, such as State practice, self protection and the need for coastal installations, the International Law Commission also mentioned the geographical factor in the following words:

“Neither is it possible to disregard the geographical phenomenon, whatever the term—propinquity, contiguity, geographical continuity, appurtenance or identity—used to define the relationship between the submarine areas in question and the adjacent non-submerged land. All these considerations of general utility proved a sufficient basis for the principle of the sovereign rights of the coastal State as now formulated by the Commission.”

There is no indication that proximity in its narrow sense was the determinant factor among these considerations.

In the discussions of the International Law Commission on the delimitation problem, there again is no hint that the members of the Commission, in adopting the equidistance formula, considered it to be merely a geometrical expression of an alleged principle of general international law, according to which any area which is nearer to some point of the coast of a State than to any other coast, should appertain as by right to that State.

At the Geneva Conference in 1958, the equidistance method was not defended by reference to the principle of proximity. The equidistance method was rather adopted by the delegates with the hope that this method might, in normal geographical situations, lead to an equitable apportionment of the continental shelf between opposite or adjacent States.

It seems rather doubtful whether the exception of special circumstances could ever have been maintained if mere proximity would already confer a valid title to areas nearer to some point of the coast. The Court may have observed that this dilemma necessitated that our opponents interpret the special circumstances clause in such a narrow manner that the principle of proximity, or the principle of equidistance, would thereby be safeguarded as far as possible.

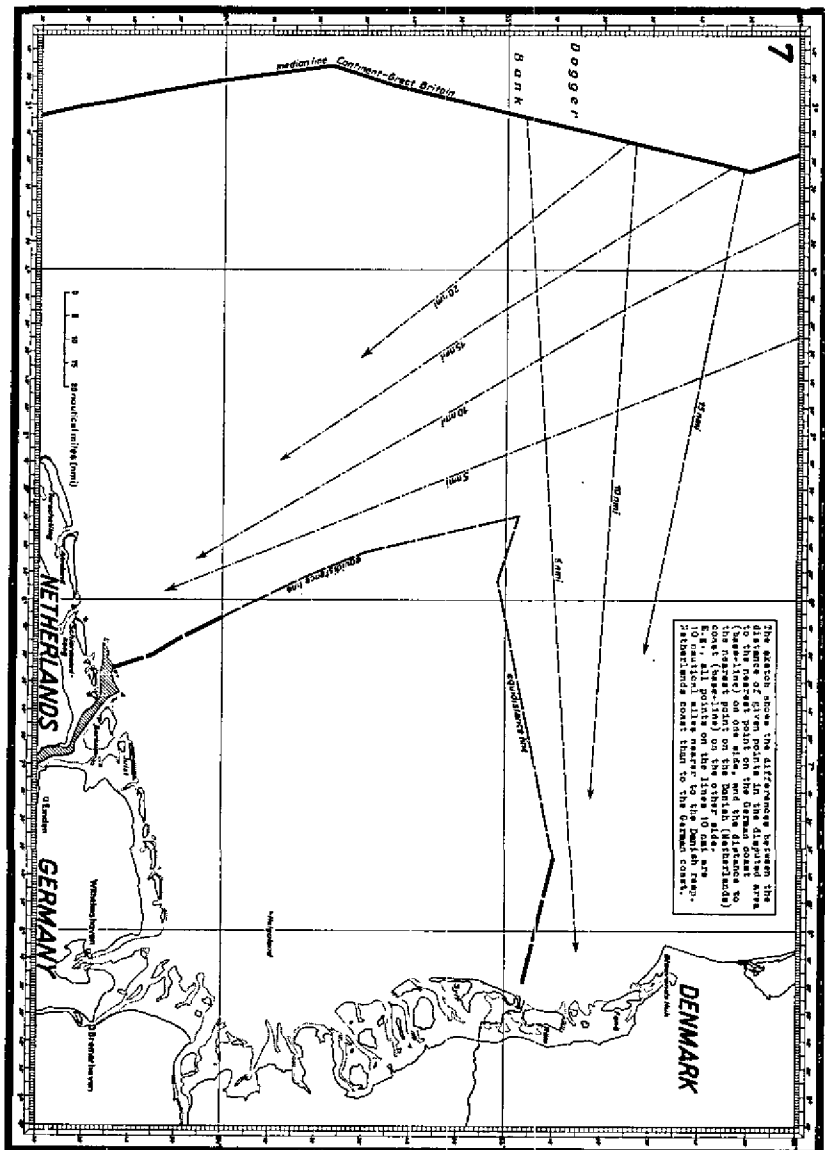
I think that I need not again stress the fact that a recognition of mere proximity, in the narrow sense as interpreted by our opponents, conferring on a State title to all areas nearer to some point of its coast, would very much complicate compromise solutions under equitable principles in areas where delimitation by reliance on mere proximity is inequitable on its face.

In their written pleadings, the Kingdom of Denmark and the Kingdom of the Netherlands had recognized that it was the purpose of Article 6 of the Convention to transform the principle of an equitable delimitation into a more concrete formula. But now it seems that they take the view that the principle of proximity, and its geometrical expression, the equidistance method, is equitable *per se*. There is no indication that the members of the International Law Commission or the delegates at the Geneva Conference were convinced that the equidistance method was equitable *per se*.

This does not mean that the principle of proximity is without any relevance to the concept of the continental shelf. Within a narrow belt of continental shelf before the coast, areas within that belt can certainly be regarded as naturally connected with the coastal State's territory; but farther from the coast mere proximity cannot be a sufficient basis to determine the allocation of continental shelf areas to a certain State. If two or more States are adjacent to the same continental shelf, mere distance to some point, or some small part of the coast, cannot decide the allocation of shelf areas far off-shore to the one or the other States.

In my address on 24 October, I had announced that we were preparing a diagram which shows, mile by mile, the effect of minor differences in distance from the coast upon the allocation of the areas in the middle of the North Sea. This diagram, No. 7 (see p. 171, *infra*) of the maps that have been distributed today¹

¹ See No. 46, p. 389, *infra*.



to the Members of the Court and to the Parties, requires some explanation. I shall in brief explain what this diagram is meant to show.

The broken lines with arrows pointing to either Denmark or the Netherlands show that the areas up to these lines would, under the equidistance method, have been allotted to the Federal Republic if the base point on the Danish or Netherlands coast would have been 5, 10 or 15 nautical miles—according to what is written at the line—more distant from that area than it is now. If you take, for instance, the line pointing to the Netherlands, which is marked by the figure 10 nmi, that would mean that any point to the right side of this line, any area to the right of this line would have been allotted, under the principle of equidistance, to the Federal Republic of Germany, if the base point on the Netherlands coast would be 10 nautical miles more distant than it is now.

The diagram is meant to show that the difference of more or less 10 nautical miles decides upon the allocation of extensive areas which are situated at a distance of about 100 nautical miles from the coasts of Denmark, the Federal Republic, and the Netherlands respectively. This indicates that mere distance from some point of the coast is not a reliable basis for the allocation of continental shelf areas to one or the other State. The allocation of continental shelf areas farther offshore must be determined by criteria other than mere proximity to some point of a State's coast.

If areas are situated within the coastal belt, this is a strong indication that those areas may be regarded as a continuation of the coastal State's territory into the sea and appertaining to its continental shelf. But the farther off the coast, the more this criterion fades away, and can no longer constitute a convincing basis for the attribution of those areas to the territory of one State.

I think I need not refer to the absurd results the principle of proximity would produce if continental shelf exploitation were to extend deeper into the ocean.

The learned Agent for the Netherlands was of the opinion that division of the oceans is a remote possibility, and that discussions were already going on excluding such a possibility. However, I have just read in an article on United States legislation relating to the continental shelf published by Mr. Stone in the *International and Comparative Law Quarterly*, Volume 17, 1968, at pages 113-114, that a concession for the extraction of phosphate had been granted for an area off the Californian coast which reaches a depth of 4,000 feet.

Therefore, in wider maritime areas, proximity cannot possibly be the test for the allocation of the continental shelf.

To conclude this aspect, I respectfully submit that the alleged principle of proximity does not inhere in the concept of the continental shelf, nor does it govern the delimitation of the continental shelf, nor does it confer title to areas of the continental shelf.

The learned counsel for our opponents has asserted that a delimitation made bona fide, in accordance with the equidistance method, is prima facie legally valid and binding on all other States, including the Federal Republic. He has advanced three justifications for his contention, which I would like to discuss.

The first is the reference to a statement of this Court in the *Anglo-Norwegian Fisheries* case concerning the position of a coastal State in the delimitation of maritime jurisdiction. In reading that statement I fail to see in what respect it can form a basis for his contention. On the contrary, the statement seems rather to support our contention that the unilateral delimitation by application of the equidistance method cannot bind the Federal Republic.

In the statement referred to, this Court has said that the delimitation of sea areas cannot be dependent merely upon the will of the coastal State, and that

the validity of the delimitation with regard to other States depends upon international law.

Between the Parties in the present case it is in dispute whether the equidistance method is applicable to the delimitation of the continental shelf between the Parties, and the Court is asked to decide this issue. The validity of the delimitation, therefore, depends on the judgment of this Court.

Thus I fail to see how this statement in the *Fisheries* case can support the contention of our opponents that the equidistance boundary unilaterally applied by the Kingdom of Denmark and the Kingdom of the Netherlands is binding on the Federal Republic of Germany. Such a contention could only be maintained under the assumption that the principle of proximity, as interpreted by our opponents, is the only rule with respect to the concept of the continental shelf.

The second rationale on which the learned counsel of our opponents attempted to base the validity of the unilateral delimitation, by application of the equidistance method, is the fact that Article 2 of the Continental Shelf Convention recognizes the *ipso jure* title of each coastal State to the continental shelf before its coast. We have already shown that the delimitation of the continental shelf by equidistance is not inherent in the concept of the continental shelf as embodied in Articles 1 and 2 of the Convention.

Consequently, there is no *ipso jure* validity of any delimitation unilaterally imposed by a coastal State. Since a delimitation of a continental shelf boundary vis-à-vis another coastal State necessarily affects the rights of the other coastal State, there can be no prevailing right on the part of the first State as long as the other takes the view that the delimitation by application of the principle of equidistance is not valid.

Such an opinion would imply that there is a legal presumption in favour of the equidistance method in the sense that the equidistance method is the only rule applicable unless another State shows a better title to the area within the equidistance boundary. The Federal Republic of Germany objects to such a contention because such a presumption has no foundation in State practice. At the most it could be maintained that, if Article 6 of the Convention were applicable as a conventional rule between the Parties, then by virtue of Article 6, a presumption in favour of the equidistance method would have to be recognized if two States are going to delimit their common continental shelf boundary.

Be that as it may, such a presumption does not bind the State which is not a party to the Convention and even if Article 6 were applicable, this would not give any support against the State which disputes the applicability of the equidistance method. Whether the equidistance method is applicable in the present case, or whether the particular geographical situation justifies another boundary line, depends on the appreciation by the Court.

I shall now return to the question whether the equidistance method or the alleged principle of proximity is a rule of customary international law and therefore binding upon the Federal Republic.

I do not think that it is necessary to repeat here all the facts and arguments advanced against the alleged customary law character of the principle of proximity or the principle of equidistance, but I have to reply to some of the new presentations of these arguments advanced in support of such a customary law status of the equidistance method.

First, in their oral arguments our opponents have repeatedly referred to the alleged hostility of the Federal Republic of Germany to the Continental Shelf Convention in general and the equidistance method in particular. They have further asserted that the Federal Republic of Germany has aimed at displacing the equidistance method by other methods. This is far from the truth.

In our written pleadings, it has been repeatedly said that the Federal Republic recognizes the main rules of the Continental Shelf Convention as embodied in Articles 1-3. The Federal Republic is not hostile towards the equidistance method in principle, especially in its median line form, and recognizes that, depending upon the geographical situation, it may very well achieve an equitable apportionment in the delimitation of the continental shelf. The Federal Republic has applied the equidistance method in the delimitation of its continental shelf boundary in the Baltic Sea vis-à-vis Denmark.

The Federal Republic, however, does not recognize that the equidistance method is the only rule, irrespective of the nature of the apportionment achieved by its application, nor does it recognize that there is a presumption in favour of the equidistance method which would allow a State unilaterally to delimit its continental shelf vis-à-vis other States by application of that method. The Federal Republic takes the position that it has to be ascertained by both the States who wish to determine their common continental shelf boundary, whether the proposed equidistance boundary apportions an equitable share to each of them.

Secondly, I do not think that the learned counsel for our opponents has been able to prove the formulation of a customary law rule which would oblige a State to accept the equidistance boundary as the only solution, with some narrow exceptions as defined by our opponents. His main concern has been to deduce such a rule from Articles 1 and 2 of the Convention and from the State practice concerning the delimitation of coastal waters. Learned counsel has, however, not convincingly shown that there is sufficient State practice recognizing such a rule. He has very eloquently shown that the States had acted, as he put it, within the framework of Article 6, paragraph 2, or had used the language of Article 6, paragraph 2. All this, however, is not sufficient proof of a recognition by States that the equidistance method is the only rule.

If States negotiate an agreement for the delimitation of their continental shelf boundaries, one of the Parties would certainly invoke the equidistance method, while the other might invoke special circumstances, whether the States are parties to the Continental Shelf Convention or not; if they both agree that the equidistance method will lead to an equitable result they will adopt this method; if one State invokes special circumstances they might agree to take account of them by altering the boundary line in order to satisfy this demand. They would certainly come to an agreement only if they are both convinced that the equidistance method is equitable to both or that the demand for an adjustment of the line based on special circumstances has been met.

The cases of the Italian-Yugoslav boundary and the British/Venezuelan boundary in the Gulf of Paria are significant in this respect because they show that States do not merely act pursuant to the pretended principle of proximity or equidistance but try to agree on a boundary line that apportions a just and equitable share to each of them.

Therefore such agreement does not support the contention that there is an obligation for a State to accept the equidistance boundary if it is not equitable.

The argument of our opponents has shifted somewhat from the agreements to the unilateral acts of States delimiting their continental shelf. As the learned counsel of our opponents expressly said, such unilateral acts would be the most convincing proof of the acceptance of the equidistance method. However, it seems very doubtful whether the examples cited give any support in this respect. The only relevant cases are Belgium and Iraq and neither of them, in my opinion, supports the recognition of the pretended rule of proximity.

In the case of Belgium we are not ready to admit its so-called obvious rele-

vance to the issue before the Court. If it is correct that the Belgian Government deems it acceptable that the Belgian portion of the continental shelf should be determined by application of the equidistance method, this does not yet prove that Belgium accepts the method as the only rule. This is particularly so because the case of Belgium is not comparable to the case of the Federal Republic. The Belgian coast is mainly facing Great Britain, but not the centre of the North Sea; even if one might regard Belgium as a North Sea State to some extent, in view of its small coastal front vis-à-vis the North Sea, Belgium probably does not want to claim a substantial share of the North Sea continental shelf.

In the case of Iraq, the share it would get under the equidistance method in the Persian Gulf is not disproportionately small in view of its coastal front. In any case, there is no indication that Iraq had already taken a final position in this respect. The map shown in the Common Rejoinder, I, page 502, which has been prepared by a Norwegian expert for the Iraq Government, has not yet led to an official act of the Iraq Government to the effect that it accepts the boundary line as shown in that map. According to information we have got through diplomatic channels the Iraq Government has not yet taken a final decision in view of the proceedings pending in this case.

The learned counsel for our opponents relied very heavily on the adoption of the Continental Shelf Convention and its ratification by, up to now, 39 States, the contention being that thereby the principle of proximity embodied in Article 6 of the Convention had acquired, in his view, the status of customary international law.

I feel that it is no longer useful for me to dwell on all the arguments and counter-arguments with respect to the importance of reservations allowed by Article 12 of the Convention to Article 6. The learned counsel for our opponents has however referred, *inter alia*, to Article 34 of the draft Convention on the Law of Treaties provisionally adopted at the Vienna Conference. This Article states that nothing in the preceding Articles—30 to 33—precludes a rule set forth in the treaty from becoming binding upon a third State as a customary rule of international law.

The learned counsel interpreted this Article to mean that the right of the State to make a reservation to a certain rule set forth in the treaty could not prevent this rule from becoming a rule of customary law. Even if it might be conceded that the formation of a customary law rule outside a law-making convention cannot be prevented by the fact that the like rule is subject to reservations in the convention, then, however, it is equally true that in such a case the rule in the convention cannot contribute to the formation of such a customary law rule.

Since, however, our opponents rely mainly on the Continental Shelf Convention to support their contention that the Convention had contributed to the establishment of the rule of proximity as a customary law rule, Article 34 of the Draft Convention on the Law of Treaties is no support for such a contention.

Among the arguments of our opponents, the previous attitude of the Federal Republic of Germany towards the equidistance method has been given much prominence. I fail to see what legal consequences could follow therefrom. The legal relevance of the facts cited has, in my opinion, remained unclarified.

Our opponents have not asserted, and they could not have asserted, that the Federal Republic of Germany is bound by the Convention. The fact that the Federal Republic at the Geneva Conference, and later, had not voiced stronger opposition to Article 6 of the Convention, or the fact that the officials of the Federal Republic had not foreseen how narrowly Article 6, paragraph 2, of the

Convention might be interpreted by our neighbours, cannot have any relevance to the legal issue of the present case.

Our opponents have repeatedly referred to the Partial Boundary Treaties of 1 December 1964 and 9 June 1965 between the Federal Republic of Germany and the Kingdom of the Netherlands and the Kingdom of Denmark respectively.

Our opponents have pointed to the fact that the boundary lines agreed upon in those treaties follow to some extent the equidistance method. I again fail to see what legal consequences our opponents wish to infer from the conclusion of these treaties.

The conclusion of those treaties was accompanied by a reservation of the Federal Republic of Germany in the form shown in Annex 4, Annex 6 and Annex 7 to the Memorial of the Federal Republic of Germany. The reservation stated that the Federal Republic of Germany did not recognize that the principle of equidistance would be applicable in the further delimitation of its continental shelf vis-à-vis the Kingdom of Denmark and the Kingdom of the Netherlands respectively.

Our opponents pose the question of why the Federal Republic of Germany has not earlier voiced any objection to the application of the equidistance method to the delimitation of the continental shelf in the North Sea nor raised any opposition prior to the negotiations with the Kingdom of Denmark and the Kingdom of the Netherlands starting in 1964.

The reason for this is quite simple. Up to 1963 no North Sea State had, by formal executive or legislative act, asserted exclusive rights over the continental shelf of the North Sea. Therefore there was no need for the Federal Republic of Germany to be concerned about the delimitation of its continental shelf vis-à-vis its neighbours. The Federal Republic of Germany still hoped at that time that a joint régime for the exploration of the continental shelf of the North Sea might be set up by agreement between the North Sea States.

It was not before the other North Sea States began to assert exclusive rights of the continental shelf before their coasts and claimed the application of the equidistance method, that the Federal Republic began to be concerned about the delimitation. From that time on, the Federal Republic initiated negotiations with its neighbours for an equitable settlement on other lines than the equidistance method.

The Proclamation of 20 January 1964, to which our opponents have repeatedly referred, also does not contain any clause which could be interpreted as a recognition of the applicability of the equidistance method in the North Sea.

In this context I should point to the fact that in the translation given in Annex 10 A of the Counter-Memorials the relevant phrase in the German proclamation of 20 January 1964 is not quite accurate. The part of the translation in Annex 10 A of the Counter-Memorials beginning with the words: "The detailed delimitation" does not correspond to the meaning of the German text. The text correctly translated would read:

"In the individual case the delimitation of the German continental shelf vis-à-vis the continental shelves of foreign States remains subject to agreement with those States."

The sentence does not imply that only minor corrections of an equidistance boundary had been contemplated. No reference to Article 6 (2) of the Continental Shelf Convention or to the equidistance method could be inferred from this sentence in the Proclamation. On the contrary, this sentence rather expresses the view of the Federal Republic of Germany that the delimitation of

continental shelf boundaries is a matter to be settled by agreement between the Parties to this case.

This concludes, Mr. President, my observations on the alleged status of the principle of proximity and the status of the equidistance method.

I would now like to proceed to what I consider the third principal issue of this case. This is a question of whether or not the equidistance boundaries claimed by the Kingdom of Denmark and the Kingdom of the Netherlands are equitable.

In opposition to the contention of our opponents, who regard the equidistance boundaries as equitable *per se*, the Federal Republic maintains that under general international law there is no obligation to accept the equidistance method for the determination of continental shelf boundaries, if such a boundary does not apportion a just and equitable share to each of the parties.

Though, in our view, it is incumbent on the Kingdom of Denmark and the Kingdom of the Netherlands to convince the Court that the proposed equidistance boundaries are equitable. We have developed criteria, which may provide the basis for a judgment, as to why these equidistance boundaries are not equitable; we have indicated what the Federal Republic would regard as an equitable solution.

The legal principle of the just and equitable share which, in our view, is the basis of the delimitation of continental shelf areas among States, has been attacked in principle as well as with respect to the criteria which we have offered for the appreciation whether the proposed equidistance boundary achieved an equitable apportionment. Our opponents contend that the principle of the just and equitable share has no foundation in international law and that, therefore, the application of the equidistance method could not be put to the test under such a principle. The arguments against the applicability of the principle of the just and equitable share to the delimitation of continental shelf areas are, I submit, not convincing. There seems to be agreement between the Parties that the delimitation of the continental shelf between States which are adjacent to the same continental shelf should be made on equitable principles, but the Parties differ fundamentally about how they define "equitable".

It is our opponents' contention, and we believe an erroneous contention, that the principle of proximity is equitable *per se*, while the Federal Republic of Germany maintains that any delimitation must be put to the test whether it conforms to the standards of the just and equitable share. Thus, the Court is plainly faced with the issue whether the principle of proximity or the principle of the just and equitable share should be controlling for the delimitation of the continental shelf between States adjacent to the same continental shelf.

If you look at the lengthy list of arguments advanced against the principle of the just and equitable share, by the learned counsel for our opponents in his address on 30 October 1968, verbatim record, pages 117-118, *supra*, the first four points merely repeat the well-known argument that the principle of a just and equitable share would conflict with the principle of proximity. According to his view, the principle of proximity is the only rule that governs the allocation of continental shelf areas, therefore no further recourse could be had to the principle of the just and equitable share. Since, however, we have tried to show, the principle of proximity is not the only rule for the delimitation of continental shelf areas, this argument against the principle of the just and equitable share loses its force.

The Court adjourned from 4.20 p.m. to 4.35 p.m.

When the Court adjourned I was just referring to the different viewpoints of both Parties regarding the question what would be the controlling principle for an equitable delimitation. Our opponents contend that the equidistance method is equitable *per se* and we contend that the result achieved by the application of the equidistance method should be put to the test of whether it conforms to the standard of the just and equitable share.

Learned counsel for our opponents contended that the application of the principle of the just and equitable share leaves the realm of the rules and principles of international law and would be equivalent to an *ad hoc* legislating decision of the Court *ex aequo et bono*. I might refer to the verbatim record of 30 October 1968, page 118, *supra*. We strongly object to such an interpretation. As to the basis and legal quality of the principle of the just and equitable share, I might refer to Chapter I, paragraphs 29 to 37 of our Memorial, I, and to Chapter I, paragraphs 7 to 16 of our Reply, I. I would like, however, to indicate very briefly that it would be very clearly within the Court's competence to apply this principle.

First, the principle of the just and equitable share follows, in our opinion, from the concept of the continental shelf by necessary implication. The doctrine of the continental shelf, which is now generally recognized as part of general international law, attributes to each coastal State a portion of the continental shelf for its exclusive exploitation. The learned Agent for the Government of the Netherlands has very aptly shown how the submarine areas of the continental shelf, which formerly, as part of the high seas, were subject to common use, had, by the development of the continental shelf doctrine, been transferred to the exclusive jurisdiction of the coastal States. If there are several States adjacent to the same continental shelf, this transfer of jurisdiction involves a partitioning among those States of areas, and the potential resources therein, which have accrued to the coastal States from the common fund of mankind. The making of such an apportionment implies that the self-evident principle of the just and equitable share must be given effect. The necessary criteria will have to be developed from the concept of the continental shelf and adapted to the situation of the particular case.

Secondly, the principle of the equitable share had been implicitly recognized by States in their declarations as well as in their agreements on the delimitation of their continental shelves. The principle has also been recognized in the formulation of Article 6, paragraph 2, of the Continental Shelf Convention. If a legal provision such as Article 6, paragraph 2, contains a rule and at the same time provides for an exception to this rule under the general notion of special circumstances, there must necessarily be some higher standard for judging whether the rule or the exception applies. This higher standard could not possibly be the principle of proximity or equidistance, for it is just to this principle that exceptions are allowed.

Thirdly, the principle of the just and equitable share is by no means a principle unknown to international law. The German Memorial referred to the Helsinki Rules on the Uses of Waters of International Rivers, adopted at the 52nd Conference of the International Law Association on 20 August 1966. These Rules were published in the Conference Report on the 52nd Conference of the International Law Association. Article 4 of these Rules states that each basin State is entitled, within its territory, to a reasonable and equitable share in the beneficial uses of the waters of an international drainage basin. I refer in this respect to the Memorial, I, page 35.

This Article had been framed by the members of the International Law Association's Committee on the Uses of the Waters of International Rivers

unanimously, after nearly ten years of study and discussion, on the basis of State practice and legal doctrine in this field. During these deliberations, numerous cases of treaty practice and national judicial decisions had been examined for the formulation of these Rules.

The learned Agent for the Netherlands Government disputes the relevance of this parallel development in international law. He contends that the distribution of water resources is not comparable with the delimitation of the continental shelf, because in the division of international water resources the territorial boundaries remain unchanged while delimitation of the continental shelf involves the drawing of boundaries. That, however, is not the point of comparison. As I have already pointed out, in my previous address, the delimitation of continental shelf areas is in its essence not a mere extension of sovereignty. It is primarily a distribution of submarine areas in which each coastal State is given an exclusive right to exploit the potential resources of those areas. Since the resources of the continental shelf which have to be distributed among several adjacent States are as much limited as are the resources of an international water-basin, the law is in both cases faced with the same problem, namely the equitable distribution of such resources. This is all the more so in the present case, where what I might call the hydro-terrestrial unity of the North Sea basin calls for the same approach to an analogous problem.

Fourthly, the principle of the just and equitable share is not mere equity but it is a principle of law, inasmuch as it directs the States concerned to base their agreement on the boundary line on criteria which are taken from the concept of the continental shelf and are applied equally to each of the States concerned.

Applying the principle of the equitable share to the delimitation of continental shelf areas is not an excursion into the field of legislative discretion, but it is the application of the principle of law. It is an application of the self-evident notion of justice to a particular legal problem which has arisen in the development of the new doctrine of the continental shelf.

I do not think that the Court, in order to employ the principle of the just and equitable share, must have recourse to Article 38, paragraph 1 (*c*), of its Statute, although the principle of the just and equitable share is certainly a principle in the sense of Article 38, paragraph 1 (*c*).

I have already said that the generally recognized continental shelf doctrine conferring the seabed and subsoil of areas under the high seas to the exclusive jurisdiction and use of the coastal States implies equitable apportionment, and that the principle of the just and equitable share has, moreover, been recognized by State practice as well as by the formulation of Article 6, paragraph 2, of the Continental Shelf Convention. Therefore, I respectfully submit that the application of the principle of the just and equitable share does not necessitate recourse to Article 38, paragraph 1 (*c*), but is rather an interpretation of existing law.

This is not judicial legislation, as the learned counsel for our opponents has called it. It is rather the transformation of a general principle of law into criteria applicable to the particular situation.

May I refer in this context to the *Fisheries* case where this Court had applied general principles of law and adapted them to the particular situation. I would like to quote from the Judgment of this Court in the *Fisheries* case a passage which is published in the *I.C.J. Reports 1951*, page 132:

"It does not at all follow that, in the absence of rules having the technically precise character alleged by the United Kingdom Government, the delimitation undertaken by the Norwegian Government in 1935 is not subject to certain principles which make it possible to judge as to its validity under international law."

And after some subsequent sentences, it continues:

“In this connection, certain basic considerations inherent in the nature of the territorial sea, bring to light certain criteria which, though not entirely precise, can provide courts with an adequate basis for their decisions, which can be adapted to the diverse facts in question.”

It would seem that the present case might very well be decided along these lines of judicial reasoning.

If we have to apply the principle of a just and equitable share to the delimitation of the continental shelf in the North Sea we need criteria for determining the equitableness of the share which should be allotted to each coastal State.

Our opponents contend that the principle of the just and equitable share is unworkable since it does not entail criteria for such appreciation. They contend further that the criteria we have offered were artificial, without any foundation in the actual geographical situation. Despite their strong criticism we still maintain that these criteria are by no means artificial but may be deduced by logical operation from the concept of the continental shelf, with a view to the particular geographical situation in the North Sea.

Criteria for the equitable apportionment of the continental shelf of the North Sea must be founded on the special geography of this region.

The boundaries already agreed upon between Great Britain, Norway, Denmark and the Netherlands indicate already the pattern of apportionment which has been regarded as equitable by those States. They would certainly not have delimited their continental shelves by those lines if they had not regarded them as equitable. The delimitation effected thereby has led, in this part of the North Sea, to the formation of three sectors—the British sector, the Norwegian sector and the third sector comprising the yet undelimited continental shelves of the Parties to this case.

As is already explained in our written pleadings, the Federal Republic of Germany maintains that the most equitable apportionment of the remaining third sector of the continental shelf would consist of the delimitation by sub-sectors or, if you prefer to avoid geometrical inferences, by sector-like slices among the Parties. Such a delimitation would be consistent with the general pattern of delimitation manifested in that part of the North Sea which is surrounded by Great Britain, Norway, Denmark, the Federal Republic and the Netherlands.

At this point I would like to make it clear that the boundary lines claimed by the Federal Republic, under the principle of the just and equitable share, start from the end points of the partial boundary lines which have already been agreed upon between the Federal Republic and the Kingdom of Denmark and the Kingdom of the Netherlands respectively. This sector claimed does not quite correspond with the hypothetical sector which might be constructed on the end points of the territorial sea frontiers between the Parties. It does not correspond with such a sector which would have been, in our view, the equitable apportionment which the Federal Republic might have claimed prior to the agreements upon the partial boundaries. In any case, however, the present claim of the Federal Republic of Germany is within the limits of such an equitable sector. What constitutes the claim of the Federal Republic of Germany has already been indicated in paragraph 91, figure 21, of the Memorial, I, pages 85-86, and, for the convenience of the Court, has been more precisely delineated in map No. 6 (see p. 182, *infra*) which has been distributed today to the Members of the Court and to the Parties.

I submit that this apportionment is equitable on its face. We have tried to show that there are also objective criteria which determine the equitableness of such a delimitation of the continental shelf. These criteria are pertinent to the geographical situation and are in harmony with the concept of the continental shelf.

While our opponents apparently do not deny the equity of a division by sectors of a circular area, their main objection against the application of the sector concept has been that in the North Sea there is no ascertainable centre from which to draw the boundary lines for such sectors. I shall try to show that there is a central area in the North Sea which may safely be considered to be its centre, at least with regard to that part of the North Sea where the delimitation of the continental shelf between the Parties is in issue.

To show this I would like to refer to some of the maps we have prepared and distributed in response to questions of Judge Jessup¹. These are the maps Nos. 1, 2, 3 and 4 on your table. These maps need specific comment.

Map No. 1 (see p. 183, *infra*) is drawn in response to the following question posed by Judge Jessup: Assume hypothetically that in 1960 or 1961 the United Kingdom and the Federal Republic of Germany agreed to specify and delimit a boundary between their respective parts of the continental shelf in the North Sea in accordance with Article 6, paragraph 1, of the Geneva Convention on the Continental Shelf—what would be the median line between the two States?

On map No. 1 the broken line shows the median line between the coasts of the Federal Republic of Germany and Great Britain based on the hypothesis that the coasts of Denmark and of the Netherlands would have been disregarded, as if these countries did not exist. I need not stress the point that we did not negotiate such an agreement and we would not have negotiated an agreement with Great Britain on such a boundary, which would ignore the rights of her neighbours. This map is only meant to show what is the line where the territories of both countries continuing into the North Sea, if viewed in isolation, would meet each other.

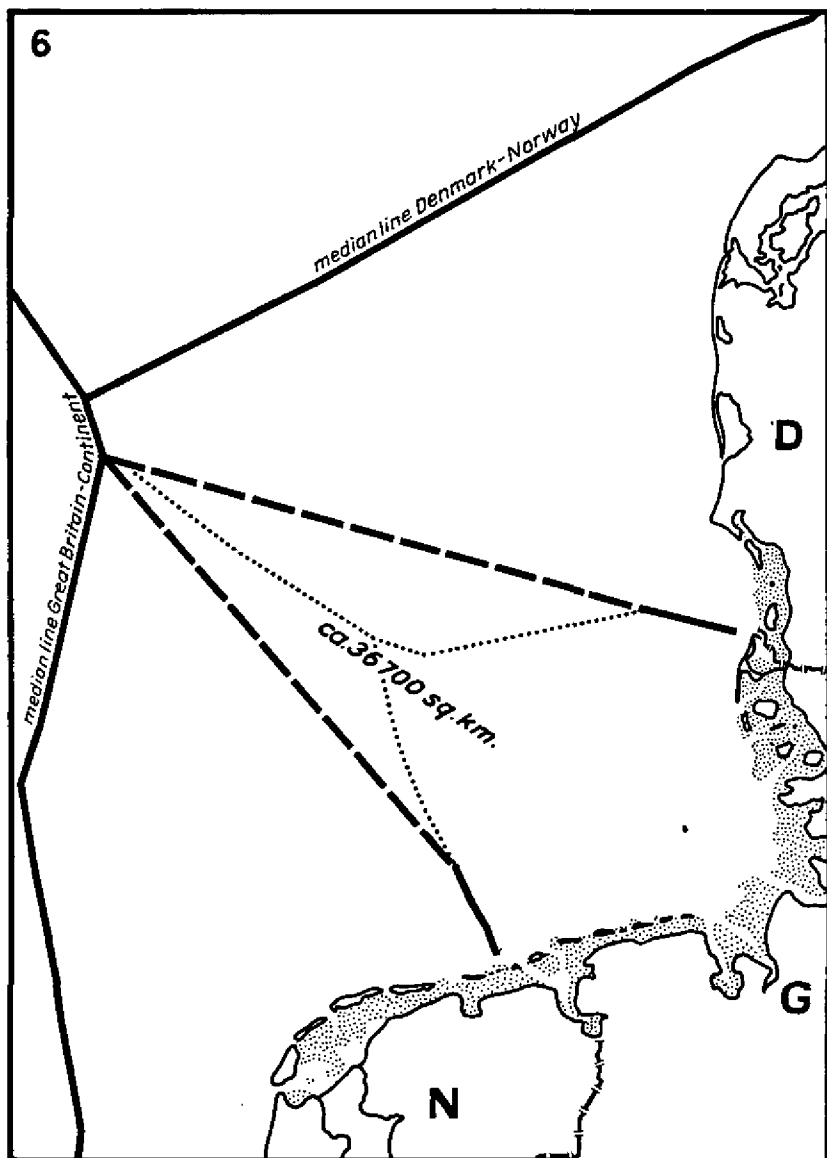
The map No. 2 (see p. 184, *infra*) is also drawn in response to a similar question posed by Judge Jessup concerning the median line between the Federal Republic of Germany and Norway. The punctuated line on map No. 2 shows the median line between the coast of Norway and the coast of the Federal Republic based on the hypothesis that no other coast would have to be taken into account, as if other countries did not exist. Again I need not stress the point that this is a hypothetical line. We did not negotiate and we would not have negotiated an agreement on such a boundary without consideration of the rights of our neighbours.

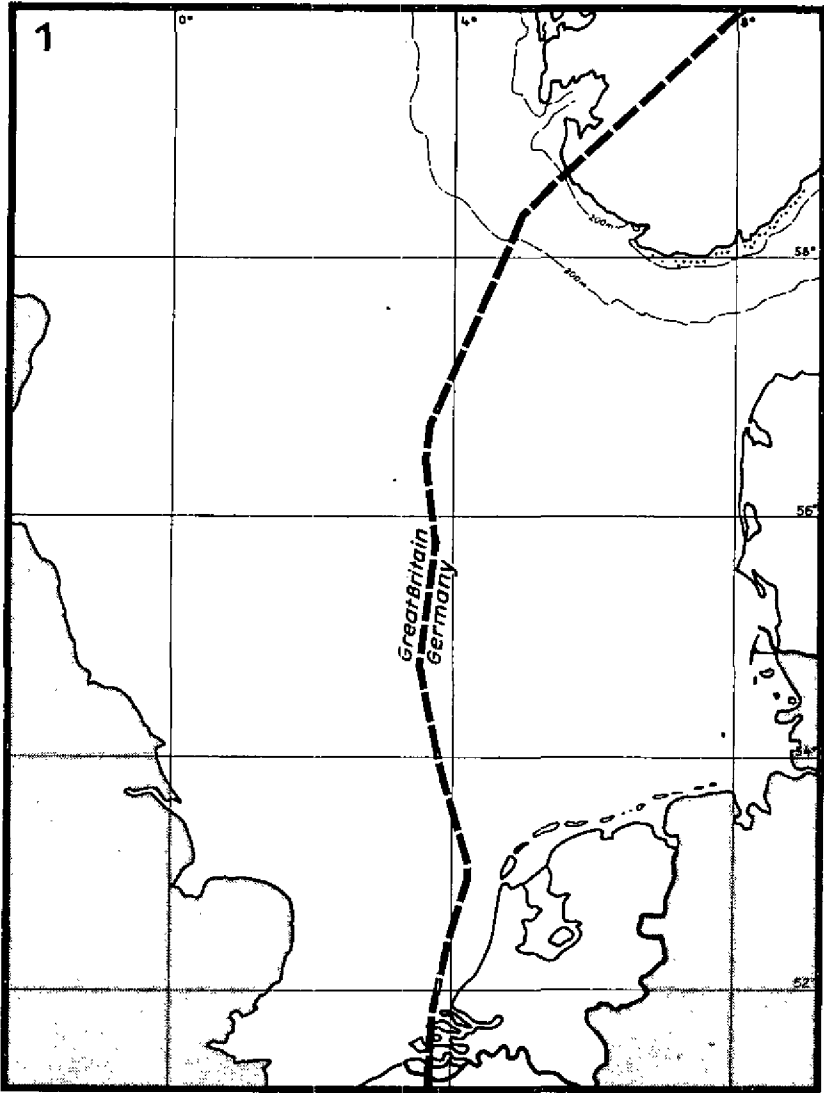
This map is only meant to show what would be the line where the territories of both countries continuing into the North Sea, if viewed in isolation, would meet each other.

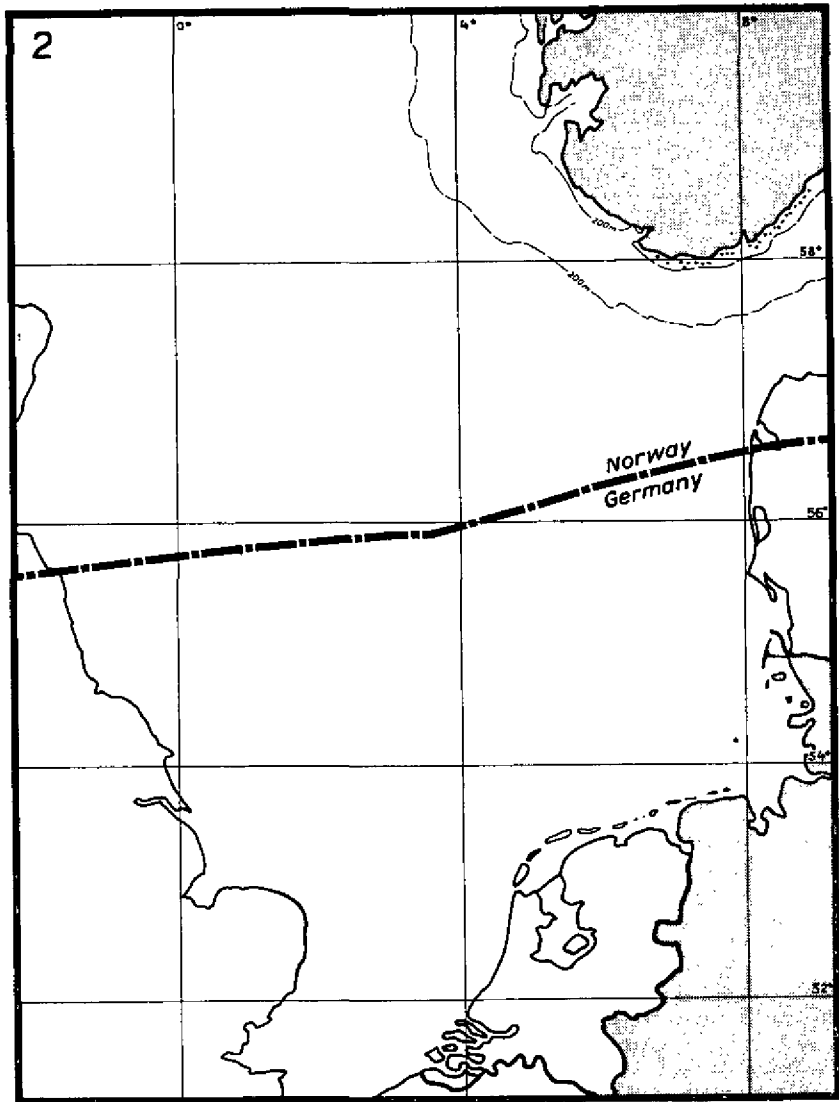
To demonstrate all the possible median line situations, we have further prepared map No. 3 (see p. 185, *infra*), which shows the hypothetical median line between the coast of Norway and the coast of the Netherlands. The dotted line on map No. 3 shows where this median line between the Netherlands and Norway would be.

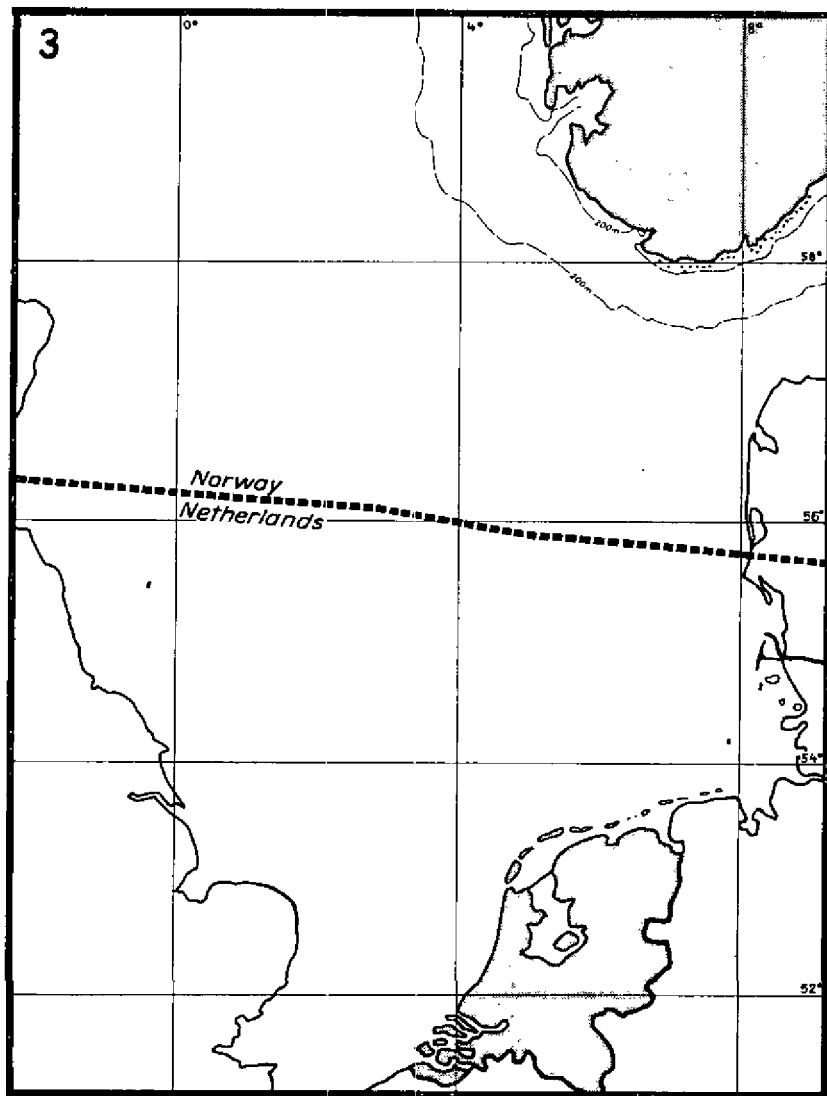
Now, if you project these three hypothetical median lines shown on maps Nos. 1, 2 and 3 on a map that shows the actual median lines, that have already been agreed upon between the remaining North Sea States, the result is shown on map No. 4 (see p. 187, *infra*). I would suggest that this projection permits us to draw some important inferences.

¹ See No. 46, p. 389, *infra*.









First, all these median lines meet each other within a very small area, so that it may well be said that this area may be characterized as the centre of that part of the North Sea which is surrounded by Great Britain, Norway, Denmark, the Netherlands and the Federal Republic. We need not have, in order to distribute the continental shelf area in that part of the North Sea equitably, an exact geometrical point constituting the centre of a geometric circle. For the appreciation of the equitableness of such a distribution, it is sufficient to have an approximate centre.

Second, the median lines between the coast of the Federal Republic, on the one hand, and the coast of Great Britain and Norway, on the other hand, show that the territory of the Federal Republic continues to this part of the North Sea, or, in other words, up to this line the coast of the Federal Republic of Germany is as near to the British coast as the coast of Denmark and the Netherlands. Up to this line the territory of the Federal Republic of Germany is no less geographically connected with that area of the continental shelf than are the territories of Denmark or Norway. This underlines the cut-off effect of the equidistance boundaries, as proposed by Denmark and the Netherlands.

Third, this network of median lines further shows that it is not an arbitrary assumption, but rather a true application of the continental shelf concept to this particular geographical situation that the continental shelves of Great Britain, Norway, Denmark, the Federal Republic and the Netherlands extending from their respective coasts into the enclosed sea converge into each other.

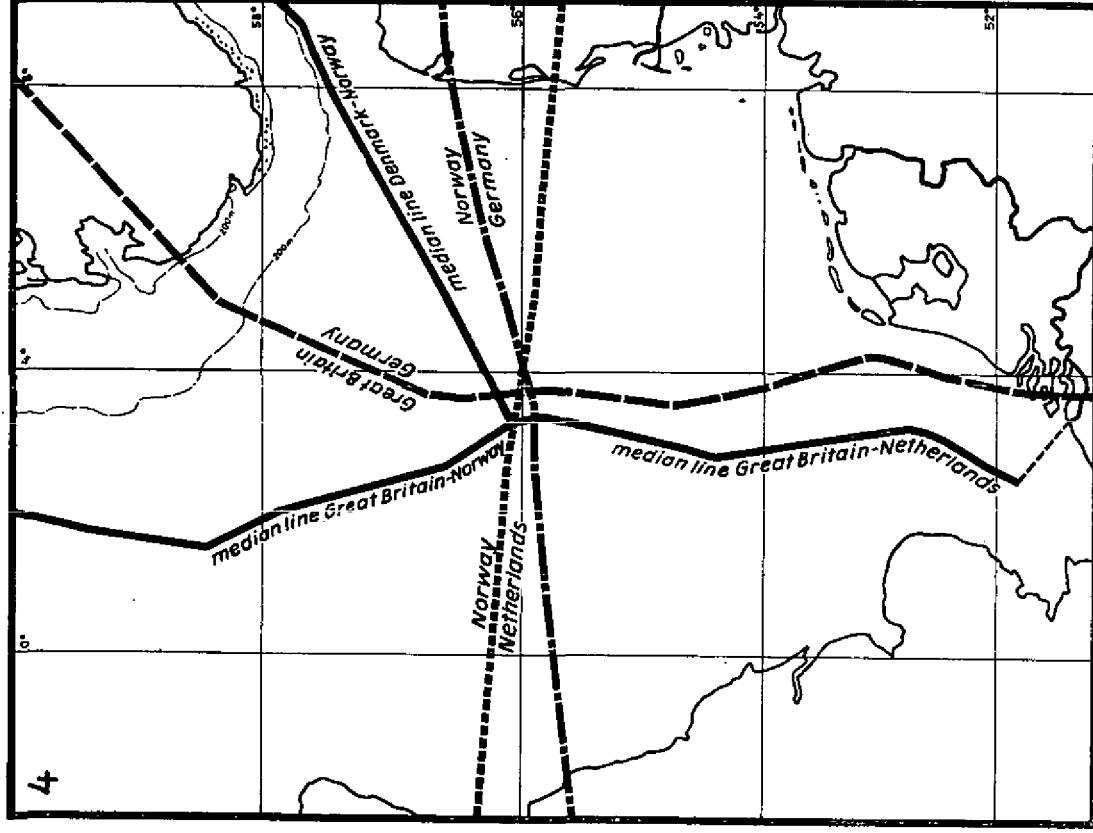
On the ground that there is a real centre in that part of the North Sea where the continental shelves of the five States converge into each other, it seems legitimate to start from that centre in order to achieve an equitable apportionment of the continental shelf among the three Parties. As the centre is not an exact point, it is certainly modest, as far as the Federal Republic's share is concerned, to start from the point indicated in map No. 4. This point is equidistant to Denmark and the Netherlands and at the same time equidistant between Denmark, the Netherlands and Great Britain. Such a delimitation is a geometrical consequence of the convergence of the continental shelves of the three Parties into that part of the North Sea.

To support our view that such a sectoral division of the south-eastern part of the North Sea is not only equitable by geometrical construction, but also follows from the concept of the continental shelf, we proposed the so-called coastal front, or coastal façade approach, which had been so severely attacked by our opponents.

The learned agent for the Kingdom of the Netherlands has called the coastal front a wholly arbitrary line, unspecified as to its location and unknown to the principles or rules of international law. This is found in the verbatim record of 31 October, pages 136-137, *supra*. This attack is unjustified.

We have introduced the coastal front concept as a criterion for determining the breadth of the continental shelf which extends from the territory of each coastal State into the sea. We use the coastal front to determine what area of the continental shelf before the coast might be regarded as a natural continuation of a State's territory into the sea in the particular geographical situation.

As I have already pointed out, in my address on 24 October, the coastal front concept used for this purpose has nothing to do with straight baselines. It is neither a straight baseline, as it is understood in connection with the delimitation of territorial waters, nor is it a straight baseline as it is used for the construction of equidistance boundaries under Article 6, paragraph 2, of the Continental Shelf Convention. The coastal front is different in character from



these baselines, because no distance is measured from that line. Rather, it shows the breadth and the direction into which the continental shelf of each State extends into the sea.

If the coastal front is understood in this sense to define the breadth of, and the direction into which the territory of the coastal State continues into the sea, it becomes necessary to determine the location of the coastal front. This is necessary because it is obvious that the coastal front line determines the direction into which the continental shelf extends into the sea and determines, at the same time, in continental shelf areas surrounded by several States, the converging points of the different continental shelves. We are thus confronted with the question of what should be regarded as a coastal front in that particular geographical situation.

In the simple case of two or three States lying on a straight coastline which faces the open sea, the continuation of each State's territory into the sea is represented by stretches of continental shelf parallel to each other extending into the sea. The basis is a straight line which represents the general direction of the coastline. Demonstrating this, I would refer to figure 1 in our Reply, I, page 427, which shows the ideal case of a perfectly straight coastline.

If the coastline is curved, as shown in figure 2 in our Reply, I, page 427, the coastal front, which determines the breadth of the territories extending into the sea, could not be measured by the length of the actual coastlines, or located along the actual coastline which is projecting or curving back. Nor could the basis from which the continental shelf of each State extends into the sea be determined otherwise than by reference to the general direction of the coast.

As figures 2 and 3 in our Reply, I, pages 427 and 428, show, the direction of the continental shelf extending into the sea could not possibly be determined by the changing direction of a curving coast. By the way, "the general direction of the coast" is a term not unknown to maritime law.

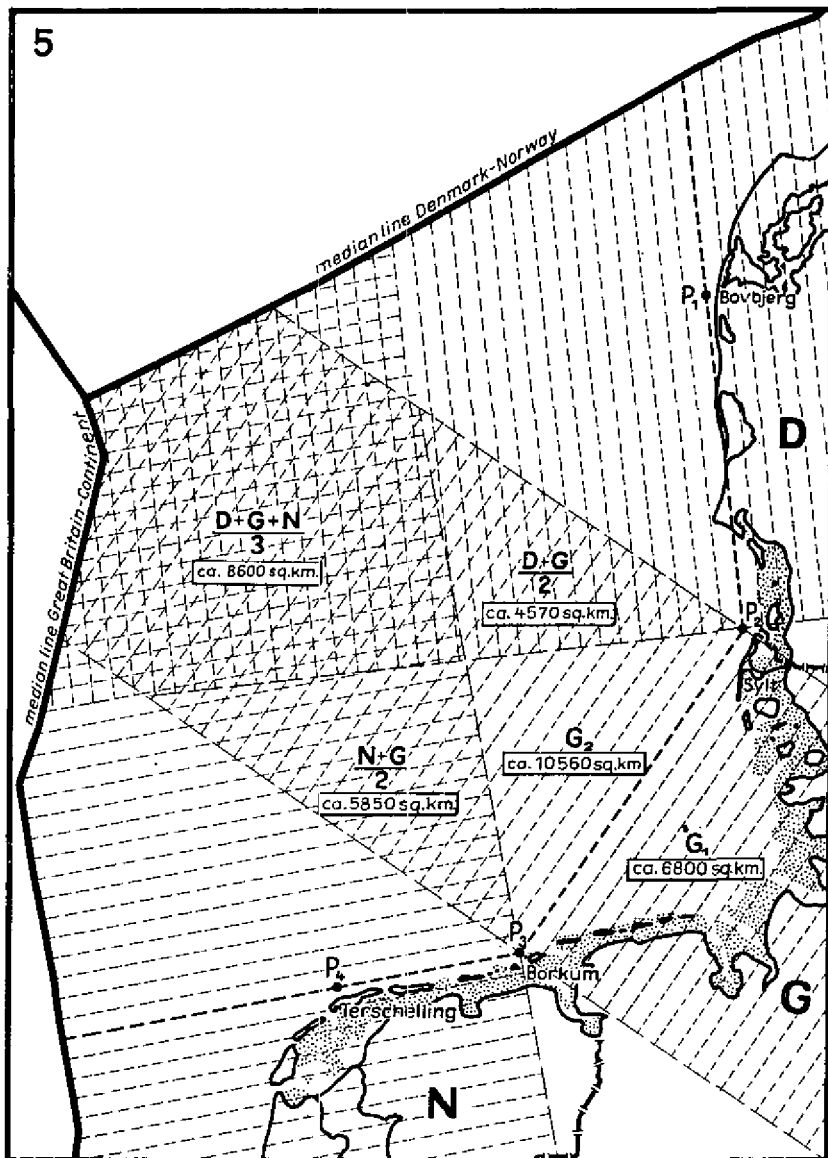
In the special situation of the North Sea, however, we are in the presence of converging continental shelves, because the three Parties and other North Sea States do not face an open sea, but rather surround an enclosed continental shelf. If we want to determine what is the continuation of each State's territory, in such a case, we again have to disregard the actual coastline, whether projecting or curving back. We have to use the coastal front of each State for determining the basis from which the continental shelves of the three States continue into the sea, gradually converging into each other.

We have prepared and distributed a diagram-map No. 5 (see p. 189, *infra*)—of the situation in the south-eastern part of the North Sea, which shows what we understand to be the coastal front of each State and what we understand to be the natural continuation of each State's territory into the North Sea. This diagram needs explanation.

The parallels before each coastal front indicate the direction in which the territory of each State extends into the sea. The overlap of the parallels indicates where the continental shelves converge into each other. I have to explain how the line representing the coastal front had been determined.

If the continental shelf area which is apportioned between the surrounding States has a centre, as in the North Sea, it seems to be legitimate to define the coastal front of these States as the line which represents the breadth of its coast facing the centre. If we had no centre, we would have to take the general direction of the coastline of these States facing the continental shelf area which is to be distributed.

In the case of the south-eastern part of the North Sea, fortunately, we can define the coastal front of each State, starting from the centre, or by proceeding



from the coastline. The result reached by using either of these two methods is not materially different.

Map No. 5 shows the coastal fronts of each of the three States, from which the continental shelf of each of them converges towards the other. Again, I have to stress the point that this line used for the location of the continental fronts of Germany or of our neighbour States, is not an arbitrary line. The coastal fronts of our neighbour States follow closely the general direction of their coasts. Any turn in the direction of the coastal front, towards the east, in the case of Denmark, or towards the south in the case of the Netherlands, would have changed the convergence in such a manner that it would no longer coincide with the approximate centre of the North Sea.

In map No. 5 we have taken the following points for determining the coastal frontline of each State: Point No. 1 three nautical miles off Bovbjerg, point No. 2 three nautical miles off Sylt North, point No. 3 three nautical miles off Borkum West—not off the Hohe Riff but off Borkum West—and point No. 4 three nautical miles off Terschelling West.

The coastal fronts so chosen are facing the centre of the North Sea, just as the Borkum-Sylt line does in the case of the Federal Republic of Germany. It cannot be said that the coastal fronts thus chosen are unfair to our neighbours. We cannot accept that these coastal fronts have been chosen arbitrarily. They correspond to the geographical situation prevailing in that part of the North Sea.

In this context, I should again stress the point that the coastal front is not to be a geometrical baseline on the basis of which boundaries should be constructed. The coastal front has in this context only the function of defining in the most plausible and ostensible way the basis from which the continental shelves converge into each other where a continental shelf area is surrounded by several States.

Since a coastal front in this sense not only expresses the breadth of the basis of the continental shelf of each State extending into the sea, but also a direction into which these continental shelves converge, the configuration of each State's coast is immaterial in this respect. The breadth of the territory extending into the sea cannot be influenced in any way by the configuration of the actual coastline.

The Borkum-Sylt line—the line between the end points of the Danish-German and Netherlands-German frontier, taking not the whole of it but Borkum West as the point of departure—is nothing more than a line indicating the breadth of the basis of the German continental shelf and the direction in which the German continental shelf extends towards the centre of the North Sea. The breadth of that front cannot be influenced by the fact that the German coastline curves back behind that line.

Suppose the German coastline would not curve back, but, on the contrary, would partly project beyond the Borkum-Sylt line, that would not in any way influence the breadth of the basis or the direction of the German continental shelf. You could, without changing the concept, take another of the parallels in front of or behind the Borkum-Sylt line to define breadth and direction of the coastal front.

To conclude my explanation of the coastal front approach, I would again like to make it clear that the coastal front concept only has the function of expressing the dimension of the continuation of a State's territory into the continental shelf before its coast.

In order to offer a criterion for the determination of the equitableness of the delimitation of the North Sea continental shelf, and in order to show that the

sector claimed by the Federal Republic of Germany is not only geometrically equitable, but also equitable under a quantitative standard of evaluation, we submit the following considerations.

If you would care to take a look at the diagram in map No. 5, I shall try to explain what this diagram is meant to show.

We start from the basis that each State's territory continues into the sea with a breadth represented by its coastal front. In terms of area covered by this continuation, the extent of the continuation may then be geometrically expressed by a stretch of area covered by the parallels following each other from the coastal front towards the centre of the North Sea, and enclosed between two lines which are constructed at the end points of the coastal front, perpendicular to the coastal front. These stretches of area, representing the continuation of each State's territory into the sea, converge into each other because of the concave coastline. As map No. 5 shows, the stretches of each State overlap each other. This indicates that the area where they overlap may be considered to be the continuation of both States' territories. It seems equitable that those areas must be divided between both States in equal parts, because each of them shares title to those areas with the other States.

In order to get a quantitative criterion, half of such an area may be attributed in square kilometres to each of the two States. Such areas are those which in map No. 5 are marked by the letters $D + G$ and $N + G$, meaning that in those areas the extension of the territory into the sea of Denmark and Germany, or the Netherlands and Germany, respectively, overlap each other: the figures $N + G$ and $D + G$ indicate that within those areas each of the two States may

$$\frac{\quad}{2} \quad \frac{\quad}{2}$$

claim half of the share of that area as being part of the continuation of its coast into the sea.

Further on to the centre, the stretches of all three States overlap each other. That indicates that within those areas, which in map No. 5 are marked by the letters $D + G + N$, each of the three States may claim that those areas constitute a continuation of its territory. Here it seems equitable that each of the States may claim only one-third of the area, because it shares its title to those areas with two other States.

If you then collate what, for example, the Federal Republic of Germany could claim in square kilometres of the areas covered by the extension of its territory into the sea, we come to a quantitative result in square kilometres which may show whether the area claimed by the Federal Republic of Germany corresponds to the geographical situation.

We have for this purpose to add up the square kilometres shown on all these parts. The square kilometres in the parts marked G_1 and G_2 are parts which are to be considered as belonging or appertaining to the Federal Republic alone, therefore, the square kilometres indicate the total plane area within these parts.

The square kilometres indicated in the other parts are already one-half or one-third of the area shown on this map.

If you then add up these figures and compare the result with the square kilometres covered by the sector the Federal Republic of Germany claims as an equitable share, these figures do not differ very much.

If we add up the square kilometres shown on diagram 5 the result will be about 36,000 square kilometres, while the sector claimed by the Federal Republic would comprise 36,700 square kilometres.

We do not contend that this method may be used to determine the square kilometres each coastal State may claim under any scheme of delimitation applicable between the Parties. We do not contend that this method may be the

basis of a claim to specific areas. This method may, however, provide us with a quantitative criterion as to whether the share which is allotted to a State under the proposed scheme of delimitation is equitable or not.

The criteria which we have offered are not arbitrarily chosen to support the claim of the Federal Republic of Germany to a certain size of area of the continental shelf. They have been developed from the concept of the continental shelf in view of that particular geographical situation where an enclosed continental shelf area has to be apportioned among several adjacent States.

The criteria we have offered should not be taken as criteria generally applicable in all geographical situations. They have been offered as an additional indication of the equitableness of the sector delimitation.

All this was meant to show that by using criteria which may be developed from the concept of the continental shelf and which are pertinent to the particular geographical situation, the principle of the just and equitable share can be transformed into an appropriate standard for the judgment of the equitableness of a proposed scheme of delimitation of the continental shelf.

The Court rose at 5.45 p.m.

TENTH PUBLIC HEARING (5 XI 68, 10 a.m.)

Present: [See hearing of 23 X 68.]

Professor JAENICKE: Mr. President, I would like very much to give my learned colleague Professor Oda the opportunity to explain his coastal façade approach to the Judges, and to make some additional remarks on certain State practice.

REPLY OF PROFESSOR ODA

COUNSEL FOR THE GOVERNMENT OF THE FEDERAL REPUBLIC OF GERMANY

Professor ODA: Mr. President and Members of the Court, today, may I expand the façade approach which I introduced before the Court during my last address. Judge Sir Gerald Fitzmaurice, on the third day of the oral hearing, remarked that I had not indicated exactly how I would draw the lines of demarcation from each end of the baseline if this baseline were drawn between the Island of Sylt and the Island of Borkum.

It is quite true that I had not proceeded so far in my previous address. What I attempted the other day was to demonstrate that the application of the equidistance method, as provided for in Article 6 of the Convention on the Continental Shelf, could lead to progressively inequitable results as the distance from the coast increases. When I mentioned the equidistance method, I was referring to the utilization of equidistance points measured from the actual coastal configuration, except where, under Article 4 of the Convention on the Territorial Sea and the Contiguous Zone, straight baselines may be employed.

In delimiting the lateral boundaries between the adjacent States which extend no farther than the territorial sea and the contiguous zone, the equidistance method can, in some cases, lead to certain inequitable results by adhering closely to the actual configuration of the coasts concerned. This does not, however, have serious consequences, since the territorial sea, after all, is merely a narrow belt before the coast, and since the outer limit of the contiguous zone does not extend to more than 12 miles from the coastline. Furthermore, the lateral boundary of the territorial sea and the contiguous zone is not greatly relevant to the exclusive exploitation of the resources by the coastal States, but is primarily relevant to the regulation of navigation by the coastal States. If the right of foreign vessels to innocent passage through these waters is taken into account, there is even less significance to the lateral delimitation of these coastal maritime areas among the adjacent States. For these reasons, an inequitable result produced by the application of the equidistance method is minimized. A lateral line drawn between the respective States, reaching no farther than the relatively narrow belt composed of the territorial seas or the contiguous zone, does not pose a major problem for the coastal States concerned.

A far more crucial problem, however, is presented in delimiting the continental shelf because such division results in the apportionment of very large areas at great distance from the coast. With such a delimitation task in mind, the coastline at low tide cannot have the same decisive effect but should be brought into proper perspective to make it possible that each adjacent State receives a just and equitable share of the continental shelf. The coastal façade, as I envisage it, represents a view taken of a State's coastal front with the intent of placing it in the proper perspective in relation to the coastal front of its neighbouring States. Such a perspective would lead to a division granting each

State a just and equitable share. In order to visualize such a façade, one should be guided by the general direction of the coast; in some particular cases, the most useful course would be to take the whole coastline of a country as constituting an entity.

In my previous address I referred to the map shown in the *Common Rejoinder, I*, page 470, in order to indicate just one example of what might constitute a coastal façade determined by the particular shape of the German coast. I would like to make clear, at the same time, that the lines shown on this map, in so far as they refer to the Kingdom of Denmark and the Kingdom of the Netherlands, do not represent a correct delineation of a façade. With respect to the latter countries, their façades can easily be visualized on the basis of the general direction of their respective coasts. If one determines the proper façades of the three countries bordering the south-eastern part of the North Sea pursuant to the criteria I have suggested, the continuation of each State's respective territory will converge in the North Sea.

In this connection I feel that it might be pertinent to note the rationale underlying the decision of this Court in the *Norwegian Fisheries* case. The Court said:

"Where a coast is deeply indented and cut into, as is that of Eastern Finnmark, . . . the base-line becomes independent of the low-water mark, and can only be determined by means of a geometrical construction. In such circumstances the line of the low-water mark can no longer be put forward as a rule requiring the coastline to be followed in all its sinuosities. Nor can one characterize as exceptions to the rule the very many derogations which would be necessitated by such a rugged coast: the rule would disappear under the exceptions. Such a coast, viewed as a whole, calls for the application of a different method; that is, the method of base-lines which, within reasonable limits, may depart from the physical line of the coast." (*I.C.J. Reports 1951*, pp. 128-129.)

With this judgment in mind, the *International Law Commission* considered the concept of the straight baseline. In his 1952 report, the special rapporteur, Professor François, stated:

«s'il s'agit d'une côte profondément découpée d'indentations ou d'échan-
cures, . . . la ligne de base se détache de la laisse de basse mer, et la méthode
des lignes de base reliant des points appropriés de la côte doit être admise».
(*Yearbook of the International Law Commission, 1952, Vol. II, p. 32.*)

In his 1954 report, Professor François further suggested that:

«En général la longueur maximum admissible pour une «ligne de base
droite» sera de 10 milles.» (*Ibid., 1954, Vol. II, p. 3.*)

With some minor modifications the *International Law Commission* adopted the proposal of the special rapporteur in its report of 1954. The *International Law Commission*, in 1955, made a further modification by setting up a 10-mile limitation for the length of the straight baseline. This was done because some countries, in commenting upon the 1954 *International Law Commission's* report, were of the view that the 10-mile length was arbitrary and not justified by the opinion of this Court in the *Norwegian Fisheries* case. Thus, the final draft by the *International Law Commission* in 1956 stated:

"Where circumstances necessitate a special régime because the coast is deeply indented or cut into . . . the baseline may be independent of the low-water mark. In these cases, the method of straight baselines joining appropriate points may be employed." (*Ibid., 1956, Vol. II, p. 257.*)

With regard to these provisions, the International Law Commission, in its comments, said:

"The Commission interpreted the Court's judgment, which was delivered on the point in question by a majority of 10 votes to 2, as expressing the law in force; it accordingly drafted the article on the basis of this judgment." (*Ibid.*, p. 267.)

At the Geneva Conference on the Law of the Sea in 1958, most States gave support to the concept. For instance, the delegate from a Scandinavian country made a statement to the effect that:

"The system of straight baselines had great practical advantages wherever the coastline was indented or irregular . . . the length of the straight baseline . . . shall not exceed ten miles . . . the system of straight baselines should not be considered as a 'special régime' . . . but rather as the normal method of delimitation where geographical conditions rendered it applicable." (United Nations Conference on the Law of the Sea, *Official Records*, Vol. III, p. 5.)

For the sake of brevity, I would here restrict myself to quoting the revised United Kingdom proposal which states in part:

"In localities where the coastline as a whole is deeply indented and cut into . . . the method of straight baselines joining appropriate points may be employed in drawing the baseline from which the territorial sea is measured" (*ibid.*, p. 228).

This proposal was adopted by a vote of 47 in favour, 5 against, with 12 abstentions, at the meeting of the first committee of the Conference, 10 miles having been extended in the debate to 15 miles. A further development occurred at the plenary meeting where the Canadian delegate proposed that the reference to the restriction of the straight baseline—15 miles—be dropped on the grounds that the restriction was neither necessary nor desirable. The attempts made by other States to retain a limitation were unsuccessful. The end result was the wording of Article 4, paragraph 1, of the Convention on the Territorial Sea and the Contiguous Zone, adopted by a vote of 63 in favour, 8 against, with 8 abstentions.

In summary, the concept of a straight baseline was intended for the purpose of delimiting the territorial sea. Finally, there was a tendency to restrict the application of this concept to distances not exceeding 10 or 15 miles; in the course of the deliberations of the Geneva Conference on the Law of the Sea, this limitation was not retained.

It may be suggested that this entire concept and its subsequent development may serve as a bridge towards my concept of a coastal façade. This façade line is a macrogeographical viewpoint which is a further abstraction from the microgeographical viewpoint. The latter consists in the drawing of the linear coastline as, for example, is envisaged in the concept of the straight baseline, whereas the façade theory involves a further abstraction from the actual coastal configuration and, therefore, should be characterized as a macrogeographical viewpoint.

At this point I suggest that it might be useful if I were to attempt to explain how and to what extent the thrust of my argument deviates from that of Professor Jaenicke and to underline the issues on which I have taken a somewhat more personal viewpoint as a scholar. As may have become apparent from the written Pleadings submitted by the Federal Republic and the previous

oral arguments advanced by Professor Jaenicke, the approaches emphasized by him of necessity tend to deal with solutions which include a concept of an over-all central area in the North Sea, which he suggested is specifically applicable to the special situation in the North Sea. On the other hand, in the approach that I have suggested, I am primarily concerned with the over-all characterization of the coastlines concerned, the directions in which they face, and the conclusions which can be drawn from this façade.

My façade approach, if I may so call it, is primarily designed to find a solution which may be applied also in other geographical situations. I am not so much concerned with what scheme of delimitation might be based on such a coastal façade as I have envisaged it. I might only add that even if the principle of proximity which our opponents favour so much would be applied to that façade for constructing boundaries, the German share of the continental shelf in the North Sea would be considerably bigger than it would be as delimited by the equidistance boundaries proposed by the Kingdom of Denmark and the Kingdom of the Netherlands. I hope that I have shown that the fundamental feature of my solution is the concept of adjacency adapted to the wider dimensions of the continental shelf concept. I must stress, however, that satisfactory conclusions can only be drawn from the concept of adjacency if in the proper cases the employment of the concept of a coastal façade is viewed as a prerequisite. In this connection I would like to refer to the map in the Danish Counter-Memorial, I, page 200, which shows a hypothetical case which has several times been referred to by the learned agent for the Kingdom of Denmark, as for example, on page 145, *supra*, of the verbatim record of the seventh day and on page 161, *supra*, of the verbatim record of the eighth day. Perhaps the boundary shown on that map is not unreasonable nor is the share allocated to Middleland inequitable in comparison to each of the shares of Leftland and Rightland respectively. However, this illustration has no relevance to the German situation since, in contrast to the latter, the hypothetical Middleland has no justification for claiming that the façade approach would alter the situation because all the three hypothetical adjacent countries are almost on a straight line.

Now I would like, if I may, to reiterate the point I made during my previous address to the Court, namely that the solution based on the coastal façade concept is submitted to the Court simply as one of the possible ways of defining a just equitable apportionment of the continental shelf among the States of the North Sea.

Having addressed myself to one of the questions which had been posed by Judge Sir Gerald Fitzmaurice in order to develop and clarify my concept of the coastal façade, I would now like to turn to some observations which I feel are called for by the address of the learned counsel for our opponents.

An important point in this case, and one which I had dealt with in my previous address, is the fact that the equidistance method has widely differing results dependent upon whether it is applied to demarcation boundaries at close distances near the coast or to boundaries extending for long distances offshore. In this connection I had tried to demonstrate that the committee of experts of the International Law Commission, at the time when it first introduced the concept of equidistance, mainly had in mind the application of this method within territorial seas. A strong indication of this is that the committee of experts stated that they were concerned with the "practical difficulties of the navigator" (citation at p. 57, *supra*, of the verbatim record of the third day). This observation about the interests of the navigator is primarily pertinent to the boundaries of territorial seas. Learned counsel for our opponents, in his

address to this Court, dwelt on this report of the committee of experts. In contrast to my viewpoint, however, Sir Humphrey Waldock emphasized the contention that there is no real distinction with regard to the applicability of the equidistance method between the territorial seas and wider maritime areas beyond them. I refer to page 98, *supra*, of the verbatim record of the fifth day.

In the opinion of the learned counsel the principle of propinquity is the primary and general principle for the partitioning of the continental shelf. Learned counsel alleged, at page 101, *supra*, of the verbatim record of the fifth day, that the Federal Republic was not consistent in the attitude it took towards the applicability of the equidistance method since, even though it now vehemently denies the value of this method, it nevertheless concluded treaties on partial boundaries with the Kingdom of Denmark, on the one hand, and the Kingdom of the Netherlands on the other hand. These partial boundaries, referred to by Sir Humphrey Waldock, terminate on points on the equidistance line. I think, however, that there is no inconsistency whatsoever in the position taken by the Federal Republic of Germany. The Federal Republic made it quite clear in the negotiations leading to the conclusion of these partial boundary treaties that it did not accept the equidistance line as the appropriate demarcation of the continental shelf beyond the points just mentioned. If any inference at all can be drawn from the existence of these partial boundary treaties, it is that the Federal Republic upheld a sharp distinction between the application of the equidistance method to short distances offshore, and its application to greater areas of the continental shelf farther off the coast.

I would like to address myself to the position maintained by our opponents that the equidistance principle is not only explicitly stated in Article 6 of the Convention on the continental shelf, but is also inherently contained in Articles 1 and 2 of this Convention. I give the exact wording of the learned counsel for our opponents at page 95, *supra*, of the verbatim record of the fifth day:

“... we have emphasized the logical and legal link which exists between the equidistance principle prescribed in Article 6 and the recognition in Articles 1 and 2 of the coastal State's exclusive rights *ipso jure* over the continental shelf adjacent to its coast”.

I must say that I strongly disagree with this opinion. I would consider that Article 1 of this Convention on the Continental Shelf is only definitional in purpose and content and has no independent normative function. As for Article 2, it discusses and circumscribes the concept of the continental shelf itself. This concept of the continental shelf, however, was developed far prior to any introduction of the equidistance method and it is therefore, I submit, impossible to infer that a reference to the general concept of the continental shelf, as contained in Article 2, must inherently include the principle of equidistance.

It should be pointed out, moreover, that the Convention on the Continental Shelf of 1958 does not, even in its entirety, present a complete solution to the entire range of problems inherent in the concept of the continental shelf. For one thing, a crucial question has not yet been settled—what are the outer limits of the continental shelf towards the open sea? The issue of the outer boundaries of the shelf has now become of crucial importance in dealing with the resources of the deep sea.

In this connection, may I cite the Court some of the recent resolutions passed by the United Nations in relation to these resources: Economic and Social Council resolution 1112 (XL) of 7 March 1966, on non-agricultural resources; General Assembly resolution 2172 (XXI) of 6 December 1966 on resources of the sea and General Assembly resolution 2340 (XXII) of 18 December 1967, on

examination of the question of the reservation exclusively for peaceful purposes of the seabed and the ocean floor and the subsoil thereof, underlying the high seas beyond the limit of present national jurisdiction and the uses of their resources in the interest of mankind.

All these three resolutions deal with the exploitation of sea resources and the first and third resolutions especially were adopted to deal with the proper use of the sea resources beyond the continental shelf. In all the discussions which led to these afore-mentioned resolutions, and were subsequent to them, it was quite evident that the delimitation of the outer boundary of the continental shelf plays a very important role.

During the deliberations of the United Nations *Ad Hoc* Committee to Study the Peaceful Uses of the Seabed and the Ocean Floor Beyond the Limits of National Jurisdiction, established by General Assembly Resolution 2340 (XXII) of 1967, the attention of the Committee was drawn to the fact that the definition of the outer boundary of the continental shelf, as provided for in Article 1, is still uncertain.

- In accordance with the provisions of Article 13 of the Geneva Convention on the Continental Shelf, a revision of this Convention may take place at any time after the expiration of the five-year period following ratification. This period of time ends during the next year.

All these considerations, I submit, make it quite evident that it is not possible to speak of the continental shelf concept as an already fixed or completed concept. It cannot, therefore, be asserted that Articles 1, 2 and 6 present a complete picture of the continental shelf, containing, as inherently necessary, any specific technical method dealing with it.

I feel that it is appropriate at this point to turn to the question of what legal principles determine the apportionment of the continental shelf in the North Sea. Learned counsel for our opponents has maintained that the primary and general rule on which the delimitation has to be made is the equidistance method, and he attempted to justify this position by claiming that this method has the status of a rule of customary international law, citing as proof therefor the declaratory nature of the provisions of the Convention on the Continental Shelf as well as the Convention on the Territorial Sea and the Contiguous Zone, and the Convention on Fishing and Conservation of the Living Resources of the High Sea, all of which were adopted at the Geneva Conference on the Law of the Sea in 1958. Furthermore, he regarded the acceptance of the equidistance principle in the afore-mentioned Conventions as an element in the formative process of customary international law. Sir Humphrey Waldock alleged that the Federal Republic of Germany did not make any objections to these dispositions during the Geneva Conference of 1958. May I quote his remarks on page 96, *supra*, of the verbatim record of the fifth day:

“Equally, there is no trace that we have found in the records of the Conference of the Federal Republic’s having opposed the incorporation of the equidistance principle in Articles 12 or 24 of the Territorial Sea Convention, or in Article 7, paragraph 5, of the Fishing and Conservation Convention.”

This statement by the learned counsel does not seem to be entirely correct as far as the Geneva Fisheries Convention is concerned.

Article 7 of the Convention on Fishing and Conservation of the Living Resources of the High Sea was adopted by a vote of 34 in favour, 20 against and 5 abstentions at the Third Committee of the Conference. The Federal Republic of Germany was among the States opposing the adoption, together

with Japan, the United Kingdom, France, Italy and Sweden. Since the vote was not taken by means of a roll-call, the names of the voting States are not recorded in the official documents. However, may I cite the Court the two-volume commentary on the four Geneva Conventions on the Law of the Sea which Professor Yokota and I published in Japanese in 1959 under the title *The International Law of the Sea*. I have therein, in Volume II, on page 99, stated that my personal notes taken at the Conference indicate that the countries I have just enumerated voted against Article 7 of the Fisheries Convention. Furthermore, the Federal Republic of Germany, for other reasons, voted against this Fisheries Convention as a whole at the plenary session. In fact the final vote on the Convention on Fishing and Conservation of the Living Resources of the High Sea was 45 in favour, 1 against with 18 abstentions. The Federal Republic of Germany cast the only vote against the Convention. This Convention, therefore, cannot be cited as proof for the proposition that the Federal Republic acquiesced by silence to the equidistance method during the Geneva Conference.

I have now dealt with the argument of the learned counsel for our opponents regarding the importance of the Geneva Conventions for the formation of alleged customary rule of equidistance.

Learned counsel for our opponents further referred to the State practice subsequent to the Geneva Conference as evidence for the formative process of customary law. I do not find myself in agreement with him on some of the cases he cited as evidence in this connection. For example, let me come to our discussion on the oil concession granted by the Kuwaiti Government. Our opponents, in the map printed in the *Common-Rejoinder*, I, page 580, demonstrated the boundaries of the oil concession granted by the Kuwaiti Government to the Shell Oil Company, and stressed the fact that the boundaries of this concession correspond to the equidistance line. In my previous address I tried to show, in contrast, that these concession boundaries were not yet final. May I develop the reasons for this contention a little further?

If we here disregard questions of private law, it is evident that the Kuwaiti Government itself does not regard the boundary of the Shell concession as final. Earlier the same Government, acting with respect to its half interest in the neutral zone between Kuwait and Saudi Arabia, had granted a concession dealing mainly with the area before the coast of the neutral zone to the Arabian Oil Company. The delimitation of this concession is not definitively regulated in the concession because the other State having an interest in the neutral zone, Saudi Arabia, had also given a concession over the same general area of the continental shelf before the coast of the neutral zone to the same oil company. Both Governments, however, were not in agreement as to the lateral boundaries of the concession. As a result of these non-identical concessions granted by the two competent States, the northern boundary of the prior concession to the Arabian Oil Company is likely to be at variance with the subsequent concession to the Shell Oil Company. It seems that the Kuwaiti Government, in its dealings with the two oil companies, affirms both concessions. Under these circumstances, I think I can repeat that we are not entitled to regard as final these boundaries which were cited as an example of the application of the equidistance line as shown in the *Common-Rejoinder*, I, page 580.

May I now come to another point, namely the problem of applying the general principles of law recognized by civilized nations to this case.

In my first address, I submitted the conclusion that in the absence of a convention or rule of customary law, which calls for the mandatory application of the equidistance method, the Court should render its decision based upon the

principle of just and equitable apportionment in reliance on Article 38, paragraph 1 (c), of the Statute of the Court. It is true that neither the Permanent Court of International Justice nor this Court have yet explicitly taken recourse to this provision of the Statute. However, it can well be maintained that the Court has, in the past on numerous occasions, seen fit to apply the general concept of justice and equity. It has referred to the general principles, the recognized principle of law, etc. I submit therefore that the Court has employed this provision of the Statute implicitly. Our reliance on Article 38, paragraph 1 (c), does not imply a request that in this case a decision transcending the domain of strict law be reached.

The general principles of law recognized by civilized nations within the meaning of Article 38 are fundamental elements of established international law. A decision founded upon general principles of law recognized by all civilized nations is, therefore, a decision founded on law and can never transgress the domain of a statement of binding law. In contrast, a decision *ex aequo et bono* may be handed out even in opposition to the existing legal norms. For this reason both Parties must agree explicitly, according to Article 38, paragraph 2, to a solution based on this standard. We have not, however, in the present case, asked the Court, in our submissions, to render a decision which goes beyond the limits of positive law. It is a proper practice to refer to the general principles of law supplying a legal basis if Article 38, paragraphs 1 (a) and (b), namely treaty law or customary law, cannot be applied.

Among civilized nations, the principle that justness and equitableness governs the sharing of the common interest is followed by the domestic courts as a recognized source of law which exists in addition to statutory or customary law. May I quote from the individual opinion of the late Judge Hudson in the *Water from the Meuse* case which the Permanent Court of International Justice decided in 1937:

“Article 38 of the Statute expressly directs the application of ‘general principles of law recognized by civilized nations’, and in more than one nation principles of equity have an established place in the legal system. The Court’s recognition of equity as a part of international law is in no way restricted by the special power conferred upon it ‘to decide a case *ex aequo et bono*, if the parties agree thereto’.” (*P.C.I.J., Series A/B, No. 70, p. 76.*)

This Court has often referred to the “general concept of law”, the “general principle of law”, “general and well-recognized principles” and “well-established and generally recognized principles of law”, and other expressions of a like nature, without mentioning Article 38, paragraph 1 (b), or Article 38, paragraph 1 (c). May I cite some cases: the *Polish Upper Silesia* case, *P.C.I.J., Series A, No. 6*, the *Lotus* case, *P.C.I.J., Series A, No. 10*, pages 16-17; the *Chorzów Factory* case, *P.C.I.J., Series A, No. 17*, page 29; the *Corfu Channel* case, *I.C.J. Reports 1949*, page 22; the *Right of Passage* case, *I.C.J. Reports 1957*, pages 141-142.

I think that we can conclude from this discussion that the Court set the so-called natural law of nations on an equal footing with positive international law, treaty law or customary law. Admittedly, according to the priorities enumerated in Article 38 of the Statute, this natural law of nations has to yield to treaty law or customary law. The equidistance method has not become binding upon the Federal Republic of Germany, either by virtue of treaty law or by virtue of customary law.

I have respectfully submitted to the Court that recourse to Article 38,

paragraph 1 (c), should be regarded as one possible solution. I pointed out, however, in my first address, that I am not attempting to circumscribe the Court's discretion in arriving at other possible solutions.

When I expressed my doubt that there is customary law which is applicable to this case, I did not deny thereby that there are generally accepted rules and principles of international law. Quite to the contrary, we can find the legal solution to this case in the principle that equitable apportionment among the adjacent States may be achieved.

Let me come to the conclusion of my argument. It is not my intention to criticize and underestimate the great value of the work done by the International Law Commission and the Geneva Conference on the Law of the Sea. It is, however, necessary to look at the provisions of the Convention in their right perspective. During the discussion in Geneva, the United Kingdom, in the Fourth Committee, made the proposal to determine the boundary of the adjacent States on the principle of equidistance, in the absence of agreement, without any regard for special circumstances. (United Nations Conference on the Law of the Sea, *Official Records*, Vol. VI, p. 134.) During the discussion on this proposal, which was later withdrawn, the delegate of the Netherlands, the late Admiral Mouton, said that agreement between the States concerned must be the corner-stone of the article (*ibid.*, p. 96).

We are not asking the Court for a decision on what boundaries should be drawn, but we are asking for guidance on what principles should be applicable so that the Federal Republic of Germany could come to an agreement with the adjacent States.

I am of the opinion that even if we take the Convention on the Continental Shelf as the basis, amicable agreement should be regarded as the most desirable manner of delimiting the continental shelf boundary among the adjacent States. The Convention does not offer guidelines for such an agreement, but certainly agreement takes precedence over the application of the method of equidistance. There is no doubt that the principle of just and equitable share should be a determining factor among the Parties seeking agreement.

The equidistance method does have a function, but it is subordinated to the higher principle of equitable apportionment. I respectfully submit that the real intent of the Convention on the Continental Shelf has that orientation. The concept of equitable apportionment of the continental shelf does not necessarily assure an automatic or an easy solution, but it can provide a guideline for negotiation or for arbitration, which might possibly be resorted to. For settlement of their disputes, the States concerned may rely on the method of equidistance or may choose criteria more appropriate to a particular coastal situation. The ultimate and general principles which govern an agreement between the parties, or an arbitral solution, must always be the expression of justice and equity.

Mr. President, this concludes my address and I would like to express my gratitude for the Court's indulgence in hearing my argument.

REPLY OF PROFESSOR JAENICKE

AGENT FOR THE GOVERNMENT OF THE FEDERAL REPUBLIC OF GERMANY

Professor JAENICKE: Mr. President and Members of the Court, in continuing my address, in this second phase of the oral argument, I shall deal in this last part with the eventual application of the special circumstances clause.

I would like to begin with some preliminary observations on the legal ap-

proach which could be followed in the interpretation and application of the special circumstances exception.

The Parties are in agreement that Article 6, paragraph 2, of the Convention does not bind the Federal Republic of Germany under treaty law. The Parties differ, however, as to what principles govern the relations between the Parties in the delimitation of their respective continental shelves in the absence of treaty law applicable between them. According to the view of the Federal Republic, the principle of the just and equitable share determines whether a proposed boundary line must be accepted. In the evaluation of what constitutes an equitable share, the particular geographical situation will be an important element, and no specific authority is therefore necessary to take account of particular geographical facts in this case.

According to the view of the Kingdom of Denmark and the Kingdom of the Netherlands, Article 6, paragraph 2, has become a part of general international law binding on the Federal Republic of Germany. If this be true, then the question arises whether the particular geographical situation in this case is within the realm of the special circumstances exception.

Passing judgment on the question whether and to what extent the particular geographical situation may be taken into account under the clause, we again have the choice of two fundamentally different approaches.

One approach might be to follow the rigid rule of equidistance and to limit exceptions of this rule to questions of basepoints.

The other approach might be to interpret the clause in a wider sense in order to leave the door open to do justice in individual cases. It is the latter approach I would advocate as appropriate, having in mind the purposes of Article 6 of the Convention.

Mr. President, and Members of the Court, the learned Agent for the Danish Government has said that the Federal Republic of Germany, in its Memorial, had not invoked the special circumstances clause and had done so only later on in the Reply. He intimated to the Court that it might therefore be inferred therefrom that the Federal Republic of Germany was not very confident that a case of special circumstances could be made out, and therefore it only half-heartedly invoked the special circumstances clause at a later stage of the proceedings.

This interpretation of our written pleadings arises from the erroneous assumption that Article 6, paragraph 2, of the Continental Shelf Convention is applicable between the Parties. The Court, I presume, is well aware that the Federal Republic has, in its Memorial, taken the view that Article 6, paragraph 2, of the Convention is not applicable among the Parties. Therefore, the Federal Republic obviously could not rely on that clause. This explains then, very logically I hope, why the Federal Republic of Germany did not invoke the special circumstances clause in its Memorial. We had, however, at that time already referred to the particular geographical situation existing in that part of the North Sea. I should like to quote from our Memorial, I, page 74:

"The enclosure of the coast of a State by projected parts of the coasts of the two neighbour States to the left and to the right has a cumulative geometric effect; at a relatively short distance from the coast the two equidistance lines intersect, thereby cutting off the inside coast from the high sea. The diagrams (figures 17, 18, page 73) demonstrate this geometrical consequence very clearly."

Since, however, the Kingdom of Denmark and the Kingdom of the Netherlands, in their Counter-Memorials, contended that Article 6, paragraph 2, of

the Continental Shelf Convention, or its equivalent, the so-called equidistance-special circumstances rule, was binding on the Federal Republic of Germany, the latter had reason to invoke the special circumstances clause in the event that the Court approved of the arguments of our opponents.

Thus, the Federal Republic invoked the special circumstances clause as a subsidiary defence against the submissions of the Kingdom of Denmark and the Kingdom of the Netherlands at the right time and in the right place. Any inference that the Federal Republic acted half-heartedly and belatedly, without enough confidence to base its case on the special circumstances clause, is without foundation.

In its Reply, the Federal Republic of Germany has maintained that the North Sea presents a special case because it covers a single continental shelf surrounded by several States, and the Federal Republic has further maintained that such a geographical situation might call for special solutions, in order to arrive at an equitable apportionment.

In the Reply, the Federal Republic had already more explicitly pointed to the combined effect which both equidistant boundaries would have on the size of the Federal Republic's share of the continental shelf.

The Federal Republic has referred to the rectangular bend in the Danish-German-Netherlands coastline that causes both equidistance lines to meet before the German coast, thereby reducing the Federal Republic's share to a disproportionately small part compared to the shares of the other North Sea States. A glance at the map will make this plain to any observer, and it is the view of the Federal Republic that such a geographical situation is special enough to come within the meaning of the special circumstances clause.

This view has been further elaborated in my address on 24 October, where I said, at page 51, *supra*, of the verbatim record of this day, that the cut-off effect with respect to extensive areas before the German coast has to be regarded as a special circumstance within the meaning of Article 6, paragraph 2, of the Convention. Thus, I feel, it is perfectly clear what the Federal Republic regards as a special circumstance in the present case. There has been no half-heartedness in this regard.

Our opponents contend that this cut-off effect could not be regarded as a special circumstance in the sense of Article 6 (2). They deny this for several reasons.

First, they interpret this clause so narrowly that only insignificant islands or peninsulas could perhaps be considered as a case of special circumstances.

Second, they contend that the boundary lines, based on the equidistance method, between Denmark and the Federal Republic, and also between the Netherlands and the Federal Republic, should be viewed separately so that the combined effect of both boundaries could not be taken into account.

Third, they assert that the Danish as well as the Netherlands' part of the continental shelf, within its equidistance boundaries, is perfectly normal, so that it would be unjustified to enlarge the Federal Republic's share at the expense of its neighbours.

Now as for the interpretation of the special circumstances clause, I do not think that I should again go into the matter after the arguments I have already advanced against such a narrow interpretation in my address on 24 October. However, one point in the argument of the learned Agent for the Danish Government needs specific comment.

The learned Agent for the Kingdom of Denmark took issue with the wider interpretation advocated by the Federal Republic, on the ground that such an interpretation would deprive the equidistance method described in Article 6 (2)

of any effect if a State could object to the application of the equidistance method as inequitable under its subjective notion of what constitutes a just and equitable share. You may find that on page 144, *supra*, of the verbatim record of 31 October 1968.

I respectfully submit that this is not the right perspective from which one should regard the matter. Surely, the appreciation as to whether there are special circumstances justifying another boundary line does not depend on the subjective view of one of the States concerned, but depends, rather, on objective criteria. But if the two States differ as to whether there are special circumstances or not, in the sense of Article 6, paragraph 2, this matter must then be decided by arbitration.

It cannot be said that the one State which wants to rely⁴ on the equidistance method has a better legal position than the other which invokes special circumstances. It depends on the objective criteria applicable to the case whether the particular geographical situation is to be considered a special circumstance within the meaning of Article 6, paragraph 2.

The reasoning of our opponents amounts to the thesis that the principle of the just and equitable share could not be made the test for the presence of special circumstances, because this would lead to uncertainty.

I do not think that this is a *convincing argument against a wider scope of application of the special circumstances clause.*

The application of the special circumstances clause necessarily involves an appreciation of the result of the application of the equidistance method. Such a margin of uncertainty is unavoidable because the clause does not specifically define what are special circumstances in the sense of Article 6, paragraph 2.

The learned Agent for the Danish Government admits that even under the narrow interpretation given by him to the special circumstances clause the clause would have to be invoked fairly often because of the presence of numerous insignificant islands all over the world; but what are the criteria for determining whether an island is insignificant and whether such an insignificant island should be disregarded and under what circumstances? In all these cases an appreciation has to be made as to whether the presence of a particular island, if taken into account in the construction of the equidistance line, would lead to an apportionment which seems inequitable to one of the Parties. If we just take the example of figure E, in the Common Rejoinder, I, page 533, why should this small island not be taken into account? Would the case be the same if this island was situated nearer to the coast, thereby causing a smaller deviation of the equidistance line?

Obviously in all these cases an appreciation has to be made whether the area of the continental shelf, which by the presence of such an island will be allocated to the other State, assumes such dimensions that the apportionment of the continental shelf between the two States becomes inequitable.

I do not see what else could be taken as a basis for such an appreciation. Furthermore, what size would the island have to be in order that it no longer be regarded as insignificant, so that the diversion of the equidistance line caused by the presence of that island must be accepted by the other State, although its effect would be of just the same magnitude as that caused by an insignificant island?

Take the world of scattered islands in the Pacific Ocean—on what lines should the continental shelf be delimited in this region? All these questions show that even under the narrow interpretation of the special circumstances clause advocated by our opponents one cannot dispense with an appreciation whether the taking into account of such a geographical fact is equitable or not.

Therefore, I submit, it is no valid argument against the wider interpretation advocated by us that the application of the clause would necessitate an appreciation as to the equitableness of the result caused by the equidistance method.

The Federal Republic of Germany maintains that the special circumstances clause has a much wider scope of application. According to the opinion of the Federal Republic it is the purpose of the special circumstances clause to avoid that the application of the equidistance method leads to inequitable results, and the scope of the application of the equidistance method must therefore be defined with a view to that purpose of the clause.

In this context I should mention that the clause was not inserted into the Convention, as the learned Agent for the Danish Government has asserted, at a later stage to provide against hardship caused by the rigid application of the equidistance method; rather the combination of the equidistance method with the special circumstances clause was regarded by the members of the International Law Commission as a necessary prerequisite for the adoption of the equidistance method.

If Article 6 (2) prescribes, as our opponents contend, the principle of proximity to be the rule, but at the same time, Article 6 (2) provides for general exceptions to this rule under the heading of special circumstances; if a legal provision contains a rule and at the same time provides for a general exception to this rule, there must necessarily be some higher standard for deciding whether the rule or the exception applies. It would be a logical contradiction to define the cases where the rule of proximity should not apply by standards of proximity.

We must look for the higher standard which permeates the legal provision as a whole, namely the rule plus its exception. The Federal Republic is of the opinion that there is such a higher standard, which governs the provision of Article 6. This standard is, according to our view, the principle of equitable apportionment.

This standard can be ascertained by looking to State practice as well as to the discussions and deliberations that preceded the adoption of Article 6; even our opponents admit that it was the purpose of the provision contained in Article 6 to transform the ideas of equitable principles into a legal formula. It does not seem necessary for this purpose to prove that the principle of the just and the equitable share is a general principle of law in the sense of Article 38, paragraph 1 (c), of the Statute of the Court.

To interpret Article 6 (2), it is sufficient to know what was the aim of the authors of Article 6 and the purpose of Article 6 as formulated by them to satisfy the demands of equitable apportionment.

I would like to elaborate on this point a little further.

The Court adjourned from 11.20 a.m. to 11.40 a.m.

When the Court adjourned I was just about to elaborate on the point how the principle of equitable apportionment could be made the basis for the judgment, whether there are special circumstances in the sense of the clause.

Our opponents contend that the application of the principle of a just and equitable share would be alien to the field of the law of the continental shelf and would conflict with treaty law. Equitable apportionment, however, is the legal essence of the equidistance-special circumstances rule. The relationship between rule and exception must be interpreted in the light of the purposes of Article 6, of the purpose to achieve an equitable result. We are here on safer ground than in the field of general international law. Adopting the stan-

dards of equitable apportionment is interpretation of treaty law, not judicial rule making.

We are all aware of the changing concept of international law which manifests itself not only in the substance of the rules but also in the interpretation of these rules. The so-called functional interpretation has paved the way, in contrast to the orthodox interpretation due to the jurisprudence of this Court and due to the work of eminent scholars in this field of law, to mention only the late Judge Lauterpacht.

I would like to refer in this context to the French reservation to Article 6 of the Continental Shelf Convention. It seems that France shares the legal position taken by the Federal Republic of Germany that under the special circumstances clause, not only insignificant islands or peninsulas, but also the macrogeographical situation of a country may furnish a sufficient ground for invoking the special circumstances clause. As the wording of the reservation shows, France regards the geographical position of its Atlantic coast in the Bay of Biscay, which is flanked on both sides by other countries, as a case of special circumstances. In an article by France de Hartingh on "La position française à l'égard de la convention de Genève sur le plateau continental", published in the *Annuaire français de droit international* 1965, at page 728, those macrogeographical factors which might divert the equidistance boundary farther off the coast in such a way as to "enclaver" the French continental shelf were specifically referred to.

The special circumstances clause does not contain any specific criteria that must be taken into account in the appreciation of whether there is a case of special circumstances. This decision of the authors of Article 6 of the Continental Shelf Convention was very wise, since no rigid formula of delimitation can be found that would be applicable under all circumstances.

It is not possible to establish particular specific criteria as to the application of the special circumstances clause since its motivation was to provide a procedure whereby consideration could be given to the particular elements of each case. Therefore, determination whether, in a particular geographical situation, special circumstances are present, can only be made with a view to the underlying idea which is to provide for a just and equitable apportionment under all circumstances.

When we keep this in mind, we may be in a better position to understand why it is hardly possible to determine the manner of application of the special circumstances clause from the examples provided by State practice and by legal writers. The clause must rather be interpreted and applied to each individual case with a view to its purpose to achieve a just and equitable result.

We have asked the Court to appreciate the special factors prevailing in the present case. This does not, therefore, mean that we request the Court to make an *ad hoc* decision but rather to interpret and to apply the special circumstances rule to the concrete situation.

What do we regard to be the special circumstance in the present case? It is the rectangular bend in the Danish-German-Netherlands coastline which causes both equidistance lines to meet before the German coast, thereby, if I might use this word, "enclaving" the continental shelf of the Federal Republic.

As the combined effect of the two equidistance lines on the size of the German share caused by the rectangular bend of the Danish-German-Netherlands coastline cannot be denied, our opponents, therefore, try to split up the evaluation process. They contend that the appreciation of the equitableness or the normality of the equidistance boundary between the Federal Republic of Germany and the Kingdom of Denmark and the Kingdom of the Netherlands

respectively can only be made with a view to the part of the coastline to the right and to the left of the boundary. No regard should be paid to the macro-geographical situation as a whole. Obviously this cannot be done.

The learned Agent for the Danish Government relied on a statement I made in my address on 24 October, when I referred to the hypothetical case where both Denmark and Germany face an open sea to the west as if there was no bend in the German coastline and as if the Netherlands coast did not exist. I said that in such a case, and only in such a case, the equidistance line constructed on such a Danish-German coastline might be characterized as normal and equitable. The latter would also be the case in the hypothetical situation which assumes that the coastline of the Netherlands and the Federal Republic would face an open sea to the north as if there was no rectangular bend in the German coastline and as if Denmark did not exist. I said that in such a case, and only in such a case, the equidistance boundary constructed on such a Netherlands-German coastline might be characterized as normal and equitable.

It was perfectly clear from the context in which I presented these two hypothetical cases that I wanted to show thereby that, only under the assumption that these countries were alone in the world, the normality of the equidistance boundary could be maintained. It is perfectly clear, furthermore, that such an isolated view of each coastline does not correspond to the geographical reality.

In the case now before the Court whether the equidistance boundaries between Denmark and the Federal Republic and between the Netherlands and the Federal Republic are just and equitable can only be evaluated by examining the effect each of those boundaries has on the size of the Federal Republic's share.

If there were only a small belt of continental shelf before the coasts of Denmark, the Federal Republic and the Netherlands, it would probably be legitimate and sufficient to judge the equitableness of the boundary line by examining the relatively small area delimited thereby. In such a case the equidistance boundary would perhaps even be regarded as equitable. But if the equidistance boundary reaches far out into the sea it affects the apportionment of extensive submarine areas and the evaluation of the effects of the proposed boundary cannot be restricted to the local configuration of the coast. The whole geographical situation around the continental shelf that is to be apportioned has to be taken into account. That is what I would like to call the macro-geographical perspective.

It is a fact of geography that the bend in the Danish-German-Netherlands coastline causes the equidistance lines to meet before the coast of Germany and thereby to cut off the German share of the continental shelf from the areas in the middle of the North Sea. Each of the two equidistance boundaries constructed on the Danish-German-Netherlands coastline contributes to this result.

The existence of this cut-off effect cannot be denied by asserting that between Denmark and the Federal Republic only one of the equidistance boundaries is in dispute, and, *mutatis mutandis* between the Netherlands and the Federal Republic only the equidistance boundary between these two States is in dispute, and that therefore the effects of such a boundary on the apportionment in general are irrelevant.

While it is true that the Court would have to pass judgment on the equitableness of the particular boundary line, either between the Federal Republic and the Kingdom of Denmark, or the Kingdom of the Netherlands and the Federal Republic, in the appreciation of the equitableness, it must take into account all effects caused by this line.

The extent to which the macrogeographical perspective must be used depends

on the size of the continental shelf areas to be apportioned among the States.

We think that the geographical situation in which the equidistance method causes such cut-off effects constitutes a case of special circumstances and we leave it to the appreciation of the Court whether we are right in this respect.

I again refer to the demonstration of the cut-off effect of the two equidistance boundaries shown in our Reply, I, pages 428 and 430.

Our opponents deny the existence of such a cut-off effect by contending that the location and configuration of the German coastline is caused by nature or history, and that therefore the consequences have to be accepted as such by the Federal Republic of Germany. That again is tantamount to saying that apportionment on the principle of proximity is equitable *per se*. The appreciation whether the Federal Republic's share is equitable in comparison with those of its neighbours must depend on a basis of a standard higher than that of mere proximity.

The Federal Republic maintains that this basis should be the principle of the just and equitable share applied to the particular geographical situation. It depends very much on the size and the extension of the continental shelf area to be apportioned between the several adjacent States whether only the local or the macrogeographical situation has to be considered.

If—may I repeat that again—the delimitation in the North Sea were confined to a narrow coastal belt of the continental shelf, the appreciation whether the Federal Republic share would be equitable, would not lead to the same result as in the situation in the present case where the seabed of the whole North Sea has to be apportioned amongst the adjacent States. We have already demonstrated that under the particular macrogeographical situation in the North Sea a division by sectors amongst the adjacent States is the equitable apportionment.

Judged on this basis, the cut-off effect of the two equidistance lines constructed on the Danish-German-Netherlands coast and its result on the size of the Federal Republic's share could not be regarded as equitable. Consequently, another boundary line must be sought which would neutralize the cut-off effect and thereby apportion an equitable share of the continental shelf to the Federal Republic.

In order to show that the cut-off effect of the two equidistance lines constructed on the Danish-German-Netherlands coastline is a special circumstance, which justifies a correction in favour of the Federal Republic, one has only to visualize a different configuration of the coastline. Assuming that the German coastline did not curve back but rather, in its middle part, projected towards the centre of the North Sea—say perhaps 20 to 25 miles farther to the sea than the Island of Heligoland is now situated—in such a hypothetical case the share of the Federal Republic would, by application of the equidistance method, result in the sector claimed by the Federal Republic. This would come about without any modification of the Danish-German or the Netherlands-German coastline. That shows that the cut-off effect is caused by the deep indentation in the German coastline.

One might well ask whether such differences in the configuration of the German coastline should have such an effect on the size of the Federal Republic's share. In a macrogeographic perspective, the sector claimed by the Federal Republic of Germany under the geographical situation in the North Sea constitutes an equitable share compared with the respective shares of its neighbours; and, therefore, the actual coastal configurations should not be taken into account; it should be immaterial whether the coast curves back or projects forwards.

While in the narrower belt of territorial waters the coastal configuration in the vicinity of the boundary determines the equitableness of such a boundary, the allocation of areas far off the coast must be determined by the macro-geographical situation. Consequently, indentations or projecting parts, even if they are of larger dimensions, should not decide the allocation of continental shelf areas at a distance of more than 100 nautical miles off the coast. It may then be said that such indentations or projecting parts of the coastline, if they considerably influence the size of a coastal State's share, should be regarded as a special circumstance.

The learned Agent for the Kingdom of Denmark further contended that even if the configuration of the German coast could be characterized as a special circumstance, the Federal Republic still has to establish what other boundary line would be justified thereby and how such a boundary line might be constructed. To the latter question we have already responded and have made clear how such an equitable boundary line should be constructed. But, the learned Agent contended that the share of Denmark as well as the share of the Netherlands, within their equidistance boundary lines, were perfectly normal, so that it would be unjustified to ask these States to transfer part of their continental shelf to the Federal Republic. Here again, it is no argument in support of his contention that the Kingdom of Denmark or the Kingdom of the Netherlands share is normal and justified, to say it comprises a part of the continental shelf which in all its parts is nearer to some point of their coasts rather than to the German coast. To say that the application of the equidistance method is justified by the principle of proximity is a mere tautology, since the equidistance method is nothing but the geometrical expression of the principle of proximity. Therefore, proximity cannot possibly provide the standard of whether the equidistance boundary and the shares resulting therefrom are normal and equitable.

In order to prove the normality of their shares, our opponents have reproduced two different maps in their Counter-Memorials, to which the learned Agent for the Danish Government has referred, namely the one in the Danish Counter-Memorial, I, page 213, and the other in the Netherlands Counter-Memorial, I, page 366. Both maps were designed to show that if the boundaries were drawn according to the equidistance method, neither the Danish share nor the Netherlands share would be abnormal in relation to its respective coastline. However, the two maps are not identical. I think the Court will perceive that the one in the Danish Counter-Memorial omits the German-Netherlands equidistance boundary, while the other, in the Netherlands Counter-Memorial, omits the German-Danish equidistance boundary. Therefore, neither of the two maps shows the size of Germany's share, because in the Danish map the shares of Germany and the Netherlands appear as a single share, and in the Netherlands map the shares of Germany and Denmark appear as a single share. This creates the impression that the Danish share as well as the Netherlands share are perfectly normal.

These maps, of course, were not drawn by our opponents to create a wrong impression because we all know what the boundaries and the shares of these countries are. But the purpose of these maps was to show that the continental shelves of both countries are perfectly normal in relation to their coastlines if viewed in isolation. That is the fallacy of the approach of isolating the appreciation of each share without regard to the share of any other State, although the continental shelf in the North Sea has to be apportioned among the States under principles that apply to each of those States.

One cannot appreciate the equitableness of the Danish or the Netherlands

share separately without comparison with the shares of all adjacent States, and if you compare them on the map—I will once again repeat that—you will easily perceive that there is no equitableness of the Danish and Netherlands shares when compared to the German share with respect to their coastlines.

The Federal Republic is of the opinion that an adjustment of the boundary line as indicated on map No. 6, which we distributed yesterday, is not unjustified. It is a modest adjustment and it is, in our view, not unjust either towards the Kingdom of Denmark or towards the Kingdom of the Netherlands, in view of the length of their respective coastlines. I do not think that it takes away areas which are clearly the natural continuation of the Danish or the Netherlands coast and therefore naturally appertaining to them.

The share claimed by the Federal Republic would then still constitute only two-thirds of the size of the shares of its neighbours if our proposal would be adopted. The adjustment of the German share, resulting in a sector which would satisfy the claim of the Federal Republic, could be made without substantial diminution of the Danish or the Netherlands share. The area involved would be approximately 12 per cent. of the Danish and 9 per cent. of the Netherlands equidistance share—*approximately*. The approximate figures in square kilometres would be 7,600 on the Danish side, and 5,500 on the Netherlands side. That concludes my observation on the application of the special circumstances clause.

Turning to our submissions, we do not add to or subtract from the wording of the Submissions Nos. 1, 2 and 3 contained in our Reply, I, page 435. They are therefore hereby explicitly and formally upheld. With respect to Submission No. 4, I would state the following.

Since our opponents have asserted that the wording of our Submission No. 4 could be interpreted as an invitation that the Court refer the matter back to the Parties for further negotiation, we would like to replace Submission No. 4, without changing its substance, by the following new submission:

“Consequently, the delimitation of the continental shelf, on which the Parties must agree, pursuant to Article 2 of the Special Agreement, is determined by the principle of the just and equitable share, based on criteria relevant to the particular geographical situation in the North Sea.”

The full text of the submissions has just been handed to the Registrar.

I assume that the Court would, in accordance with the proper procedure, like me to read the full text of all the final submissions that we submit to this Court. These submissions are:

1. The delimitation of the continental shelf between the Parties in the North Sea is governed by the principle that each coastal State is entitled to a just and equitable share.

2. (a) The method of determining boundaries of the continental shelf in such a way that every point of the boundary is equidistant from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured (*equidistance method*) is not a rule of customary international law.

(b) The rule contained in the second sentence of paragraph 2 of Article 6 of the Continental Shelf Convention, prescribing that in the absence of agreement, and unless another boundary is justified by special circumstances, the boundary shall be determined by application of the principle of equidistance, has not become customary international law.

(c) Even if the rule under (b) would be applicable between the Parties,

special circumstances within the meaning of that rule would exclude the application of the equidistance method in the present case.

3. (a) The equidistance method cannot be used for the delimitation of the continental shelf unless it is established by agreement, arbitration, or otherwise, that it will achieve a just and equitable apportionment of the continental shelf among the States concerned.

(b) As to the delimitation of the continental shelf between the Parties in the North Sea, the Kingdom of Denmark and the Kingdom of the Netherlands cannot rely on the application of the equidistance method, since it would not lead to an equitable apportionment.

4. Consequently, the delimitation of the continental shelf, on which the Parties must agree pursuant to paragraph 2 of Article 1 of the Special Agreement, is determined by the principle of the just and equitable share, based on criteria relevant to the particular geographical situation in the North Sea.

These are our final submissions in this case.

Mr. President, before concluding my address, I would like to observe that there are two basic questions in issue in this case. The answers given to them may have far-reaching effects on the future development of the law of the continental shelf. These questions are:

First, should the delimitation of the continental shelf follow the rigid principle of proximity or rather the more flexible principle of the just and equitable share.

Second: should only local and insignificant configurations of the coast allow minor adjustments of the continental shelf boundaries, or should, also, the macrogeographical situation of a country provide a sufficient justification for a more equitable delimitation.

This concludes, Mr. President, the second presentation on behalf of the Federal Republic of Germany. I shall not fail to thank you, Mr. President and Members of the Court, for listening to our arguments. Thank you.

The Court rose at 12.20 p.m.

ELEVENTH PUBLIC HEARING (7 XI 68, 10 a.m.)

Present: [See hearing of 23 X 68.]

Professor JAENICKE: Mr. President, would you please allow me to make a short announcement for the record. In response to the request of the Court to make available to the Court minutes, notes or reports with reference to the negotiations which led up to the partial boundary treaties between the Parties, I would like to announce that I shall deposit on behalf of the Federal Republic of Germany relevant material in this respect. The material will be made available to the Court as soon as possible, but since the selection and translation of this material takes some time, I shall deposit this material, with your permission, within the next week.¹

Le PRÉSIDENT: La Cour prend note de la déclaration de M. l'agent de la République fédérale d'Allemagne.

REQUEST BY JUDGE MOSLER

Judge MOSLER: Will the Agents of the Parties please provide the Court with maps showing the baselines of their coasts facing the North Sea from which the breadth of their territorial sea is measured.

Le PRÉSIDENT: Naturellement, les Parties sont invitées à produire ces cartes aussitôt que possible, mais elles pourront les présenter après la clôture de la procédure orale, s'il ne leur est pas possible de le faire avant.²

REJOINDER OF PROFESSOR RIPHAGEN

AGENT FOR THE GOVERNMENT OF THE KINGDOM OF THE NETHERLANDS

Professor RIPHAGEN: Mr. President and Members of the Court, before commencing my address I may respectfully inform the Court that the notes on the negotiations between the Kingdom of Denmark and the Federal Republic of Germany, relating to the partial boundary line, have been deposited in the Registry.³ The notes on the negotiations between the Kingdom of the Netherlands and the Federal Republic will be deposited today.⁴

We will also deposit in the Registry the documents we have been able to find in the archives of the Ministry of Foreign Affairs relating to the meeting of the Committee of Experts.⁵

Finally, I may announce that the reply to the questions put by Judge Sir Gerald Fitzmaurice will be given by Sir Humphrey Waldoock in the course of the second round of the oral pleadings.

Mr. President and Members of the Court, in their respective Counter-Memorials, in their Common Rejoinder and in their oral argument, the Kingdom of Denmark and the Kingdom of the Netherlands have repeatedly drawn the Court's attention to the remarkable inconsistency of the Federal Republic's

¹ See pp. 339-363, *infra*.

² See Nos. 51, 52 and 53, pp. 391 and 392, *infra*.

³ See pp. 303-319, *infra*.

⁴ See pp. 320-338, *infra*.

⁵ See No. 50, p. 390, *infra*.

submissions, and of the arguments the Federal Republic advances in support of its submissions.

The submissions and arguments of the Federal Republic, both in their negative part—the rejection of the equidistance principle—and in their positive part—the introduction of the so-called just and equitable shares principle—present a formidable attempt to combine two fundamentally different, even diametrically opposed, legal approaches into a set of alleged legal rules, favourable to the Federal Republic in these particular cases.

The Agent of the Federal Republic is apparently fully aware of the hazards of such an attempt, since he himself qualifies the result of the operation as, and I quote from page 36, *supra*, of the records of the second day, “a standard . . . pertaining only to that particular situation”.

I think I would abuse the patience of the Court were I to discuss the question whether the Court could apply such a one-case standard, without precedent in, or consequence for, other cases, under Article 38 of its Statute or, indeed, under Article 1 of the two Special Agreements submitting the two disputes to the Court. The answer to that question is only too obvious.

But I might be allowed, in this final stage of the oral procedure, to demonstrate briefly the fundamental inconsistency in the Federal Republic's arguments and illustrate this inconsistency with a few quotations from the pleadings of our opponents. In simple terms, the legal issue before the Court could be stated in the form of the following alternative.

Are the sovereign rights of a State over a continental shelf area to be considered—first branch of the alternative—as a continuation of its sovereignty over its land territory; or—second branch of the alternative—as a result of the distribution of common property, the sea, between States?

Mr. President and Members of the Court, we respectfully submit that the whole German argument, as developed and modified in the Memorial, the Reply, the oral pleadings in the first round and again the oral pleadings in the second round, is an attempt to escape from this alternative by using concepts derived from the second branch of the alternative, in order to alter the normal application of concepts derived from the first branch of the alternative, and this in a direction favourable to the expansion of the Federal Republic's continental shelf. Let me explain this submission by a brief review of both the negative and the positive German contentions.

According to the Federal Republic, the legal rule of boundary delimitation, the equidistance-special circumstances principle, would not be applicable as between the Parties to the present disputes, as it would not result in the Federal Republic receiving a fair and equitable share. The Federal Republic, and now I quote from page 37, *supra*, of the record of the second day, is sitting at the table and is “waiting to get a piece of the cake which is to be divided up”. But, Mr. President, one may regret it or not, the body of existing rules of general international law does *not* represent a collectivist system designed to distribute the world's wealth between the members of the community of States.

Quite a lot of boundaries in the world have a considerably different shape and location if international law were to decree that each nation should have at its exclusive disposal a total area representing a fair and equitable share of the world, or even only of the submerged parts of the world.

On the contrary, and I repeat, whether we regret it or not, international law as it stands today accepts the States, the size of their territories and their potentialities as they have historically developed, and its rules in relation to boundaries are only marginal. These rules refer to lines, not to the total surface of areas, and even less to the total resources and potentialities of such areas.

When, therefore, the Federal Republic invokes, as it does, *inter alia*, on page 32, *supra*, of the record of the second day, a so-called principle of the just and equitable share as—

“an over-riding principle generally recognized in legal systems; a principle which governs the distribution of wealth, resources, and potentialities among persons entitled to the same if the legislator has not made a specific rule for that purpose”,

then it invokes a so-called principle which, whatever its status may be in municipal law systems, is manifestly not a principle of present-day international law.

The, what one might call, individualist attitude of present-day international law relating to States' territories is also reflected on the institutional plane in the generally accepted procedures of establishing boundary lines between States. There is no centralized world authority which, to borrow again the metaphor employed by the Agent of the Federal Republic, cuts the cake and hands out the pieces to the States sitting around the table.

On the contrary, it is common ground that power and authority are decentralized in the present state of international law. As a consequence, the determination of a boundary line is a matter between each group of two neighbouring States, in other words, is always a bilateral affair. For these bilateral relations between neighbouring States, for the determination of the line where the sovereign rights of one State meet the sovereign rights of the other State, the rules and principles of international law give guidance.

But wherever one looks in the mass of materials relating to the rules and practices of international law, one never can find a legal concept according to which the boundary line between State A and State B is determined or influenced by the boundary line between State B and State C.

Surely we do not overlook the fact that in history we can find post-war settlements which are multilateral treaties, including the determination of frontiers. But these are highly special treaties and can hardly be considered as precedents for a general rule of international law prescribing a sharing out of areas or resources in just and equitable shares.

Nor do we overlook the possibility that, from a political point of view, a group of States might feel inclined to come together in order to rearrange their respective territories, possibly with a view to arriving at a solution according to which members of the group which nature and history have provided with greater potentialities cede some of those potentialities to other members of the group less favoured by history and nature. Indeed, such a possibility was one the Federal Republic had in mind in the earlier stages of the present boundary disputes.

In this connection it is significant to note the present attitude of the Federal Republic towards what they consider to be the common continental shelf of the North Sea. On page 37, *supra*, of the record of the second day, the Agent of the Federal Republic states:

“I shall now try to develop the standard for an equitable delimitation of the continental shelf between the Parties step by step.

The first fact which we have to take into account is the legal situation already existent as to the delimitation of the North Sea continental shelf. The continental shelf of the North Sea, I would like to stress this point, is already divided up into three sector-like parts or slices, if you like to say so, the British sector which, as you will see, is a rather large sector, fortunately for Great Britain, the Norwegian sector and the remaining sector comprising the Danish, German and the Netherlands parts. This general pattern of

delimitation has already been agreed to by treaties between Great Britain, the Netherlands, Denmark and Norway.”

But, Mr. President, all those treaties mentioned by the Agent of the Federal Republic as presenting the legal situation to be taken into account in the present disputes are bilateral treaties establishing the common boundary line between two States; States which, in respect of their continental shelf areas, are neighbouring States; and if those bilateral treaties are rightly considered by the Federal Republic as establishing the legal situation, why then should the bilateral treaty between the Netherlands and Denmark, establishing their common frontier on the North Sea continental shelf, not be a part of the legal situation?

The answer is, of course, that the Federal Republic tries to escape from the alternative. It accepts and recognizes the perfectly normal bilateral determination of common boundaries on the continental shelf between two States, the sovereign rights of which meet at that boundary, the equidistance line; but only to the extent that those boundaries do not operate to the effect of leaving to the Federal Republic a continental shelf area which it considers insufficient in size. Then it turns to the opposite legal approach of a multilateral sharing out on the basis of fair and equitable shares between North Sea States.

There are more of those glaring inconsistencies in the Federal Republic's arguments. We have already referred, in the Counter-Memorials, in the Common Rejoinder and in our present exposé, to the persistent confusion by the Federal Republic of resources and space. This confusion is a necessary element of the attempt to escape the legal alternative. Indeed, if there would be any principle of so-called equitable apportionment, such principle could only apply to an apportionment of resources.

This is, in effect, as we have noted earlier, the way the Federal Republic formulates that alleged principle. But, since there is no doubt that the actual rules and principles of international law determine the extent of the sovereign rights of a coastal State over its continental shelf not in terms of resources, but in terms of space, the Federal Republic is virtually forced to let us believe that the two notions—resources and space—coincide.

In the second round of the oral pleadings, the Federal Republic has once more tried to find some support for this alleged principle of equitable apportionment in the so-called Helsinki Rules on the Uses of Waters of International Rivers. The learned Agent for the Federal Republic said, and I quote from page 179, *supra*, of the record of 4 November:

“Since the resources of the continental shelf which have to be distributed among several adjacent States are as much limited as are the resources of an international water-basin, the law is in both cases faced with the same problem, namely the equitable distribution of such resources.”

Mr. President, we have in our Counter-Memorials, in our Common Rejoinder and in the first round of the oral pleadings demonstrated that this line of argument is entirely beside the point. Reference may be made to paragraph 49 of the Danish Counter-Memorial and paragraph 43 of the Netherlands Counter-Memorial, to paragraphs 21 and 22 of the Common Rejoinder and to page 128, *supra*, of the records of the sixth day. We have remarked there:

First, that it is extremely doubtful whether the so-called Helsinki Rules really express existing international law; but that is a preliminary point.

Second, that the international regulation of the non-navigational uses of the waters of a drainage basin, extending over the territories of several States, is primarily necessitated by the fact of nature that water flows from one point to another; thus that the use of the water within the territory of one State

necessarily affects the use of the water within the territory of another State. No such problem exists with regard to the continental shelf as such.

Third, that the solution adopted in the Helsinki Rules is not a redistribution of the territories of the basin States, which remain exactly as they are, but a system of relative priority and accommodation of the various uses of the waters by various States.

Fourth, that the Helsinki Rules, to this effect, take into account such factors as the economic and social needs of each basin State and the availability, in such a State, of other resources, to mention now only two factors typical for the approach of the Helsinki Rules.

Actually, Mr. President, the so-called Helsinki Rules rather illustrate a legal approach radically different from the one advocated in the present cases by the Federal Republic for the delimitation of the continental shelf areas. The use by a State of resources within its territory has nothing to do with the question of delimitation of the boundaries of that territory. The accommodation of the various uses of resources by various States, taking into account the needs of those States, has nothing in common with a distribution of space in proportion to the length of an imaginary line.

It is significant in this connection that the Federal Republic, while on the one hand relying heavily on the Helsinki Rules relating to the uses of water resources of an international drainage basin, the location of which must necessarily be known in order to be able to assess the effect of use in one State on the use in another State, at the same time and on the other hand does not consider the actual or probable location of known or potential resources on or in the continental shelf in the North Sea as one of the criteria for its scheme of so-called equitable apportionment. This, at least, seems to be the upshot of the reply given by the learned Agent of the Federal Republic to one of the questions posed by Judge Jessup. I may refer here to pages 164 and 165, *supra*, of the records of the ninth day. Here again the Federal Republic shifts its base from space to resources and from resources to space, according to convenience.

But, Mr. President, it is not mere chance, or even error, which lies at the basis of the formulation, by the rules of international law, of the extent of sovereign rights over the continental shelf in terms of space rather than in terms of resources. On the contrary, the formulation of the extent of such rights in terms of space is a corollary of the concept of the continuation of a coastal State's sovereignty into the sea, that is, a corollary of the other branch of the alternative.

Indeed, this concept of continuation is at the basis of the legal definition of the continental shelf, including its outer limit, as it is at the basis of the legal rules relating to the boundary lines between States which on the continental shelf are neighbours.

The Federal Republic is well aware of this and therefore once again switches over silently from the alleged principle of equitable apportionment of resources to the other branch of the alternative, the delimitation of areas in space, in an attempt to alter the very basis of the latter concept to its favour.

By doing so, the Federal Republic attempts at the same time to let us believe that the rules of international law are concerned with the total size or surface of an area which appertains to a State rather than with the location of boundary lines between two States.

The same technique, of attempting to use one element of one of two mutually exclusive legal approaches in order to alter the basis of the other legal approach in its favour, is apparent in the Federal Republic's elaboration of the alleged standard of equitableness.

Here again the Federal Republic started from the idea of equal shares, invoking the principle of equality of States. I may refer here, *inter alia*, to paragraph 80 of the Memorial. Surely it is also stated in the same paragraph that—

“the existence of a community of interests does not necessarily lead to the conclusion that every coastal State of the North Sea can claim an equal share of the continental shelf, regardless of the differences in the geographical situations of the individual coastal States. The Federal Republic of Germany has not insisted on such division in the negotiations with its neighbour States. Nevertheless, the Federal Republic of Germany, in view of the extent of its maritime responsibility as coastal State of the North Sea, is at least justified in hoping that any criterion chosen for the apportionment of the North Sea will not be of a nature as to reduce the share of the Federal Republic of Germany disproportionately in comparison with the shares of the other coastal States.”

Now this is a very significant statement, and I may recall to the Court that recently the Agent of the Federal Republic has expressly declared that all the arguments in the written pleadings are maintained. It is a significant statement because it clearly demonstrates the basis of the Federal Republic's claim: equality of States commands in principle equality of the shares of all coastal States in the continental shelf under the North Sea. If the Federal Republic finally claims less, that is pure modesty on the Federal Republic's part.

Indeed, the alleged principle of equal shares, all through the written and the oral pleadings of the Federal Republic, underlies the persistent distinction the Federal Republic wishes to make between median lines between opposite States, and lateral equidistance lines between adjacent States. Median lines between opposite States are, according to the Federal Republic, the summit of justice, since they result in equal shares apportioned to those States. Lateral equidistance lines are gross injustice, since they do not result in the apportionment of equal shares.

But the statement just quoted is also significant in other respects, since it illustrates again the attempt to switch over to the other branch of the alternative legal approaches. Indeed, the Federal Republic cannot, of course, deny or escape from the fact that the actual rules of international law are based on the concept of continuation of the coastal State's sovereignty.

It therefore cautiously advances the possible relevance of “the differences in the geographical situations of the individual coastal States”. But how could this difference in geographical situation, product of nature and history, possibly justify unequal shares in an equitable sharing-out process, as international law would demand in the vision of the Federal Republic?

If I may once more, and for the last time, borrow the Federal Republic's metaphor of persons sitting around a table waiting for their piece of cake: would it be so equitable that the largest of those persons, who faces the cake with a larger frontage would get a proportionally larger piece of cake?

In reality, of course, the Federal Republic, in the face of the consistent State practice in the North Sea, cannot maintain its thesis that the principle of equality of the coastal States is the principle underlying the bilateral agreements concerning the delimitation of the continental shelf. But, nevertheless, it uses this concept of equitable distribution in order to alter the *real* basis of these agreements to suit the Federal Republic's purposes.

The real basis of the sovereign rights of a coastal State being the continuation of the sovereignty of that State over its land territory, the Federal Republic does not “insist” on equal shares but invents an entirely new concept of equit-

able apportionment which, at first blush, seems to take into account "the differences in the geographical situations of the individual coastal States".

That concept of equitable apportionment is, then, that the total continental shelf area appertaining to each coastal State should be proportional to the breadth of that State's so-called coastal front.

No attempt is made to explain this new concept from the point of view of equitable apportionment. There is in all the pleadings of the Federal Republic not even the slightest hint of a possible explanation why the length of the coastal front would be of any relevance for the equitableness of the apportionment. The concept of distribution in proportion to coastal frontages is an invention which purports to reconcile the idea of distribution of common property with the idea of continuation of national sovereignty. Surely, in the latter approach, the continental shelf area appertaining to a coastal State must be adjacent to its whole coastline. But this is a matter of location of the continental shelf area, and not one of the total size of that area. The total size of the area depends upon the location of the coastlines of the coastal States involved, and not on the length of the coastline of each of those States.

It is logically impossible to reconcile this legal approach with the legal approach of distributing a common area in just and equitable shares.

Incidentally, Mr. President, so pressing is the need of the Federal Republic to reconcile the irreconcilable that the Agent of the Federal Republic even goes to the length of stating—and I now quote from page 178, *supra*, of the records of the ninth day:

"... the principle of the just and equitable share follows, in our opinion, from the concept of the continental shelf by necessary implication. The doctrine of the continental shelf, which is now generally recognized as part of general international law, attributes to each coastal State a portion of the continental shelf for its exclusive exploitation. The learned Agent for the Government of the Netherlands has very aptly shown how the submarine areas of the continental shelf, which formerly, as part of the high seas, were subject to common use, had, by the development of the continental shelf doctrine, been transferred to the exclusive jurisdiction of the coastal States."

Mr. President, my gratitude for the compliment is somewhat marred by the fact that it is patently undeserved, since I actually wanted to demonstrate the opposite of what the learned Agent for the Federal Republic is stating here. Indeed I stated plainly—if I may be allowed to quote from page 137, *supra*, of the record of the seventh day:

"Actually, it is impossible to explain the exclusive sovereign rights of a State over the continental shelf adjacent to its coast as the result of a sharing-out operation of the bed and subsoil of the high seas by the rules of international law. Indeed, the only possible explanation of these rights is the recognition by international law of the extension of the national sovereignty over the land into sovereign rights over the continuation of the land under the sea contiguous to the coast. The common area is not distributed but reduced by this recognition of exclusive sovereign rights."

Having once created the appearance of taking into account the difference in the geographical situations of the individual coastal States, which is indeed dictated by the legal approach of the continuation of the sovereignty of the coastal State over its land territory into the sea, the Federal Republic's argument continues the erosion of that legal approach through various devices.

One device is the introduction of the so-called sector principle, the other is the substitution of arbitrary and imaginary coastal fronts for the actual coastlines. The two devices are closely inter-related.

It is obvious that a principle of equality or proportionality of the size of an area cannot, by its very nature, give any indication about the location of the share to be allocated to a particular State. Consequently, the Federal Republic has to invent another device to arrive at a particular location of its continental shelf area. It has to invent yet another principle for this purpose, and that invention is the so-called sector principle.

Now, in order to be able to divide an area in sectors, one needs a circular shape of that area. And a circle presupposes, of course, a centre or middle point. *Ergo*, the Federal Republic pretends that the North Sea is a roughly circular sea area. Never mind the geographical realities, the Federal Republic seems to think, we want a sector-like continental shelf area, reaching to a certain point, and therefore the North Sea is circular in shape and the centre of that circle is the point we want to reach.

I must confess, Mr. President and Members of the Court, that I have seldom seen or heard a pretention concerning a rule of law so exactly tailored to the desires of a particular State in a particular situation.

In the course of the second day of the oral proceedings, the learned Agent of the Federal Republic asserted—and I quote from page 37, *supra*, of the record of that day—“Our opponents cannot deny the geographical fact that this part of the North Sea is roughly circular”.

Well, Mr. President and Members of the Court, we have always denied it, and we continue emphatically to deny it, and we trust that a mere look at the map of the North Sea suffices to assess the value of the Federal Republic's contention that the shape of the North Sea is circular. But what is the purpose of this singular and extraordinary contention?

Here again, the Federal Republic tries to combine mutually exclusive legal approaches, this time through a geometrical construction. Indeed, it attempts to make the North Sea look like a cake—which is often circular in shape—and then it follows as a matter of course that a sharing-out operation starts in the middle and results in sector-shaped pieces. But the important point in this geometrical construction is that, if the North Sea were a closed circular sea and the circle represented the actual coastlines of the States surrounding the North Sea, then the drawing of equidistance lines from the frontier points on the coastlines of these States would give exactly the same result.

In other words—as we have already remarked in paragraph 27 of our Common Rejoinder:

“in such an imaginary situation [an enclosed perfectly circular sea area] the result is the same whether the boundary lines are drawn taking as a starting point the land territory and its continuation into the sea from the actual coastline, or whether one shares out the sea area, taking as a starting point the middle of that sea area”.

The sole purpose of this geometrical construction, therefore, is to make us believe that there is no fundamental opposition between the two branches of the alternative legal approaches.

As the learned Agent for the Federal Republic said, and I quote from the record of the ninth day, page 190, *supra*:

“In the case of the south-eastern part of the North Sea, fortunately, we can define the coastal front of each State, starting from the centre, or by proceeding from the coastline. The result reached by using either of these two methods is not materially different.”

Indeed this is so—fortunately, as they say, for the Federal Republic—but only because the geometrical construction presented by the Federal Republic is such that, by definition, the so-called coastal front is constructed beforehand in such a way that it yields that result.

Indeed, if the coastal front of a State is defined as the Agent for the Federal Republic declares on page 188, *supra*, of the record of the ninth day “as the line which represents the breadth of its coast facing the centre”, then it follows necessarily, from the laws of geometry, that the construction of equidistance lines from these imaginary coastlines must yield in principle the same results as a sharing out of sectors, starting from the so-called middle of the North Sea.

Unfortunately, however, for the Federal Republic, the North Sea is not an enclosed sea and not even remotely circular in shape. Consequently, it still makes all the difference whether one starts to draw boundary lines from the actual coastlines of the North Sea States, or shares out the North Sea from a non-existing point, called for this purpose the middle of the North Sea.

In other words we are still faced with the alternative of legal approaches.

But then another device is introduced by the Federal Republic. If the actual coastlines of the North Sea States are not like the arcs of a circle, well, then we have to forget the actual coastlines and find a substitute for those coastlines and thus the concept of the so-called coastal front is born.

Mr. President and Members of the Court, on this concept of the so-called coastal front we have, in principle and apart from the comments my learned colleague will, with your permission, make later on regarding its application by the Federal Republic, not much more to say than we did in the first round of the oral pleadings.

If anything, the concept of coastal front, in the course of the second round of the oral pleadings of the learned Agent and the learned counsel for the Federal Republic, has become even more arbitrary and nebulous, has become even more a concept introduced, as the French saying goes *pour le besoin de la cause*.

In my remarks on this matter, submitted to the Court on the sixth day, I referred to “the latest version of the German coastal front concept”.

In the meantime, a still later and again different version has, by our opponents, been presented to the Court and illustrated by map number 5 (p. 189, *supra*), distributed and commented upon by the learned Agent for the Federal Republic on the ninth day. The Court will no doubt have noted that the so-called coastal fronts of Denmark and of the Netherlands, as presented on this map, are again different from the ones mentioned in the first round of the oral pleadings by the learned Agent for the Federal Republic.

Again these imaginary lines, the direction and length of which are essential in the German argument, have changed in the period of a few days both in length and in direction.

Well, Mr. President and Members of the Court, from the moment one forgets the geographical realities of the actual coastlines and starts constructing straight lines which have nothing to do with those actual coastlines, there is obviously no end to it, and one coastal front is, in principle, just as arbitrary as another. Of course, there is a reason behind this continuous change of the arbitrary construction in the course of the German pleadings. My learned colleague from Denmark will have more to say about this matter.

Anyway, Mr. President, the fact that at this stage of the oral pleadings we are faced with still another coastal front which, in the case of Denmark, hardly touches the actual coastline and, in the case of the Netherlands, does not touch the actual coastline at all, can only confirm the purely arbitrary character of the construction itself.

The concept of coastal front then is a still-born child, unable to face the realities both of geography and of the law.

Conceived for the purpose of application of the alleged principle of just and equitable shares, the coastal front cannot serve as a basis for the application of the opposite principle that the sovereign rights of a coastal State over its continental shelf are the continuation of its sovereignty over its land territory.

But now, in a final attempt to escape the alternative of legal approaches, the Federal Republic tries nevertheless to use the coastal front concept under a different cloak, to wit, the cloak of special circumstances. Originally this disguise was fairly easy to look through.

The Federal Republic, *inter alia*, in paragraph 82 of the Reply, alleged:

“if geographical circumstances bring about that an equidistance boundary will have the effect to cause an unequitable apportionment of the continental shelf between the States adjacent to that continental shelf, such circumstances are ‘special’ enough to justify another boundary line”.

Here it is easy to see that special circumstances are invoked only as a substitute for a pure sharing-out operation. As such it naturally throws overboard the principle of equidistance, which is based on the other branch of the alternative of legal approaches.

But, in the face of the impossibility of denying that the legal approach of continuation of sovereign rights of the coastal State over its continental shelf underlies the actual rules and principles of international law in this field, the Federal Republic attempts to alter the consequences of this legal approach, the equidistance-special circumstances rule, into a rule that would serve its purpose.

The only way in which this could be done is, of course, the re-introduction of the coastal front concept under the disguise of a correction of the baselines from which the equidistance lines are constructed.

And this is indeed what is done in the oral pleadings of the learned counsel for the Federal Republic, Professor Oda.

In his address to the Court on the tenth day, Professor Oda traces the history of the straight baseline system from the Judgment of your Court in the *Anglo-Norwegian Fisheries* case to the adoption of the final text of Article 4, paragraph 1, of the Geneva Convention on the Territorial Sea. In the course of the history of Article 4, paragraph 1, the originally envisaged maximum length of ten nautical miles for a straight baseline was dropped in favour of the more flexible formula “joining appropriate points”. From this fact Professor Oda, so to speak, extrapolates towards his concept of coastal front or, as he calls it, coastal façade, as a corrected baseline from which the equidistance lines are to be constructed. The learned counsel for the Federal Republic thus arrives, through what he calls, on page 195, *supra*, of the records of the tenth day, “a further abstraction from the actual coastal configuration”, at straight baselines before the coasts of Denmark, the Federal Republic and the Netherlands. But the length of those straight baselines, in any case, far exceeds 100 nautical miles, and the direction of these straight baselines has nothing to do with the actual North Sea coast lines of those States.

Now, is this an application of the method, envisaged in your Court’s Judgment in the *Anglo-Norwegian Fisheries* case, for a rugged coast, namely and I now quote from page 129 of the *I.C.J. Reports 1951* “the method of base lines, which, within reasonable limits, may depart from the physical line of the coast”?

We respectfully submit that this is not an application of the Court’s Judgment. We also respectfully submit that the learned counsel for the Federal

Republic, in his search for unlimited flexibility, overlooks that Article 4 of the Geneva Convention on the Territorial Sea contains more than only paragraph 1, and also overlooks that that same Convention also contains an Article 7 relating to bays. The provisions just mentioned are an expression of what your Court has called the "reasonable limits" of the application of the straight baseline method. Indeed, without those reasonable limits very little space would be left to the international régime of the high seas.

Mr. President, it is significant that even in this line of argument, the correction of the baselines from which the equidistance lines should be constructed, the Federal Republic still attempts to escape from the alternative of legal approaches.

While Professor Oda starts from the land, the line of the low-water mark, and by a process of abstraction from the actual coastline somehow arrives at his coastal façades, Professor Jaenicke still starts from what he calls the middle of the North Sea in his interpretation of the special circumstances clause. Indeed, this difference in starting point was clearly expressed by Professor Oda in what is recorded on page 196, *supra*, of the records of the tenth day.

But, Mr. President and Members of the Court, there is no escape from the alternative of legal approaches.

The sovereign rights of a State over a continental shelf area are to be considered either as a continuation of its sovereignty over its land territory, or as a result of the distribution of the seas between States.

In all their written and oral pleadings the Kingdom of Denmark and the Kingdom of the Netherlands have consistently maintained that only the first branch of the alternative is compatible with the existing rules and principles of international law relating to territory and boundaries in general and to maritime areas and boundaries in particular.

The whole philosophy of present day international law, the practice of States to establish bilaterally their common frontier, the expression of sovereign rights in terms of space rather than in terms of resources, the determination of the extent of those rights in terms of location of lines rather than in terms of total size of an area, the accepted concept that *la terre domine la mer* rather than the other way round, and the strict limitations of the application of straight baselines in order to stick to the geographical realities, all these legal elements point towards the equidistance-special circumstances principle of boundary making and point away from the alleged principle of a just and equitable sharing out of resources.

This, we think, is the position in law and in relation to the continental shelf.

We need not repeat that in relation to the ocean floor we stand firmly for an international régime which retains this area and its resources within the *domaine public international* for the benefit of all mankind.

Nor is it perhaps necessary to re-affirm that in the field of economic policy we stand firmly for the largest possible degree and extent of international co-operation.

These two points, the régime of the ocean floor and international economic co-operation, are not in issue.

The two disputes at present before the Court are boundary disputes relating to the extent in space of the exclusive sovereign rights of particular States, in other words are legal disputes par excellence.

They call for a clear-cut answer on the basis of firmly established rules and principles of international law. We feel confident that they will get such answer from the judgment of your Court.

REJOINDER OF MR. JACOBSEN

AGENT FOR THE GOVERNMENT OF THE KINGDOM OF DENMARK

Mr. JACOBSEN: Mr. President and Members of the Court.

A slight change of the order of speaking on our side has taken place.

While during our first presentation the question of the special circumstances clause as a whole, both generally and in its application to these two cases, was left to me, Professor Waldock will this time give the necessary comments on the understanding of the clause during his discussion of the law in general.

On the other hand it is incumbent upon me to discuss the different ideas as to the boundary delimitation put forth by the Federal Republic. I shall treat all of what might be called the geometry of the cases, whether this geometry be based on the special circumstances clause or on general considerations, with the one exception that the so-called coastal fronts in themselves have been commented upon by the learned Agent for the Kingdom of the Netherlands. I can, therefore, on this part of the technical side confine myself to comments on these fronts only as far as is strictly necessary in describing each new geometrical idea developed by the Federal Republic.

At the same time I consider the legal question as treated, or to be treated, by my two learned friends and I shall therefore only touch upon questions of law when it seems necessary in order to place the different assertions of the Federal Republic in their proper perspective.

My address will fall in two main parts. First I shall follow the developments of the assertions of the Federal Republic through the different stages of the cases, in order to show how the general position is at each stage sustained by different consideration. Finally I have one single, somewhat more comprehensive, part regarding one single point.

In my address last week I mentioned that the constructions put forward by the learned Agent for the Federal Republic in our opinion called for searching comments. But as the learned Agent for the Federal Republic had promised to demonstrate the schemes put forward by him and Professor Oda, we found ourselves both bound and entitled to reserve our comments until this demonstration had taken place.

This has now to some extent happened, and we shall for the first time during the oral proceedings give our comments to the different indications of solutions put forward by the opposing side. The solutions proposed can only be evaluated on their merits if they are seen in their evolution through not only the written proceedings, but also through these oral proceedings. That means that I have to present quite a number of different, and to some extent conflicting, projects. I shall, however, be as brief as possible. But the Court will appreciate that because the opposing side had to postpone, until their second presentation, the clarification and explanation of what they really meant, this is our first opportunity for a comment.

No doubt it is a general position of the Court that the decision will be made on the true merits of the cases and independent of the possible short-comings of the presentations by the Parties. But one consideration seems to me to make it mandatory just to look into the different assertions put forward by our opponents.

These are, after all, cases between States regarding boundary delimitation. When cases of that kind and between such parties are brought before this Court, one would expect that each of the States concerned had made its position clear to itself and had a clear line of thought and argument which could be put

forward in such a way that they could be clearly understood, and which were followed through the whole of the proceedings, written as well as oral.

In our opinion this has not been the case as far as the different presentations on the side of the Federal Republic are concerned. We think that when a State in a case like this, where not one single new element of fact has come up, has several times fundamentally changed the considerations upon which its claim is based, there is every reason to doubt that this claim is truly justified.

Introductarily I should just mention that the whole line of argument on which I am going to comment has come into existence as between the three States involved with the Memorial.

During negotiations the Federal Republic discredited the equidistance principle. And she mentioned the possibilities of joint exploitation and of "a sectoral division in the middle of the North Sea" without giving any indication, either orally or graphically, as to what this was supposed to mean. The case as presented in the Memorial was a complete surprise to both Governments, and there has been a subsequent series of surprises.

The background for the development from the stage of negotiations to these two cases is clearly seen from the documents handed over to the Court by my Government according to the Court's request.

During negotiations the Federal Republic indicated that beyond the partial boundary agreed upon, she did not want a result based on law. And then, of course, no legal considerations could be expected.

Before, Mr. President, going into the difficult task of analysing this part of our opponent's case, I have a few remarks to make on an assertion, or hinted assertion, which does not follow the general pattern of the changes of the Federal Republic's position.

As I have mentioned before, apart from the more massive contentions put forward by the Federal Republic, the case has been covered by a veil of assertions that the equidistance delimitation in these two cases was influenced by projecting parts of the coasts causing inequitable diversions of the boundary line. The Court will no doubt recall this expression.

At the end of his address on the second day the learned Agent for the Federal Republic, however, admitted the total correctness of the two equidistance boundaries when seen in isolation, and thus completely retracted any assertion that individual coastal configurations played a role in the delimitation.

The learned Agent in his second address did not try to deny that this was a correct conclusion, drawn from his general admission.

Nevertheless, during his final address on the ninth day, for instance on page 170, *supra*, of the record, the learned Agent for the Federal Republic again implied that mere distance from some point of the coast was of importance in the equidistance delimitations at hand. The learned counsel, Professor Oda, did the same.

I can only draw the Court's attention to the fact that these repeated invocations of individual projecting points of the coasts had relation to an assertion which had beforehand been retracted.

Through the whole of the proceedings, the main assertion of the Federal Republic has been that a division should take place according to the concept of the just and equitable share.

What I have to comment upon is what has been put into that concept—what more specific considerations, according to the Federal Republic, should be decisive when making that just and equitable division. If these more specific considerations are too much differing from time to time, and, at the same time,

partly contrasting, the concept of the just and equitable share seems with necessity to move further and further into the background.

True, the Federal Republic has constantly declared that the ideas put forward in order to put some content and existence into this concept are meant only as indications for the possible agreement on another boundary line. But even if this is so, the considerations put forward in a general form should, if they are to create confidence, be both coherent and each by itself of such a nature that it could with reason cause the existing general rule, the equidistance principle, to be set aside.

When analysing the different proposals put forward by the Federal Republic, I must necessarily base myself on the ideas of our opponents and express myself in their language as to, for instance, coastal front, standards of evaluation and the like. Need I say, Mr. President, that this does certainly not mean that we associate ourselves with those concepts?

The development of the German argument falls into three general parts: one presented during the written proceedings, one during the German first presentation in the oral proceedings, and one during the German final presentation. It is, of course, not possible to keep a strict distinction between the three parts. I may have to use information from one part to clear up what has been said in another part.

This may to some extent seem like going over known ground, but it is essentially necessary in order to explain the truly remarkable development which took place, especially in the third phase.

I now turn to the first phase of the German case. During the written proceedings the position of the Federal Republic was that the concept of a just and equitable share should be filled out by two general considerations. One was that the Federal Republic was entitled to a continental shelf area extending to the United Kingdom's equidistance boundary in the North Sea, which was expressed in the words that it should reach the middle of the North Sea. This contention would give one point in the North Sea deciding the position and the direction of the boundary lines.

The other concept was that the total area of the Federal Republic's continental shelf should be found by a proportionate division of the three States' combined continental shelf areas according to the ratio between the lengths of the coastal fronts of those three States.

On these two contentions the continental shelf area could be indicated and this was, in fact, done in figure 21 in the Memorial, I, page 85.

I shall first make a few remarks on the contention that this Danish-Netherlands-United Kingdom tripoint is a proper end point for the Federal Republic's continental shelf area. What I have here to say on this point covers all comments regarding this end point during the whole development by the Federal Republic covering the following stages as well. The comment can best be made upon the diagrams 1-4 (pp. 183-187, *supra*) and especially on diagram 4 (p. 187, *supra*) produced by the Federal Republic of Germany on Monday of this week and these seen in connection with the said figure 21 of the Memorial.

The contention is that a share, when the sea is circular, should reach the centre. There is neither a circle nor a centre.

That there is no circle has today been demonstrated again by the learned Agent for the Netherlands. That there is no centre is quite apparent from the diagrams 1-4.

The Federal Republic was asked by the Court to show the median line as between the Federal Republic and the United Kingdom and between the Federal Republic and Norway, the two States mentioned in each case seen in

isolation. The lines drawn were undoubtedly correct. The Federal Republic on her own initiative added a similar isolated median line between the Netherlands and Norway and this line undoubtedly is also made out correctly.

Basing herself on diagram 4, the Federal Republic declared that this diagram, showing the considerable intersection of median lines, both actual and hypothetical, within a comparatively small area of the North Sea, proved that this point was truly the middle of the North Sea as between the five States. This must mean the Netherlands, the United Kingdom, Norway, Denmark and the Federal Republic.

This, however, is directly and completely wrong. The median lines crossing each other within this comparatively small area have been made out, as indicated on each line, but no median line between Denmark and the Netherlands has been made out and no equidistance lines between the Federal Republic of Germany and the Netherlands and the Federal Republic and Denmark have been made out. If that had been the case, those lines would certainly not have intersected in the area shown in diagram 4. I think that the hypothetical lines have blurred the vision. No boundary line with any actual relation to the Federal Republic comes anywhere near this area.

The position is, of course, exactly the same with regard to Belgium and France, but I do not think I have to go into this.

This whole problem was demonstrated very clearly by the learned Agent for the Netherlands in his first address, in which he pointed out that of the five different tripoints in the North Sea—record for the sixth day, pages 130-131, *supra*—two of these tripoints are very near to each other, as can be seen in the map on the wall¹, but this is not the case with the tripoint between Denmark, the Federal Republic and the Netherlands or any tripoint to which the Federal Republic is part.

The Court adjourned from 11.20 a.m. to 11.55 a.m.

Before the recess I had just finished my comments upon one half of our opponent's case in the written proceedings regarding the centre. As to the other part of the Federal Republic's contention in the written proceedings, the proportionate division, this can also be seen from figure 21, in the Memorial, I, page 85, and in paragraph 86 on the opposite page.

The Federal Republic takes the full area of the three continental shelves delimited to the north by equidistance towards Norway, and to the west by equidistance to Belgium, and thus including areas of the Danish and the Netherlands continental shelves very far away from the Federal Republic. This aggregate area she divides in the ratio of approximately 6 : 9 : 9 given as the ratio of lengths of the coastal fronts of the three countries. That is said in paragraph 86.

As these coastal fronts were indicated in figure A in the Common Rejoinder, I, page 470, the ratio between their lengths is roughly 6 : 9 : 9. This shows, in addition to all that the learned Agent for the Netherlands mentioned during his first address—this is in the record for the sixth day, page 132, *supra*, and following—that figure A gives a true representation of what was at that time the Federal Republic's understanding of coastal fronts.

That the areas, when the division was as suggested in figure 21 of the Memorial, were approximately in the same ratio as the lengths of these coastal fronts is, of course, a mere chance. The continental shelf to the north of Denmark,

¹ See footnote 1 on p. 32, *supra*.

which does not concern the Federal Republic, could, of course, have been much larger, the length of the Danish coastal frontage being the same if, for instance, the coasts of Norway were placed farther to the north. I shall not comment further on this part of the position taken by the Federal Republic in the written proceedings.

This was the case as presented by the Federal Republic in the written proceedings and the case which we expected to meet during the oral proceedings. But the picture changed considerably.

The main thesis was, also during the oral proceedings, as I have mentioned, the just and equitable share, but how this concept was to be translated into some possible kind of practicability was now quite another matter. The Federal Republic abandoned a material part of what she had advocated in the written proceedings and turned to quite different considerations. I shall first comment upon the case made by the learned Agent and later revert to the case made by the learned counsel, Professor Oda. These two cases were clearly different; regarding both cases I so far refer to the first oral presentation.

Within the concept of the just and equitable share, the learned Agent for the Federal Republic practically threw the proportionate division of shelf areas overboard, and based himself solely on the new concept of continuation of territory as the true basis for boundary delimitation. This was done in the record for the second day, mainly on page 40, *supra*, and in the record for the third day on pages 63 to 65, *supra*.

This continuation was said to take place from the coastal fronts which should indicate the direction of this continuation. It is apparent that a continuation based on coastal fronts as they were indicated during the written proceedings, and set down in figure A of the Common Rejoinder, could not possibly serve the purposes of the Federal Republic. The intersection would take place somewhere outside the North Sea. Therefore the Agent for the Federal Republic completely gave up the coastal front concept as indicated in the written proceedings and changed the coastal fronts in order to effectuate a continuation in the direction which he wanted. However remarkable this operation may seem, it was, indeed, quite simple. In the record for the third day, the learned Agent said:

“This was the concept that I had in mind, taking the coastal front as the basis and also taking an already determined fixed point or area, the middle of the North Sea, because it has already been agreed upon that these three sectors will be formed.” (*Supra*, p. 65.)

This means that not only does the Federal Republic completely change the concept of coastal fronts, but she does this informing the Court quite boldly that the direction of those coastal fronts had beforehand been decided upon, because the wanted point of intersection is the given point which has already earlier been taken as decisive, but on quite different considerations.

What the coastal front should be was very clearly indicated by the learned Agent for the Federal Republic in the record for the second day, page 41, *supra*, and the third day, page 64, *supra*, and it was very efficiently described and indicated on the map by the Agent for the Netherlands during his first address. I think the Court will clearly remember those alleged coastal fronts, which have not been put down in any diagram.

As the Federal Republic still maintained her claim to an area of quite the same size and position as she had done in the written proceedings, it seems clear that the whole idea of proportionate division of areas according to the lengths of coastal fronts had been thrown overboard.

The new coastal fronts of Denmark and the Netherlands were very much shorter than the ones described by the Federal Republic in the written proceedings and shown in figure A of the Common Rejoinder. This is apparent if they end on the coastline, but it is also the case if their coastal fronts continue into the sea, as apparently envisaged by the Federal Republic as far as can be seen from diagram 5, to which I shall refer later. The whole idea of proportionality had therefore collapsed at this stage, without the learned Agent giving any explanation why this total change of position had been taken.

I shall, in the third phase, revert to the revival of this idea of proportionate division.

How the delimitation based on continuation from the new coastal fronts was to work out was not explained directly. But I want to stress, Mr. President, that the idea of summing up an amount of square areas, or fractions of square areas, of different parts of the alleged German continuation, as it was done later on the basis of diagram 5, presented during the learned Agent's second address, was not so much as hinted at.

It seemed apparent, especially when the learned Agent accepted the Court's suggestions as to this point, that he meant continuation consisting of lines parallel with the coastal fronts moving outwards, and that he envisaged that the intersection would be decisive as to the drawing of the boundary lines. And when the learned Agent, in the record for the ninth day, that is, in the third phase—pages 190 to 191, *supra*—when introducing the varying numbers of square kilometres, said that these should show that the sector claimed "is not only geometrically equitable", he confirmed that in his first presentation he had envisaged a geometrical delimitation based on continuation.

It further seems apparent that when two continuations take place at angles less than 150 degrees and consequently must overlap, the consequence with regard to delimiting the boundary lines must be that the angles of the overlapping areas should be divided in the middle between the two adjacent States. True, this was not spelled out, and the reason was undoubtedly that the whole idea of direction of continuation, based on revised coastal fronts, was without any content whatever. As the Agent for the Federal Republic explicitly admitted in the record for the third day, page 65, *supra*, which I have just quoted, the whole thing, and that is, the direction of the new coastal fronts, had been arranged beforehand with the explicit aim of making the boundary lines meet in the point which the Federal Republic calls the middle of the North Sea, and which is the Danish-Netherlands-British tripoint.

I shall revert to the question of the geometrical consequences of overlapping continuations when I reach the third phase, where we have an illustration of a continuation, although this continuation is not the one which the learned Agent described in his first address, and although this continuation is used in quite a different way than the continuation concept presented in the learned Agent's first address.

What we here want to point out specifically regarding this second phase being the first oral presentation are the following two things.

First, that the idea of proportionate division, so decisive during the written proceedings, was completely abandoned. The revised coastal fronts make any application of this concept impossible.

Secondly, that the whole elaborate explanation regarding the revised coastal fronts and the following continuation was admittedly without any content, either in law, equity or geometry, because the coastal fronts of Denmark and the Netherlands were redirected only on the consideration that the intersection of boundary lines should take place in the tripoint chosen, at a much earlier

stage and based on other considerations, as the point to which the ambition of the Federal Republic extends.

That ends my remarks on the case of the learned Agent in the second stage.

Then, Mr. President, we had on the third day the address of the learned counsel, Professor Oda, which address concerns us here as far as regards the final part, pages 62 to 63, *supra*. Although expressed with some carefulness, it will be apparent that the learned counsel's point was to take the already suggested Borkum-Sylt line—as presented by the Federal Republic in the written proceedings and illustrated in figure A of the Common Rejoinder—as a baseline from which to draw demarcation lines. It was not said explicitly how this was to take place.

Two different approaches had now been proposed in the second phase. The learned Agent had proposed a geometrical delimitation based on three overlapping continuations from new coastal fronts and Professor Oda had proposed the construction of demarcation lines on the basis of the Borkum-Sylt line. It was not explained how these propositions could possibly coincide.

To a question from the Court as to the clarification of this matter, particularly how the lines of demarcation should be drawn on a straight line, Borkum-Sylt, the learned Agent asked for time to demonstrate this, in the second round of the oral pleadings. I took the opportunity, in my first address, to stress that we took it for granted that this demonstration would take the form of diagrams.

I shall now turn, Mr. President, to the third phase, consisting of the second oral presentation of the case for the Federal Republic. During this phase I shall have to revert to some extent to the second phase, because some light has now been thrown on the projects set forth in the second phase.

Seven diagrams were presented. Of these, only two diagrams, Nos. 5 and 6 (pp. 189 and 182) could have any possible relation to the problems treated here, the construction put forth during the first stage of the oral pleadings. As regards diagram 6, the Court will remember that it was expressly said to be only a reproduction and clarification of figure 21 of the Memorial, produced for the convenience of the Court. That is in the record for the ninth day, page 180, *supra*. This leaves diagram 5 as the only graphic demonstration put forward in the form of a diagram, and this diagram clearly only has relation to the proposals of the learned Agent. No diagram representing the ideas of Professor Oda was presented.

No oral explanation as to this difference between the two schemes has been given apart from a few remarks from the learned Agent and from Professor Oda, each of these remarks showing that the two proposals are different in their concept of the starting point or, perhaps, starting line. Nothing real was indicated as to the relation between the results and consequently I think I am entitled to say that the Court's questions, on which we had based so much hope of clarity, have not been fully answered.

I shall here again begin with the scheme of the learned Agent which is partly and with considerable changes as to the description given during the final oral hearings and depicted in diagram 5. It is, Mr. President, difficult to decide where to begin and where to end.

On page 191, *supra*, of the record for the ninth day, the learned Agent explains that the continuation may geometrically be expressed by a stretch of area covered by the parallels following each other from the coastal front towards the centre of the North Sea and enclosed between two lines contracted at the end points of the coastal front, perpendicular to the coastal front.

It can easily be seen that diagram 5 is not made out in this way.

The continuation of the alleged German coastal front is in full agreement

with what was said by the learned Agent and the same applies to the sides of the continuing coastal fronts of Denmark and the Netherlands nearest to the Federal Republic, but it certainly does not apply to the alleged continuation with regard to the other ends of the coastal fronts of these two States. This can most clearly be seen at the northern end of the alleged Danish coastal front.

Here the continuation is contained by the existing equidistance boundary which is certainly not perpendicular to the alleged coastal front. If the principles described by the learned Agent were applied here, the Danish coastal front would, to a considerable extent, advance into the Norwegian equidistance area. The same applies, to some smaller extent, to the continuation of the Netherlands coastal front towards the United Kingdom.

Consequently, the concept of coastal fronts must with necessity cause corrections towards the United Kingdom and especially towards Norway, but the Federal Republic has for a long time maintained that the equidistance boundaries towards these two States are perfectly correct and equitable. This shows very clearly how the general principles invoked by the Federal Republic are considered appropriate towards the Federal Republic, but not towards any other State.

However revealing this fact may be, it is really nothing compared to what the Court will see if diagram 5 is only superficially analysed as regards the relation Denmark, the Federal Republic and the Netherlands.

As the Court will be aware, the learned Agent for the Federal Republic, during his second address, left no doubt with the Court that the lines of intersection in diagram 5, if these were drawn in accordance with the geometrical delimitation envisaged during the first presentation, would meet in the Danish-Netherlands-British tripoint so often mentioned. It was not said in so many words, but the implication was clear, especially from the production of diagram 6, where this intersection is shown and where the proposed boundary lines are drawn between this point of intersection and the end points of the two agreed boundary lines near the coast.

On the surface it seems remarkable that these lines are not shown in diagram 5. We have therefore exactly reproduced diagram 5—it has been distributed to the Court¹ and it is marked A (p. 231, *infra*)—and made only the one small addition that the dividing lines based on the concept of overlapping continuation have been put in. These lines are, as I have mentioned, the bisectors of the two angles overlapping between Denmark and the Federal Republic and between the Netherlands and the Federal Republic.

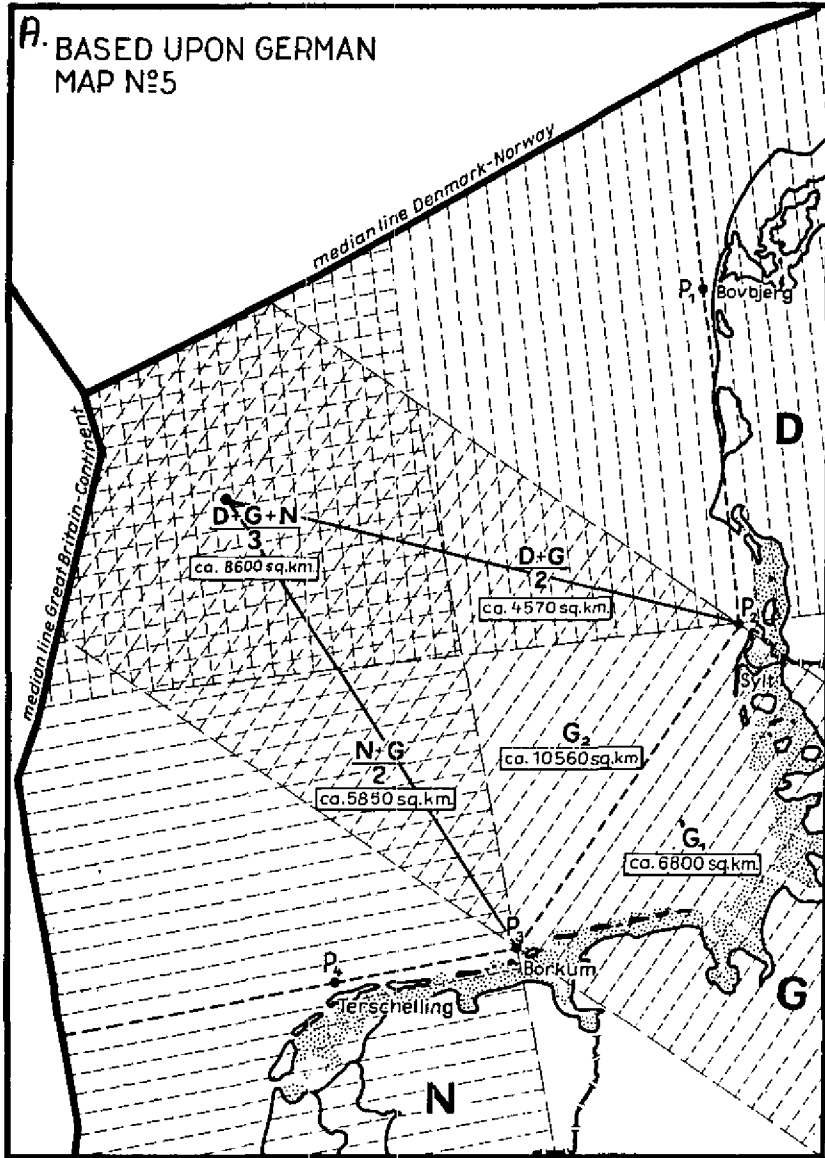
As it will be seen, they intersect in a point considerably nearer to the coasts than the point shown in diagram 6, the point which, according to the learned Agent for the Federal Republic, would be the actual point of intersection.

I can already here assure the Court that this is not a result of the diagram not being exactly made out, it is a matter of principle.

If the Court looks carefully at diagram 5, it will be apparent, as already pointed out today by the learned Agent for the Netherlands, that the coastal fronts of Denmark and the Netherlands have again been materially changed, both of them having been turned further inwards towards the North Sea. The Court will remember how these lines were very carefully described during the first presentation where the Danish line was running true north, intersecting the coast quite near to the place where the coast disappears from diagram 5. Now it cuts only through a very small part of the Danish mainland.

Regarding the Netherlands, the position is even more apparent. It was originally indicated, during the first presentation, that the line would run to the

¹ See No. 49, p. 390, *infra*.



bend in the Netherlands-British equidistance line, which can be seen at the left bottom corner of the diagram, thus cutting through a considerable part of the Netherlands. Now, on diagram 5, it is wholly placed in the North Sea.

Now, Mr. President, we have no diagram showing the intersection of the boundary lines within the concept of continuation as expressed during the first presentation, and with the two different coastal fronts running the Danish more to the north-east and the Netherlands more to the south-west. As the coastal fronts were after all only shown with a pointer on the map on the wall¹, we have not thought it proper to present a diagram showing the delimitation lines in this situation. But we have, by ourselves, gone through it and we agree that, as was quite apparently the point of the learned Agent for the Federal Republic, the boundary lines would in that case intersect roughly in the tripoint which is the real corner-stone of the position of the Federal Republic.

It now follows from the simplest geometry that when the Danish and the Netherlands coastal frontages are turned inwards, the intersection point must move nearer to the coast. The result is the one we have shown in figure A (see p. 231, *supra*), amplifying the original diagram 5.

Although the learned Agent for the Federal Republic did not, with one word, mention this very considerable discrepancy between the proposals which he put forward at two different stages of the same oral proceedings, he must, of course, have been fully aware of this fact all the time. Why then has this change, which completely destroys the concept of geometrical delimitation through continuation, taken place?

I feel entitled to try to give the reason because to me it seems quite apparent. When the learned Agent had the diagrams prepared, which were necessary in order to answer the questions from the Court, he discovered one fact about the delimitation lines which made it imperative for him not to show these lines in any diagram which had any relation to the continuation concept.

In this situation the Federal Republic had to speak of something other than geometrical delimitation and then the learned Agent came upon the idea of completely omitting any graphic reference to the lines of demarcation, which he was in fact going to show when answering the Court's question, and again switch his case to a completely new concept. This became what he calls "the quantitative standard of evaluation" as shown in diagram 5, consisting of five areas with different numbers of square kilometres.

This had never before been as much as hinted at. This completely new approach made it necessary to change the directions of the continuations in order that the final result came as near as possible to the area given in figure 6, and originally in figure 21 of the Memorial—the area of 36,700 square kilometres.

As, apparently the Borkum-Sylt line could not possibly be moved anywhere, the learned Agent moved the coastal fronts of Denmark and of the Netherlands quite considerably, until the areas concerned showed approximately the aggregate number of square kilometres wanted, 36,700.

Thus, it seems quite clear that the areas given in diagram 5 emerge as a result of careful movement of the lines of departure, that is, the coastal fronts of Denmark and the Netherlands, movements governed only by the aim of reaching a result already decided upon. Therefore they are of no consequence whatever.

A few more words on this will suffice. The sum of these artificially constructed square kilometres is used to prove that the area of the sector given in diagram 6 is equitable. This diagram, which is taken from figure 21 of the Memorial, was

¹ See footnote 1 on p. 32, *supra*.

said to have been distributed for the convenience of the Court, but it is certainly also for the convenience of the Federal Republic, for it leaves out the numerical indications of the corresponding areas for Denmark and the Netherlands, which can be found in figure 21 of the Memorial.

Thus, it might be forgotten that the area of 63,700 square kilometres had come into existence as the alleged equitable result of a proportionate division based on the length of the coastal fronts.

When diagram 6 was presented, these coastal fronts had been changed twice, to an extent that makes them unrecognizable. The area of 36,700 square kilometres, therefore, is now without any meaning.

The Court, undoubtedly, at this stage would like to know what was the fact which must have made the learned Agent for the Federal Republic resort to this new change of position.

It can be seen from figure A showing the lines of intersection drawn in diagram 5. These two lines are simple and ordinary equidistance lines, when the three coastal fronts are taken as the artificial baselines from which the boundary lines are constructed. This follows of necessity from the fact that these lines can be drawn only as the bisectors of the overlapping areas, being at the same time bisectors of the angles between the respective coastal fronts.

The Court will easily be able to ascertain the existence of equidistance by the simple use of a pair of dividers on figure A. The result is a simple consequence of the laws of geometry, and the result would be exactly the same whether the so-called Danish and Netherlands coastal fronts were swung outwards or inwards on their contact points with the German coastal front. And this result therefore also applies to the situation regarding continuation from coastal fronts, which the learned Agent proposed during the first hearing, when the coastal fronts were somewhat farther out to the north and to the west.

The fact which the learned Agent became aware of when making out the diagram necessary for answering the Court's question was, simply, that through all his movements through the realm of equitable division he had ended up in giving a delimitation, being exactly that which, according to the fundamental position taken by the Federal Republic, is unacceptable. It was a lateral equidistance delimitation of considerable areas of high sea.

Now, this fact to our mind completely shatters the basis for the Federal Republic's case as a whole, and, apparently, the learned Agent was of the same opinion. Otherwise he would hardly, during the second presentation, have changed his whole approach from geometrical delimitation to delimitation based on a quantitative standard of evaluation, letting himself be forced, in doing so, to once more materially change the direction of the so precious coastal fronts.

This operation, seen as a whole, had one result, and one result only, that of not showing the lines of delimitation, with the effect that the intersection seemed to take place in the point indicated in diagram 6.

The Court may have noticed, with perhaps some astonishment, that the learned Agent twice, on page 186 and page 190, *supra*, of the record for the ninth day, stressed very strongly that the coastal front is not a geometrical baseline on the basis of which boundaries should be constructed. Now this can be understood. The intention was that we must not look at the relation between the coastal fronts and the ensuing boundary lines.

But no one can deny that the boundaries are constructed on these lines as being the starting lines for the three continuations, and that the actual boundary lines will be found as the bisectors of the overlapping of these continuations. Therefore, it is highly relevant to see the boundary lines in relation to these

all-decisive coastal fronts. And in doing so, we find equidistance pure and simple.

I now have to leave, for one moment, the general aspects to deal with one special thing.

The point so strangely made by the learned Agent, that the coastal fronts are not baselines, has, however, relevance in two contexts. I shall touch upon one of them here. The other one is decisive as regards the scheme of the learned counsel, Professor Oda.

If one looks at the Danish coastal front in diagram 5, it will be seen that it cuts off a very small part of the Danish territory, roughly the coastal configuration called Blavandshuk. To any unbiased observer, this would give the impression that the Federal Republic is considering this configuration as a special circumstance and is therefore cutting it off and substituting a new and better baseline, as we have described it with regard to peninsulas.

The very strong assertions by the learned Agent that these lines were not to be considered as baselines, is, I think, a clear indication that he does not invoke anything of this kind.

To avoid any misunderstanding during the considerations of the Court, I have a few comments on this possibility of misunderstanding the alleged Danish coastal front.

In the Danish Counter-Memorial, paragraph 142—the Netherlands Counter-Memorial, paragraph 137—it was expressly said that the shores of both countries are “more or less straight with only the most normal small protrusions in the coastline”. Blavandshuk might be considered one of those protrusions. It was said in order to make the Federal Republic come out with an explanation as to whether the innumerable references to projecting points had relation to any possible specific coastal configuration on the Danish or on the Netherlands coast.

In the Reply nothing of this kind was asserted. On the contrary, in figure 5, I, page 430, the Federal Republic depicted the situation in a partly abstract diagram which clearly excluded the existence of any projecting points on the coasts of Denmark or the Netherlands.

During the oral proceedings, as I have pointed out, the Agent for the Federal Republic several times quite clearly declared that the two equidistance boundaries, if seen in isolation, are perfectly normal and proper. As I have indicated, this can mean only one thing, namely that on the coasts of Denmark and the Netherlands no special configuration exists which can by itself—and apart from the so-called cutting-off effect, which is something quite different—be considered as a special circumstance.

It should be added that this configuration, Blavandshuk, is the base-point on the Danish side for the end-point of the boundary near the coast agreed upon by treaty. This can be seen from the German Memorial, paragraph 18, in which is quoted the joint press communiqué, issued after the agreement, explicitly stating that the end-point is equidistant from Kap Blavandshuk in Denmark and the island of Sylt in Germany. The actual communiqué can be found in the Memorial, I, page 115.

And as the Court will recall, the Federal Republic in the Reply, when discussing the possible legal consequences of the two boundary treaties near the coast, in paragraph 30 expressly states that as far as these delimitations reach out to sea, they were not yet influenced by the special configuration of the coast so much as to cause an inequitable result.

So, in this case, where so much has happened, the Federal Republic has explicitly declared that Blavandshuk as a base-point for delimitation according to equidistance is perfectly equitable.

Mr. President, I ask the Court for forgiveness for having spent some time on this apparently minor point. But, as diagram 5 is made there is undoubtedly from the diagram—though certainly not from the learned Agent's side—a possibility of a misunderstanding.

When questions of mathematical delimitation are treated in the way in which they are treated by the Federal Republic, making constant changes of all the elements of the considerations, such possibilities of misunderstanding are apt to creep in.

I shall now, Mr. President, revert to the main line of my argument.

What I have said regarding the scheme of the learned Agent in the second phase should really be enough, but for the sake of good order I must say a few words regarding the scheme of the learned counsel, Professor Oda.

According to what was said during the last day of the second presentation for the Federal Republic, it was apparent that there is a difference between his scheme and that of the learned Agent, which I have had to explain so elaborately.

The learned counsel clearly declared that he used the Borkum-Sylt line as a baseline for drawing boundaries. On page 196, *supra*, in the record for the tenth day, he said that he was not so much concerned with what scheme of delimitation might be used. But the only scheme he then mentioned was the equidistance principle.

It should here be mentioned that the learned Agent emphatically had declared that the coastal fronts, no matter how they were considered, were certainly not baselines on which to draw demarcation lines.

Furthermore the learned counsel clearly said that he was basing himself on considerations different from those of the learned Agent.

As to the difference in results, nothing was said, but I shall later briefly revert to that.

So far there apparently is a case between the learned Agent and the learned counsel. Considering the legal relation between these two learned representatives of the Federal Republic, it might be considered unnecessary to go into further considerations regarding Professor Oda's scheme. This case, however, has now been enveloped in so much obscurity that I think it is up to us, as far as we can, to clarify the points which have come up.

I see no need to go into the learned counsel's discussions regarding the development of the concept of baselines. I have understood the situation to the effect that the rules of baselines as contained in the Geneva Convention on the Territorial Sea and the Contiguous Zone are considered expressions of general international law as this had developed in the years before the Geneva Conference, especially through this Court's decision in the *Norwegian Fisheries* case—at least I understood that Professor Oda was of that opinion and I shall not contest it.

Professor Oda's point was that the aim of the concept of straight baselines is to neutralize indentations—which is true. He contended that the Borkum-Sylt line might be considered a legitimate evolution from this general underlying idea, and he based his thoughts on the fact that Article 4, paragraph 1, of the said Convention does not give any limitation as to the length of a baseline.

The learned Agent for the Netherlands has, today, commented on the possibility of letting the rules of that Convention end up in the Borkum-Sylt line and I do not think I have any reason to add to what has been said.

I shall here at this point just underline again that the learned Agent for the Federal Republic has twice emphatically declared that the coastal front is not

a baseline. And he has in his earlier acceptance of the two true equidistance lines laid down by Denmark and the Netherlands, the lines on the map, when seen in isolation, firmly subscribed to the ordinary concept of baselines with regard to the German coast.

On this background the learned counsel, although not binding himself, invoked simply an equidistance delimitation based on the Borkum-Sylt line and the Danish and Netherlands true coasts, as they really are, and not in the version of coastal fronts. By doing this he has, in the same way as the learned Agent for the Federal Republic with his different continuation schemes, fundamentally invalidated the position of the Federal Republic as to the inapplicability of the use of the equidistance principle in the two cases before the Court.

The simple positions of the learned counsel and the learned Agent are that the learned counsel invokes equidistance on the so-called coastal front of the Federal Republic and on the actual coasts of Denmark and the Netherlands. The learned Agent has ended up, in fact, in invoking equidistance on the basis of all three coastal fronts.

Both have, after the long way we have gone in these two cases before the Court and always being confronted with the assertion that equidistance is inapplicable in this situation, ended up in equidistance only on changed geography.

Both the learned Agent and the learned counsel, Professor Oda—Professor Oda in fact did something to this effect—could be imagined to assert that they are within their own main position regarding equidistance.

It has been asserted, time and again by our opponents, that the reason for the principle of equidistance being inapplicable here is that special coastal configurations influence the equidistance lines too strongly, as this line moves outwards into the sea. And they may say that they have both, to varying degrees, ironed out such configurations and that therefore they should be entitled to use the equidistance principles wholly, or partly, on coastal fronts.

But it should here again be remembered that the learned Agent has explicitly agreed that the Danish-German coast line and the Netherlands-German coast line are completely proper for constructing an equidistance line when seen in isolation.

It is therefore admitted in advance that special circumstances influencing the equidistance line, or even special configurations influencing the equidistance line, do not exist, and there can be no grounds whatever for considering the equidistance principle more applicable on the lines chosen by the learned Agent and the learned counsel than on the actual and proper coastlines or baselines.

The whole argument, when seen in its true context, has been concentrated upon the only thing which was not said, that the geography is not satisfactory and the geography should be changed.

The point has been reached, I believe, Mr. President, where I should try to sum up the quite considerable number of possible boundary lines now to be found in what the Federal Republic calls the south-eastern corner of the North Sea.

If the two proposed boundary lines between the Federal Republic and Denmark, and the Federal Republic and the Netherlands, are seen as a result in combination, they will generally form a triangle or an approximation of a triangle. I think I might illustrate the situation and shorten the presentation by mentioning the different boundaries proposed simply as triangles.

First we have the innermost triangle, consisting of the equidistance bound-

aries claimed by Denmark and the Netherlands. This triangle is well known and can be seen on the map on the wall¹.

The basis for this triangle is our whole case as it has been presented until now, and as it will be further developed by the learned joint counsel, Professor Waldock. The considerations behind this triangle have been the same from the days of the Geneva Conference until today. We have not changed the triangle, neither have we changed its foundations in law.

Secondly, the outermost triangle is the one which the learned Agent for the Federal Republic calls a sector. It can be seen in figure 21 of the Memorial and in diagram 6 and it has been based on the following considerations.

Originally, in the Memorial, it was based on the concept of access to the middle of the North Sea and on the concept of proportionate division of a common area based on the lengths of coastal fronts.

It was, during the first oral presentation by the learned Agent, based on the concept of geometrical continuation from coastal fronts which had been carefully changed and adapted to be placed in such a direction that the continuation converged in the end-point fixed beforehand.

If this structure had been shown graphically, it would have been seen that the two lines were true equidistance lines based on the three asserted coastal fronts.

In the second presentation by the learned Agent, where the geometrical delimitation based on continuation gave quite a different point of intersection, this sector in diagram 6 was said to be found equitable on a quantitative standard of evaluation. The quantities, the square kilometres covered by the German continuation, had been constructed to give a result known beforehand. This had been done by the means of, for the second time, materially moving the Danish and the Netherlands coastal fronts.

The third triangle is the one we have shown in figure A and which is the exact geometrical result following from diagram 5 presented during the second oral presentation by our opponents. This triangle has not been shown and not been invoked by the Federal Republic. On the contrary, the whole quantitative scheme of diagram 5 had one single effect, that of not showing the two boundary lines. But I think we have been entitled to show how this triangle comes out and to show that it is based on the equidistance principle pure and simple.

Then there is, Mr. President, a fourth triangle which is not shown anywhere and which I am both unable and unentitled to show graphically; it is the triangle intimated by the learned counsel, Professor Oda.

We know that it should be based on the Borkum-Sylt line. The learned counsel has explicitly declared that he does not care how it is made out, but he has mentioned, as a possibility only, the principle of equidistance. We cannot hold him to this for he has clearly reserved his position.

The only thing we know is that it should give a larger part of the North Sea to the Federal Republic—that means a larger part than the one following from the equidistance principle and shown on the map.

Where this part is, or this triangle is, and how large it is apparently the Court is not entitled to know, but from the description, however vague, given by the learned counsel, I think I can tell the Court one pertinent fact regarding this floating triangle.

As it starts from the Borkum-Sylt line and as it is larger than the true equidistance area, it must of necessity be outside the equidistance boundary from the very beginning. Of course, the distance between the sides of the true equidis-

¹ See footnote 1 on p. 32, *supra*.

tance triangle and the sides of the learned counsel's floating triangle must be increasing as the two triangles move out into the North Sea on somewhat diverging courses. But there must, by the laws of geometry and logic, be a difference from the very beginning and this means, in simple words, that according to Professor Oda's scheme, the boundary lines which he invokes must be north of the treaty boundary between Denmark and the Federal Republic near the coast and west of the Federal Republic-Netherlands treaty boundary near the coast, or, in any event, on the wrong side of one of these boundary lines.

The learned Agent did, with regard to his triangles, make provisions for this. The learned counsel, whose scheme is openly declared to be in opposition to that of the learned Agent, certainly did not.

This means that apart from anything else which has regard to Professor Oda's triangle, it is manifestly for a considerable part, a part nearest to the coast, outside the two special agreements which have regard to the continuation of the treaty boundaries, and in conflict with the two existing treaties, the validity of which has not been contested.

It may perhaps be supposed that the learned counsel has left the task of solving this problem to the discretion of the Court. I shall, therefore, just mention that if the Court were to consider a solution of this problem by compressing Professor Oda's triangle, it should be remembered that there is an indefinite number of possibilities of connecting the two end-points of the two treaty boundaries with lines running respectively north and west of these boundaries. It should also be remembered that the deposits found on the Danish continental shelf are placed very near to the equidistance boundary. Therefore, a solution by the Court of this problem, which Professor Oda has left completely hanging in the air, might be of a practical and economic importance which far exceeds any other problem in the case between Denmark and the Federal Republic.

This is, Mr. President, apart from one single question to which I shall revert, the case for the Federal Republic. It is on these clear and constant contentions that the Federal Republic asks the Court to indicate the principles and rules of international law which should militate in favour of the Federal Republic's setting aside the equidistance boundaries and getting some other boundaries, whatever these may be.

The Court rose at 1 p.m.

TWELFTH PUBLIC HEARING (8 XI 68, 10 a.m.)

Present: [See hearing of 23 X 68.]

Mr. JACOBSEN: Are there any other assertions by the Federal Republic than those which I discussed yesterday? There is the simple assertion contained in the Reply, paragraph 83, that the geographical situation consisting in the bend in the German coastline is "certainly special enough" to come within the special circumstances clause of Article 6, paragraph 2, of the Convention. The assertion was repeated by the learned Agent for the Federal Republic in his very last address—the record for the ninth day on page 175, *supra*.

One might perhaps expect that this invocation of the clause would lead to some considerations regarding the Borkum-Sylt line, but that is not the case. On the contrary, the learned Agent and the learned counsel, who on this point are in complete agreement as to the result, even if not as to the reasons for this result, have both emphatically and clearly rejected any possibility as to basing any consequence of the special circumstances clause being applicable on the Borkum-Sylt line.

As I have mentioned, the learned Agent has twice emphatically declared that coastal fronts are certainly not baselines from which to construct boundary lines. Furthermore, the result he invokes of the clause being applicable is the so-called sector stretching to the tripoint mentioned so often, and he does not in any way consider this a boundary delimitation constructed on the Borkum-Sylt line. This sector is his understanding of the result of the concept of the just and equitable share, no matter how this concept may be filled out with the different considerations I have been going through.

The learned counsel, Professor Oda, did not want to declare what kind of boundary demarcation he would make based on the Borkum-Sylt line. But it was crystal clear that all those considerations regarding the Borkum-Sylt line as such had regard only to the general concept of straight baselines as expressed in the Geneva Convention on the Territorial Sea and the Contiguous Zone. He positively refrained from as much as implying that this line, on which he, in contrast to the learned Agent, based his specific case, has anything to do with the special circumstances clause.

Both the opposing Agent and counsel thus having clearly declared that the Borkum-Sylt line cannot have any relevance to the special circumstances clause, I must feel myself excluded from commenting on this question.

We have now the quite general assertion by the learned Agent that the bend in the German coastline, or, another expression used, the cutting-off effect, is as such a special circumstance. We have, as I foresaw in my first address, this assertion without even an attempt to indicate the other boundary line justified in any possible relation to the circumstances invoked. I hereby take it for granted that a construction as the one shown in diagram 6, and sustained by the various reasons which I have had to go through, could not be considered the other boundary line justified within the meaning of the Convention. This means that the Federal Republic leaves it entirely to the Court, without the least indication, to find out what might be the consequence of the clause of special circumstances possibly being applicable.

In considering whether the bend in the German coastline is a special circumstance justifying another boundary line, within the meaning of the Convention,

the first and perhaps the most important factor is to decide what is the proper approach to this problem. What factors in this situation are the ones which are characteristic from a legal point of view?

To our minds, the legally decisive factor is that the special circumstances clause in each of these two cases is invoked by the Federal Republic while in the same breath the Federal Republic openly and clearly admits and agrees that each of the two equidistance lines, seen by itself as a shelf boundary between the Federal Republic and each of the two States, is perfectly proper and correct. This is not a legal characteristic—or attached especially to the geographical situation at hand. Exactly the same problem will exist in a number of other geographical cases where the equidistance line in itself is quite correct and proper and not contaminated by any special circumstance.

May I here again refer the Court to the diagram figure 1 in the Danish Counter-Memorial, I, page 200. Here again, each equidistance line is correct and proper and uninfluenced by any special circumstance. But the general geographic situation causes the equidistance areas to the three States lying beside each other not to be proportionate.

We have, basing ourselves on our understanding of the special circumstances clause, maintained that this clause is inapplicable as well in the situation depicted in figure 1, as in the two cases at hand, because it could never be justified, in the words of the Convention, to change these proper equidistance lines and take away from any of the States involved continental shelf areas quite normally accruing to each of those States. That is our main contention regarding the clause of special circumstances.

If the Court, in these two cases at hand, might not accept that understanding and give the Federal Republic some degree of compensation from Denmark and the Netherlands, being compensation for the general geographical situation between the three States, what would then be the result in the case as shown in figure 1? The necessary result must, as far as I can see, be that Middleland should have compensation as well.

Where should that compensation be given? Should it be taken from Northland by a diversion of the median line so highly respected by the Federal Republic? Or should it be given by changing the direction of the two equidistance lines towards the two adjacent States, Leftland and Rightland? I hardly think either could be the result, and if any such diversion were made I think it could be properly said that this would be a decision *ad hoc ex aequo et bono*.

It now, of course, could be contended that the consequences with regard to an imaginary geographic situation, as shown in figure 1, is without interest. But, Mr. President, this situation is not imaginary. Figure 1 is, in fact, a simplified demonstration of, for instance, the situation of Belgium, which can now be seen on the map on the wall, France being Leftland, Belgium Middleland, the Netherlands Rightland and the United Kingdom being Northland.

Belgium has, as it has been shown in the written proceedings, so far staunchly adhered to the principles of the Convention of which she is, however, not a member. Belgium apparently does not believe that it could be justified to change ordinary and correct equidistance lines, and Belgium has proceeded with the preparation for her delimitation of the continental shelf on this understanding, which is exactly the same understanding as ours.

But, Mr. President, Belgium has not yet formally concluded a procedure of delimitation. The preparations have been going on although the Belgian Government, of course, is aware that Belgian interests, if seen as interests only and not as legal convictions, are parallel to the position taken by the Federal Republic.

If the Court might decide in favour of the Federal Republic, it could hardly be expected that the Belgian Government should not reconsider its position, it being then established that Belgium, just as, in that case, Denmark and the Netherlands, had been wrong in her understanding of the applicable international law.

Then the question of revision would be raised by Belgium and the problems as they were shortly described based on figure 1 would necessarily arise. And this, Mr. President, would be the case in the North Sea itself.

How then would it be in the world as a whole? If the learned counsel, Professor Oda, as the record for the third day, page 61, *supra*, states, were right that unilateral delimitations made by States might well be changed later on, then Iraq must necessarily raise the question of revision as well, and there will be a number of other cases.

I have mentioned these other boundary questions because, as far as we can see, they illustrate the relation between a decision based on law and a decision *ad hoc*. We think that what the Federal Republic asks is a decision *ad hoc*, but the decision given by this Court will by any State in the world be considered as a decision based on law.

The decision must therefore be given on legal considerations which have regard not to what is the more or less incidental geographical configuration, which differs from case to case, but to what are the true, legal characteristics of the problem presented to the Court.

Seen in the light of these legal characteristics, the question presented to the Court is, to our minds, simply whether ordinary and accepted equidistance boundaries as between two States can be put aside because a general geographical situation which has no bearing upon the equidistance boundaries by themselves causes a lack of proportionality in the result. And that is in essence the question, whether another boundary line is justified.

If the problem is viewed in this light, there should be no possibility of correcting the Danish-German or the German-Netherlands equidistance boundaries and, of course, as a consequence, no possibility of setting aside the Danish-Netherlands equidistance boundary.

STATEMENT BY PROFESSOR ODA

COUNSEL FOR THE GOVERNMENT OF THE FEDERAL REPUBLIC OF GERMANY

Le PRÉSIDENT: M. le professeur Oda désire faire une brève déclaration. Je pense que MM. les agents du Royaume du Danemark et du Royaume des Pays-Bas sont d'accord.

Professor ODA: Mr. President and Judges of the Court, the learned Agents for our opponents were kind enough to give me the opportunity to clear up a misunderstanding by the learned Agent for the Kingdom of Denmark as to what I have proposed as bases for the delimitation of the continental shelf boundaries. I did not say that the actual coasts of the Kingdom of Denmark and the Kingdom of the Netherlands should be taken as bases in addition to the Borkum-Sylt line. Rather, I have thought that, consistent with my approach, the coastal façades of the Kingdom of Denmark and the Kingdom of the Netherlands are the proper bases, as indicated in our map No. 5 (p. 189, *supra*).

REJOINDER OF SIR HUMPHREY WALDOCK

COUNSEL FOR THE GOVERNMENTS OF DENMARK AND THE NETHERLANDS

Sir Humphrey WALDOCK: Mr. President and Members of the Court. As the learned Agent for the Netherlands informed the Court, it falls to me to state our answers to the three questions put to the two Governments by Judge Sir Gerald Fitzmaurice. These questions concern three separate issues raised in the present cases. I hope, therefore, that it may be convenient to the Court if I answer the three questions successively and add, in connection with each of them, some observations on the issues to which they relate. I shall then proceed to the main part of my argument in which I propose to examine rather more closely the bases and the implications of what I may call the equitable case presented to the Court by our opponents.

I now address myself, therefore, to Judge Sir Gerald Fitzmaurice's first question. In answering this question the two Governments feel that they should first make quite precise their position in regard to the effect of the 1958 Convention. They have not maintained that the Convention embodied already received rules of customary law in the sense that the Convention was merely declaratory of existing rules. Their position is rather that the doctrine of the coastal State's exclusive rights over the adjacent continental shelf was in process of formation between 1945 and 1958; that the State practice prior to 1958 showed fundamental variations in the nature and scope of the rights claimed; that, in consequence, in State practice the emerging doctrine was wholly lacking in any definition of these crucial elements as it was also of the legal régime applicable to the coastal State with respect to the continental shelf; that the process of the definition and consolidation of the emerging customary law took place through the work of the International Law Commission, the reaction of governments to that work and the proceedings of the Geneva Conference; that the emerging customary law, now become more defined, both as to the rights of the coastal State and the applicable régime, crystallized in the adoption of the Continental Shelf Convention by the Conference; and that the numerous signatures and ratifications of the Convention and the other State practice based on the principles set out in the Convention had the effect of consolidating those principles as customary law.

We doubt whether, in the circumstances, any great significance attaches to the presence in the High Seas Convention, in contrast with the Continental Shelf Convention, of a preamble reciting the desire of the Conference to "codify the rules of international law relating to the high seas" and describing the provisions of the Convention as "generally declaratory of established principles of international law".

The High Seas Convention did, for the most part, deal with long settled principles, although it certainly contained some elements of "progressive development" of the law as, for example, the introduction of the "genuine link" in Article 5 and the definition in Article 15 of piracy in terms which conflicted with the law of piracy, as understood in common law legal systems.

The Territorial Sea Convention, which was also in considerable measure a codifying convention, dealt with a number of matters where there was a larger element of controversy or of progressive development than in the case of the High Seas Convention.

The Continental Shelf Convention, as I have indicated, dealt with emerging but not yet fully fledged customary law of very recent development.

The Fishing and Conservation Convention was essentially legislative in

character, being concerned with the introduction of new legal régimes on these matters.

In short, in terms of codification *stricto sensu* the High Seas Convention was on a somewhat higher plane than any of the other conventions; so much so, Mr. President, that the question was even mooted at the eleventh plenary meeting on 23 April 1958 as to whether the articles on the high seas should be cast in the form of a "declaration" or of a Convention. This question was resolved by deciding to include the preambular clause referred to in Judge Fitzmaurice's question.

Neither the Territorial Sea nor the Continental Shelf Convention contains any preamble and the reason seems to be simply that the question was never raised in the relevant committees of the Conference.

The Fishing and Conservation Convention, on the other hand, which was essentially legislative in intention, did include a preamble which reflected the legislative character of the Convention.

Thus, so far as preambles are concerned, the Territorial Sea and the Continental Shelf Conventions stand mid-way between the codifying High Seas Convention and the legislating Fishing and Conservation Convention and we do not think any very firm conclusions can be drawn from the contrast between the High Seas and the Continental Shelf Conventions on this point.

In passing from this point, I may perhaps be permitted to point out that the codifying High Seas Convention itself, in Article 26, refers expressly to the right of the coastal State to explore and exploit the continental shelf and that it does so in connection with cables and pipelines, one of the matters dealt with in Article 4 of the Continental Shelf Convention and with regard to which reservations are authorized under Article 12 of that Convention.

A second point raised by Judge Sir Gerald Fitzmaurice in connection with the first question is the significance to be attached to the fact that Article 1 of the Continental Shelf Convention itself opens with the words: "For the purposes of these Articles . . ."

Here again, we doubt whether the point can throw any clear light on the character of the Convention as declaratory of already received law.

In the first draft on the continental shelf adopted by the Commission in 1951, the definition in Article 1 was prefaced by the words "As here used" which Professor Hudson seems to have thought would indicate the "provisional" character of the definition. That is in the *Yearbook* of the Commission 1951, Volume 1, page 270.

In 1953 this phrase was changed to "As used in these articles" but the records do not show the reasons for what seems to have been a purely drafting change (*Yearbook* 1953, Vol. II, p. 212).

In 1956 a further change was made to the first formula, but there is again no indication in the records of why this was done. Even so, Mr. President, paragraph 65 of the Commission's Report for 1953 appears to give a clue to what was in the mind of the Commission when it prefaced Article 1 with the words in question. Having explained in the previous paragraph of its Report that this Article was now so formulated as not to limit the exclusive rights of the coastal State to the continental shelf in the geological sense, but to extend them to the limit of exploitability, the Commission commented:

"While adopting, to that extent, the geographical test of the continental shelf as the basis of the juridical concept of the term, the Commission in no way holds that the existence of the continental shelf in its geographical configuration as generally understood, is essential for the exercise of the rights of the coastal State as defined in these articles."

In short, recognizing that it was using the term "continental shelf" in the Articles as a legal term of art not conforming to its generally accepted meaning, the Commission guarded itself against criticism by the words "As used in these articles".

In any event, Mr. President, the insertion of words such as "for the purpose of the present Convention" is quite normal in conventions drafted by the Commission, including such eminently codifying Conventions as the Vienna Convention on Diplomatic and on Consular Relations, and this is true also of the draft Convention on the Law of Treaties. The reason is that terms used in the general law-making conventions may be found used elsewhere—either in other treaties or in internal legislation—with a somewhat different meaning and, as a result, it might prejudice the possibility of some countries ratifying the Convention if the definition clause in the Convention were to have automatic effects on the interpretation of other instruments.

I have completed our answer to Judge Sir Gerald Fitzmaurice's first question, Mr. President. But in connection with it I should like to say a word about the contention of our opponents on page 56, *supra*, of the third day's record, that the sections of the Convention dealing with the delimitation of boundaries were "new and did not reflect customary law existent at that time". On this basis, we do not see how our opponents can justify their recognition of the determining effect of the signatures of the Convention in establishing as customary law the exclusive right of the coastal State as defined in Articles 1, 2 and 3.

The Federal Republic in its memorandum to the Fourth Committee denied absolutely the existence of any such customary right. At the Conference, if the Commission's draft of Article 6, which had already been found generally acceptable by governments in their comments to the Commission, was the subject of some discussion, it passed through the Fourth Committee without any very great difficulty. But Articles 1 and 2 were the subject of prolonged discussion and controversy. The idea that the definition of the doctrine of the continental shelf in Articles 1 and 2 was already cut-and-dried customary law *in statu nascendi* in 1958 simply cannot be accepted.

The external limit of the continental shelf, the character of the sovereign rights and the categories of natural resources comprised in those rights were all matters of keen controversy at the Conference itself. In our view, therefore, the attempt of our opponents to make a sharp distinction between Articles 1-3 and Article 6 of the Convention, in regard to their status as embryo customary law, is quite unjustified.

In the same way, on page 198, *supra*, of the tenth day's record, we were a little surprised to hear our opponents pointing to the problem of the deep ocean and to the fact that the Convention contemplates its possible revision after five years as indications that the continental shelf is not an already fixed or completed concept. We were surprised because the deep ocean problem concerns the extent of the exclusive rights of the coastal State as defined in Articles 1 and 2, which they themselves say has crystallized as settled customary law. We were also puzzled as to the relevance of the Revision Article since this Article appears also in the High Seas Convention, a codifying convention admittedly declaratory of customary law.

I do not think that at this stage of the case the Court will wish me to say very much about the State practice, which has already been fairly well explored and the implications of which it is for the Court itself to appreciate. I shall therefore touch only briefly on a few matters raised by our opponents.

One is the argument of the learned Agent on page 202, *supra*, of the tenth day's record, advanced by no means for the first time, that the several agree-

ments between States in the North Sea, and elsewhere, based upon the equidistance principle, are not sufficient proof of the recognition by States that the equidistance method is the only rule. We pause for nearly the hundredth time, Mr. President, to say that it is the equidistance-special circumstances rule, not the equidistance method, which is in issue before you. We cannot accept for one moment that treaties in which the Parties have automatically had recourse to the principles expressed in Article 6 of the Convention are no evidence of *opinio juris*. Whether the delimitations have been the subject of no dispute, or whether they have represented a compromise between conflicting points of view, they have been made under the régime of the principles in Article 6 and on the basis that those principles are in the words of the Statute, "generally accepted as law", and this has been so whether or not the States concerned were parties to the Continental Shelf Convention.

Our opponents even go so far as to suggest that we have shifted our weight from agreements to unilateral acts. We can assure them that this is by no means the case, we have merely sought to underline the significance of certain unilateral precedents which they had sought to minimize.

The learned Agent was, we thought, rather sweeping when he said that the only relevant cases are Belgium and Iraq, for the general relevance to our argument of such unilateral acts as the Soviet Union's Decree, the Australian Petroleum (Submerged Lands) Act and the Kuwait Concession would seem evident.

Let us, however, look for a moment at the two cases which even the Federal Republic considers relevant. As to Iraq, the learned Agent said on page 175, *supra*, of the ninth day's record that the map shown in the Common Rejoinder, I, page 502, "has not yet led to an official act of the Iraqi Government to the effect that it accepts the boundary line as shown in that map". But does he not overlook the fact that the Iraqi Foreign Ministry on request transmitted the map to the Danish Embassy under cover of a Diplomatic Note of 22 August 1960? However, the learned Agent also said that "according to information we have got through diplomatic channels the Iraqi Government has not yet taken a final decision in view of the proceedings pending in this case".

We feel, Mr. President, that we can safely leave the appreciation of that information to the Court, more especially as our opponent was at pains to stress that Iraq really has no basis for going back upon its claim. "The share it would get under the equidistance method", he said, "is not disproportionately small in view of its coastal front."

Before going on to the case of Belgium, Mr. President, I would like to interpose a brief word about the position of Kuwait, the companion precedent to Iraq. Learned counsel for the Federal Republic, on pages 199 and 200, *supra*, of the record of the tenth day, repeated his suggestion that Kuwait's position in regard to her equidistance boundary with Iraq is not final and he referred again to certain overlapping concessions affected by the so-called Neutral Zone. We cannot see the relevance of these latter references since they are only an indication of the complications of the Neutral Zone boundaries and of differing points of view as to their effects on the continental shelf delimitations.

As to the Kuwait-Iraq boundary, the Court has before it an account of the matter in paragraph 71 of the Rejoinder and the illustration of the Kuwait-Shell concession boundary superimposed on the map in I, page 502. I can only reiterate what I said in my first speech.

According to my understanding, and it is clear and precise, Kuwait, in regard to this boundary as in regard to all her other boundaries, bases herself

upon the principles and rules embodied in Article 6. Nor will the Court fail to appreciate the importance of those principles to any small State discussing boundary problems with a larger neighbour.

As to the case of Belgium, Mr. President, I need not add very much to what my learned colleague, the Danish Agent, has already said this morning about this precedent and what I said myself in my first address. We submit that the automatic recognition by the Belgian Government, when Belgium herself is not a party to the Continental Shelf Convention, of the application to Belgium of the principles and rules embodied in Article 6, is extremely cogent evidence of *opinio juris* on the part of Belgium in regard to those principles and rules. Nothing, we think, could show more clearly the status of these principles and rules as the generally accepted law than their automatic, almost instinctive observance by this North Sea State which has been provided by nature and history with so inconvenient a window upon that sea.

As a final comment on this question I may perhaps be permitted to return to our opponents' argument that the principles and rules in Article 6 were too new in 1958 to be now regarded as customary law, and to make a brief comparison between them and the baseline rules contained in Articles 3 to 13 of the Territorial Sea Convention. Although these baseline rules certainly contain important elements of pre-existing customary law, they also undeniably contain some new provisions, more especially in regard to bays. Delimitations made *bona fide* in accordance with these new provisions have never, so far as I am aware, been questioned. In short, the effect of the Geneva Conference, as it was the purpose of that Conference, was to consolidate and settle the law regarding baselines. It is our contention that exactly the same thing happened with respect to the principles and rules in Article 6, and that a delimitation made *bona fide* in accordance with those principles and rules is *prima facie* valid *erga omnes*.

I now pass, Mr. President, to Judge Sir Gerald Fitzmaurice's second question. This question asks whether, with regard to our contentions as to the meaning to be attributed to the notion of adjacency, we are to be understood as contending that: "a given part of the seabed, even if it is near the coast of a particular country, cannot be considered as adjacent to it unless it is closer to that coast than to the coast of any other country".

We recognize, and the dictionaries confirm it, that the word "adjacent" is one which is used with slightly different shades of meaning in different contexts. In some contexts, the word appears to be used in a sense identical with "contiguous", as in the phrase "adjacent States" in paragraph 2 of Article 6. In those contexts the word "adjacent" concerns the actual contact between two areas and the element of proximity is thus present in its most acute form. In other contexts, as in the phrase "submarine areas adjacent to the coast but outside . . . the territorial sea" in Article 1, and in the phrase "same continental shelf . . . adjacent to the territories of two . . . States" in Article 6, the term "adjacent" seems to be used as denoting proximity—a notion which is inherent in the word—but proximity in a somewhat broader sense.

What we contend is that when the context becomes, as it does in Article 6, paragraph 2, a question of determining the exclusive rights of each single coastal State over the continental shelf adjacent to its coast, the proximity criterion fundamental to the whole notion of "adjacency" necessarily comes into operation and identifies all the area nearer to one coastal State than to any other as adjacent and appurtenant to that State, and we say that this interpretation also follows irresistibly from the fundamental role played by proximity in the general rules of international law governing the delimitation of maritime boundaries. We further say that this interpretation finds expression

in the primary role given to the equidistance principle in the delimitation of boundaries by Article 6.

In short, and subject to the qualification which I shall now mention, we do contend that, in determining the respective rights of any two States, a given part of the seabed, even if it is near the coast of a particular country, cannot in law be considered as adjacent to it unless it is closer to that coast than to the coast of any other country.

The qualification, of course, concerns the special circumstances exception; and here I may perhaps at the same time deal with the argument of our opponents, on page 170, *supra*, of the ninth day's record, that the special circumstances exception is incompatible with our contention in regard to the proximity principle. The learned Agent there said:

"It seems rather doubtful whether the exception of special circumstances could ever have been maintained, if mere proximity would already confer a valid title to areas nearer to some point of the coast."

This argument seems to us, with respect, quite misconceived. On what basis does the learned Agent himself now refer to the special circumstances clause as an exception unless it is that he now recognizes it as an exception to the general rule that proximity in principle determines the appurtenance of a given area to a particular coast?

In truth, the very existence of the special circumstances clause is a confirmation of the general validity of the proximity principle in the operation of Article 6.

The purpose of the clause was to provide for the possibility of correcting "manifest hardship" resulting from the application of the proximity principle where exceptional geographical features have the effect of divorcing altogether the operation of the proximity principle from the realities of the geographical situation. In those cases, as for example in the case of an insignificant islet out to sea, the proximity principle still operates but by reference to corrected geographical facts. The pull of the proximity principle, Mr. President, is constant in the law of the sea. Even if a small islet should have to be left out of account in delimiting the continental shelf of the mainland coast, the proximity principle will still attract to that islet its own territorial sea and also, perhaps, raise a question as to its rights in the continental shelf under subparagraph (b) of Article 1. As an illustration of the point which I am making, I really need do no more than refer the Court to the Italo-Yugoslav delimitation shown in our Common Rejoinder, I, pages 563-565, where these phenomena are illustrated.

In short, Mr. President, there is no question of incompatibility between the special circumstances exception and our contention in regard to the role of the proximity principle, there is only a question of the balance between the operation of the rule and the operation of the exception. And we think that in the interplay between the rule and the exception the principle of proximity, or greater nearness to the coast, operates in its character as a fundamental norm of the law of the sea.

Our opponents did me the honour, Mr. President, of referring to an early lecture of mine on the continental shelf published in Volume 36 of the *Grotius Society Transactions* in 1950, where I stressed that "bare contiguity" has not been accepted in international law as a legal title to territory.

As the learned Agent scrupulously pointed out, this lecture was delivered before the idea of the *ipso jure* rights of the continental shelf had been accepted. In fact, the express purpose of the lecture was to draw attention to the extreme variations in the unilateral claims being made under the banner of the con-

tinental shelf and to the risks which these claims seemed to involve for the freedom of the seas.

I ventured to issue a warning against too hasty acceptance of the new claims until the doctrine itself had been more clearly defined and limited. In that context, I analysed the various legal concepts apparently invoked in support of the claims and stressed that "bare contiguity" does not in itself constitute a legal title. Needless to say, that is a point of view which I still hold.

But, as the learned Agent himself seemed to appreciate, the position in regard to contiguity changed fundamentally when the legal title of the coastal State over the adjacent continental shelf was recognized. Once a general title to an area is established, contiguity has always been recognized as an element which may indicate the extent and limits of the title. In another, earlier article, published in the 1948 *British Yearbook of International Law*, I had in fact myself stressed the role of contiguity in indicating the scope and limits of an effective occupation. Indeed, even on page 141 of the article to which our opponents have referred, I stressed the importance of proximity—the particular relation between the coastal State and the adjacent continental shelf—as an element of "effectiveness" which might give support to claims to appropriate the adjacent continental shelf in the context of the law of occupation.

At that date, Mr. President, it was not clear whether the new doctrine was to be regarded as an extension of territorial sovereignty or as some special development of maritime jurisdiction. Today the coastal State's right over the continental shelf forms part of the general law of the sea where, as we have shown, the proximity principle is an inherent, fundamental norm.

In concluding my observations on points relating to Judge Sir Gerald Fitzmaurice's second question, I should perhaps refer to Professor Oda's unusual experience in being able to inform the Federal Republic how it voted in 1958 concerning Article 7 of the Fishing and Conservation Convention.

We, of course, accept what he says, but we doubt whether it changes in any material respect the picture which we drew for the Court of the position of the Federal Republic on the question of proximity at the Geneva Conference.

If the only evidence of the Federal Republic's opposition to Article 7 of the Fishing and Conservation Convention is to be found in the Japanese language, we doubt very much the existence of any real misgivings regarding the proximity principle itself on the part of the Federal Republic, more especially in view of its own advocacy of that principle in its memorandum on the continental shelf.

Moreover, if it had expressed any such misgivings in connection with the Fishing and Conservation Convention—a decidedly more controversial convention altogether—that would only make more conspicuous the absence of any such misgivings on the part of the Federal Republic in connection with the Territorial Sea and the Continental Shelf Conventions.

I will now turn to the third question. This question concerns what I may broadly call the equality of area points. We are asked whether there is the following difference between "median" and "lateral" equidistance lines, namely—and I now quote the question:

"That apart from the distorting effects of rocks and islands, which can be met by the application of the special circumstances exception, a median line, as its name implies, does in principle always give to the States concerned areas of the same size, within the limits of their common frontage on either side of the median line, in the sense that in each case the distance from the coast up to that line will be the same for both, whereas lateral equidistance lines often cause the areas thereby attributed to the States

concerned to be of different sizes in a way that cannot be accounted for merely by the length of their respective coastlines."

Before dealing with the equality point, I propose to demonstrate very briefly that the geometrical techniques for determining the course of a "median" and a "lateral" equidistance line are precisely the same. And, in this connection, I will be asking the Court to refer to the diagrams which are before the Court marked B, C and D.¹

Now in both cases, that is in the median line and lateral line cases, the technique is at any given place to find the two nearest points on the coasts concerned and to join those two nearest points by a straight line. This line is then bisected by a perpendicular line which gives the direction of the median or lateral line until, at another place, two other points on the respective coasts concerned intervene to influence the line. Then the process is repeated and the new direction of the line is ascertained and so on *ad infinitum*.

Now if the Court would be good enough to glance at the first diagram which is marked B (see p. 250, *infra*) and which shows two sets of straight line coasts it will see the point illustrated, if admittedly in a highly simplified form. The top set of lines shows a median line between three different versions of the coasts of Leftland and Rightland, LI and RI on the diagram are strictly parallel coasts; LII and RII are coasts diverging from each other at the same angle from the perpendicular, and LIII and RIII are similar, but more widely angled, diverging coasts. The median line marked MI, MII and MIII remains the same for all three cases and this is because in each case the angles of the respective coasts are the same and therefore give the same point of bisection for the perpendicular of the median line. The bottom set of lines does exactly the same for "lateral" equidistance lines, here the straight coastlines are placed at three different angles as in the top set of lines. The same technique is used, and it will be seen that the result in terms of the boundary is precisely the same.

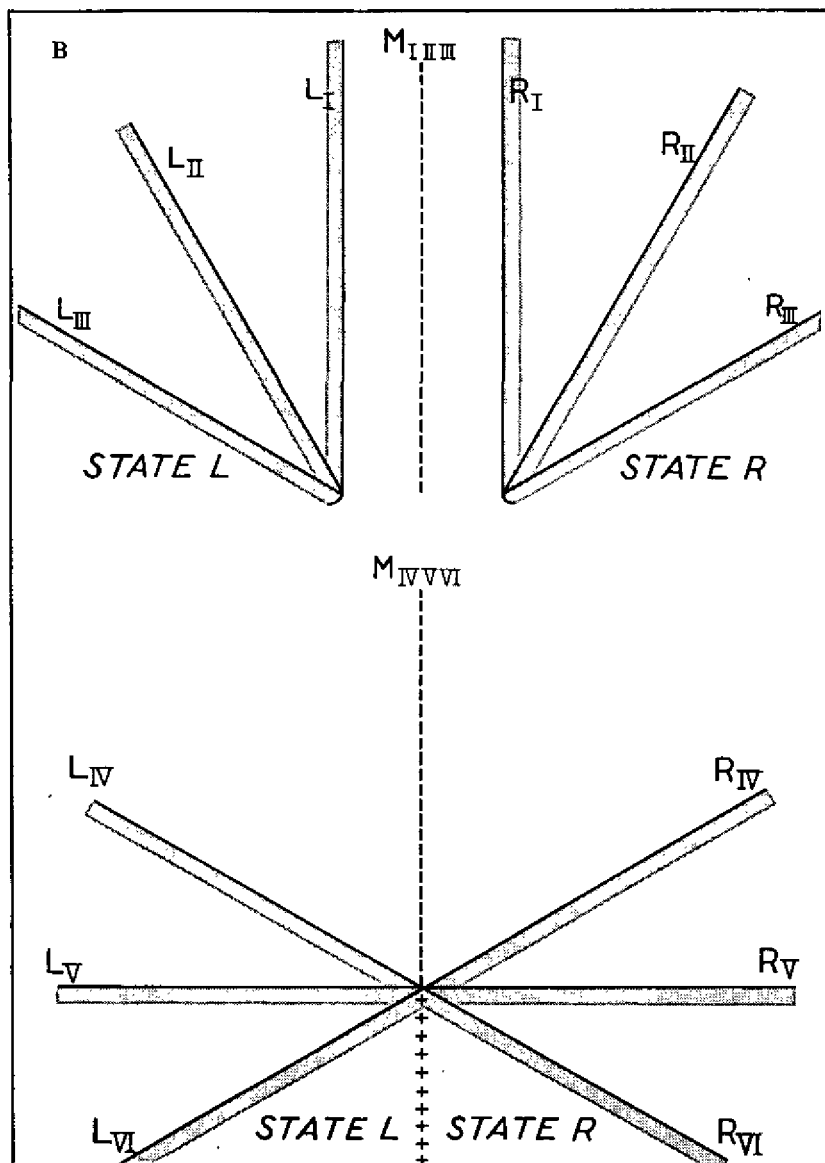
This is, as I have said, a highly simplified picture and, of course, it shows no more than that there is no essential difference between "median" and "lateral" equidistance lines from the point of view of "method". In this very simple case the areas cut off by the median and lateral equidistance lines are strictly proportional to the length of the coastline.

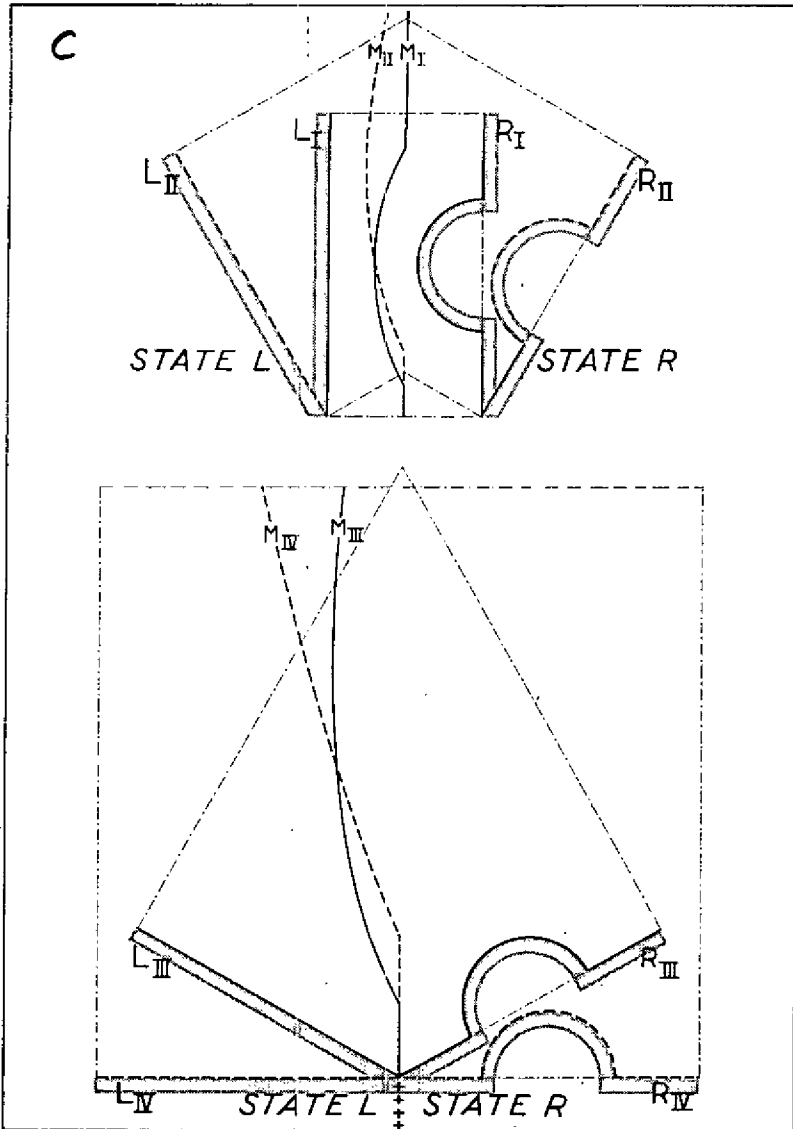
I would ask the Court now to move on to the second set of diagrams which are marked C (see p. 251, *infra*). Here the coastlines of one of the States, Rightland, has a semi-circular bulge. For simplicity, we have reduced the examples of coastlines to two instead of three. In each case, the coast of Leftland is straight and the coast of Rightland, while at the same angle as the coast of Leftland, has the semi-circular bulge.

Now the top set of diagrams again illustrates the median line situation and it shows that the assumption on which the third question is based, is not in fact, quite correct. If one takes the LI-RI situation, the bulge has the effect of pushing the median line towards Leftland in a manner which results in unequal areas. The actual figures are 46 per cent. to Leftland and 54 per cent. to Rightland, a difference of 8 per cent. If you take the angled, diverging coastlines in the LII-RII situation, the figures are 44 per cent. and 56 per cent., a difference of 12 per cent.

I may add that this is far from being simply an artificial construction of ours for the present purpose. We have produced these figures for simplicity. Substantial bulges in the coast in median line situations are by no means uncommon and I will mention one concrete case a little later. Such bulges may also take the

¹ See No. 49, p. 390, *infra*.





form of substantial offshore islands which cannot be disposed of as special circumstances.

Now by way of comparison we have undertaken the same kind of exercise for lateral boundaries in the lower set of diagrams. Here the bulge in the LIII-RIII situation deflects the boundary to some extent, giving figures of 35 per cent. to Leftland and 65 per cent. to Rightland, a difference of 30 per cent. On the other hand, in the LIV-RIV situation, the deflection differs and gives figures of 41 per cent. to Leftland and 59 per cent. to Rightland, a difference of only 18 per cent. This difference of course, we concede, would increase as the boundary moved farther away from the two coasts.

But with those diagrams I hope that I may have satisfied the Court. But while the percentages of differences in areas may be somewhat larger under lateral delimitations between adjacent States, it is not the case that median lines necessarily result in equality.

Now if the Court will be kind enough to turn to the third of my diagrams (see p. 253, *infra*), it will see this point further illustrated in a concrete case concerning two of the Parties to the present proceedings. This diagram depicts the equidistance line in the Baltic between Denmark and the Federal Republic and also lines giving the directions of what might be considered the "opposite" coasts of this situation, and this is a situation which the Federal Republic itself has repeatedly asserted is a "median line" situation.

Here, on the German side, there is a very substantial bulge in the coast at the eastern end and, off that bulge, there is a further substantial off-shore island. The resulting median line, Mr. President, works out roughly at an area of 34 per cent. for Denmark and 66 per cent. for the Federal Republic, a difference of the order of 32 per cent. We have not heard the Federal Republic complain of that, nor has Denmark complained of it, because she thought it was the Federal Republic's legal right. But Denmark also thinks that she is entitled to her rights off her North Sea coasts.

The Court adjourned from 11.20 a.m. to 11.40 a.m.

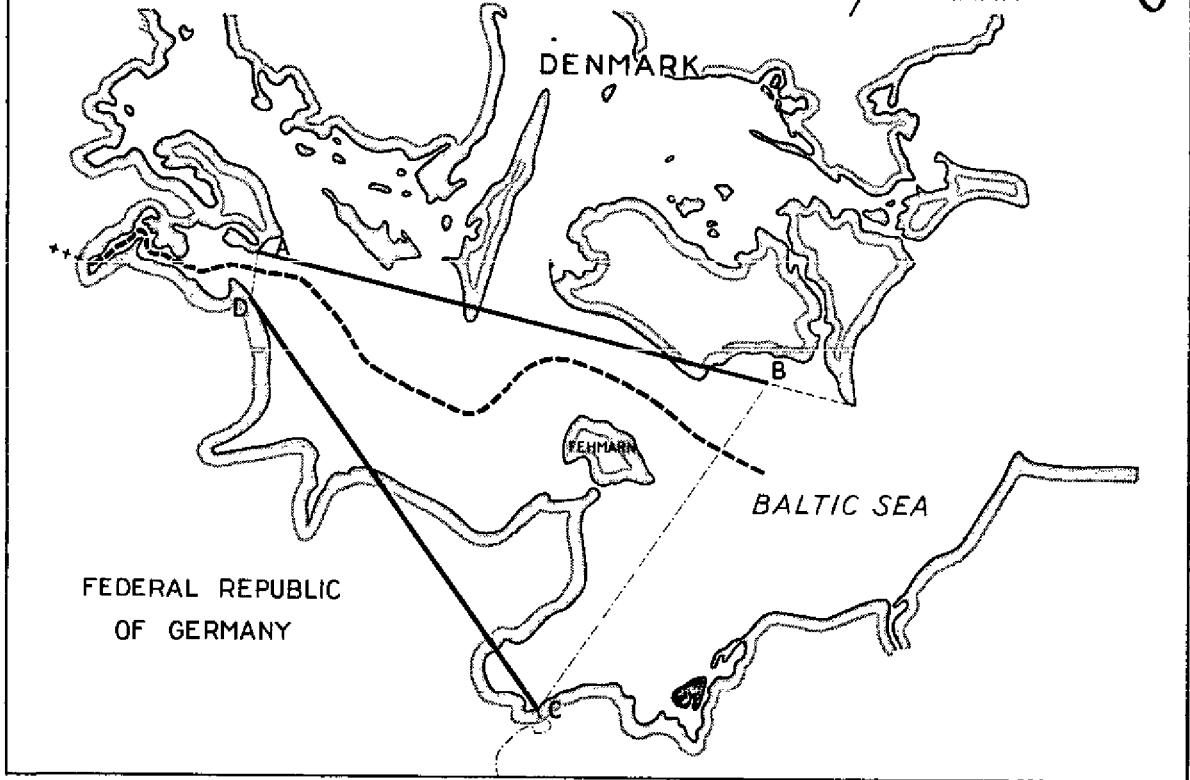
I would like to make a few further observations in relation to Judge Sir Gerald Fitzmaurice's third question.

Our opponents have repeatedly referred to the fact that lateral lines may dispose of much larger areas where they give on to the open seas and they have invoked this fact as in itself a basis for considering the application of the equidistance principle as unjust and inequitable in the particular cases before you. The learned Agent was very specific upon this point in the final stages of his address to the Court. On page 207, *supra*, of the tenth day's verbatim record he said:

"If there were only a small belt of continental shelf before the coasts of Denmark, the Federal Republic and the Netherlands, it would probably be legitimate and sufficient to judge the equitableness of the boundary line by examining the relatively small area delimited thereby. In such a case the equidistance boundary would perhaps even be regarded as equitable. But if the equidistance boundary reaches far out into the sea it affects the apportionment of extensive submarine areas and the evaluation of the effects of the proposed boundary cannot be restricted to the local configuration of the coast. The whole geographical situation around the continental shelf that is to be apportioned has to be taken into account. That is what I would like to call the macrogeographical perspective."

BALTIC MEDIAN LINE FEDERAL REPUBLIC OF GERMANY/DENMARK

A



This contention he reiterated in measured terms on page 208, *supra*, the same record. We feel bound to recall what we have already said in the written pleadings, namely that there is no suggestion in the report of the Committee of Experts nor in the report or draft articles of the Commission, nor in the Convention adopted at Geneva, of any such doctrine. The Experts, the Commission and the Conference treated median line and lateral equidistance boundaries on precisely the same basis. None of these bodies ever contemplated that a lateral equidistance line might be equitable so long as the continental shelf was not too wide, but might become inequitable should the continental shelf extend some farther distance out to sea.

Furthermore, Mr. President, it was after a prolonged debate resulting in the extension of the exclusive rights of the coastal State beyond the limit of the continental shelf proper to the limit of exploitability that the Conference adopted precisely the same rule for median line and lateral line situations.

I shall be returning a little later to the preparatory work of Article 6, when I shall read to the Court a passage from Mr. Boggs, a leading member of the Committee of Experts, which is in direct contradiction with the learned Agent's thesis on this point.

Our opponents so run together their doctrine of the "just and equitable share" and their version of the special circumstances clause that we are never quite sure when they are invoking "special circumstances". But it would seem from the contention of the learned Agent to which I have referred that you are being asked to hold that a bend like that in the German coast could not be considered a "special circumstance" so long as the continental shelf was not very extensive, but would be a "special circumstance" if the continental shelf were wider. If so, it appears to us to be a way of claiming that the area which it is correct to consider as the continental shelf naturally and properly appurtenant to the Federal Republic becomes unjust and inequitable simply because other areas appear over the horizon, although those areas are nearer to other States. This does not seem to us to have any basis either in Article 6 or in equity.

There is one further point which we wish to make in this connection and as part of our general reply to Judge Sir Gerald Fitzmaurice's question. This is that the equality, or inequality, of areas cannot be appreciated without reference to the contours of the continental shelf itself. Even granted that there is this extension to the "exploitable limit", the contour depths of the seabed still determine, for practical purposes, the outward size of the areas. The particular course of these contours may, in certain cases, though not in the North Sea, counterbalance in some measure an apparent inequality of area resulting from the course of a lateral equidistance line.

That concludes our explanations of our position on this question. We cannot, however, forbear to observe that in the present cases the problem of inequality resulting from a deflected, "lateral" equidistance line does not really arise. As we have pointed out in the written pleadings, and as my learned colleague, the Danish Agent, has emphasized in his final speech, the Danish-German and the Netherlands-German coastlines are both quite normal and almost straight in their general direction. In consequence, the lateral boundaries for each of these situations, taken separately, do not suffer any great deflection. The Netherlands equidistance line is, indeed, almost perpendicular to the coast, and such deflection as there is operates in favour of the Federal Republic. It is *not*, Mr. President, the direction of the Netherlands equidistance line of which the Federal Republic complains, it is only the fact that later this line happens to meet another line.

That, Mr. President, concludes my explanations and observations with reference to Judge Sir Gerald Fitzmaurice's questions, and I therefore propose, as I intimated in opening, to pass to my more general argument about the equity of our opponents' case.

Mr. President and Members of the Court, more has been heard of "equity" in the two cases now before you than has ever before been heard of equity in all the previous cases in this Court and all the previous cases of the Permanent Court put together. The legal system of my own country is famous for its "equity". But equity in England, as in other common law countries, is a system of settled legal rules and principles no less certain and concrete than those of the general law. Accordingly, if a party is heard today in the English courts making liberal appeals for "equity" outside the settled principles and rules, the court is apt to conclude that he does so because he knows that he cannot formulate his claim within the recognized categories of legal and equitable rights. It is our submission that this is the position of the Federal Republic in the present proceedings.

Scattered throughout the Federal Republic's written pleadings are appeals to "equity" in one form or another, though mainly in the form of the "just and equitable share" and "equitable apportionment". At the present hearings the records show counsel for the Federal Republic invoking equity in the form of "general justice", "equitable apportionment", etc., on almost every page, except sometimes where they may be discussing our case. At this final stage of the argument, Mr. President, we understand our opponents to be making their appeal to equity in two separate ways.

First, denying the existence of any legal basis for applying to them the equidistance-special circumstances rule, they invoke, under subparagraph (c) of Article 38 of your Statute, the alleged principle of the just and equitable share under the title of "general justice."

Secondly, assuming the application of the equidistance-special circumstances rule, they still invoke the principle of the "just and equitable share" under the name of "equitable apportionment" as wholly controlling the interpretation and application of this rule.

Thus, the principle of the "just and equitable share", if it is rejected by the Court under the first way of putting the Federal Republic's case, is to reappear by the backdoor under the guise of the equitable application of the equidistance-special circumstances rule.

As to the Federal Republic's first line of argument in support of the "just and equitable share" based on paragraph (c) of Article 38, the contentions on both sides have already been very fully expounded to the Court. We think, as I submitted to the Court on page 117, *supra*, of the record of the sixth day, that the Federal Republic's argument on this part of the case is wholly excluded by our own contentions regarding the principles and rules applicable to the delimitation of the boundaries now in issue before the Court.

We also think that there are numerous further objections to the Federal Republic's claim to be entitled to invoke paragraph (c). I stated them *seriatim* and succinctly for the Court on pages 117 to 118, *supra*, of the same record. We doubt whether it would assist the Court if we were to revert to all those matters again.

The Court may indeed have noted, on page 207, *supra*, of the tenth day's record, that the learned Agent himself seemed to have lost some of his enthusiasm for paragraph (c) and to be moving over to an equally vague and undefined assertion that the principle of the just and equitable share is simply an "interpretation of existing law". The objections which we have voiced

against the introduction of the alleged principle under the umbrella of paragraph (c) apply with no less force to this new contention.

To contend that this principle is "recognized by the formulation of Article 6 of the Continental Shelf Convention" seems to us to disregard entirely both the exclusive nature of the rights of the coastal State under Articles 1 and 2 and the legislative history of Article 6, which shows the clear intention of the draftsmen to lay down rules of boundary delimitation and not of "apportionment". But I need not go into the point now because I propose in the very next part of my speech to state comprehensively our objections to our opponents' attempt to read the principle of the just and equitable share into Article 6 of the Convention.

Since the Federal Republic now tries to bring its "just and equitable share" claim back into the case under cover of the equidistance-special-circumstances rule, we *do* think that it may be of assistance to the Court if we subject the legal basis of this second limb of our opponents' case to close examination. The observations which we are about to make on the "just and equitable share" in this connection necessarily have a certain bearing also on the first and main limb of our opponent's case, and we, therefore, respectfully ask the Court to take them into account also in that connection.

The principle of the just and equitable share, whether under that name or under the name of equitable apportionment, is presented to you by our opponents as a principle of "general justice" that is over-riding in its effect in any question of the delimitation of continental shelf boundaries.

That, Mr. President, is what you find on page 32, *supra*, of the record of the learned Agent's speech on the second day. True, he is there speaking in the context of paragraph (c) of Article 38, but it is in this same over-riding character that our opponents invoke their alleged principle as a factor in the application of the equidistance special-circumstances rule. On page 49, *supra*, of the same record the learned Agent said expressly:

"The Federal Republic of Germany is of the opinion that under Article 6 of the Continental Shelf Convention the criteria which determine the presence of special circumstances excluding the equidistance line, are quite the same as those which determine the applicability of the equidistance method between States to whom the Convention does not apply."

The over-riding character of the Federal Republic's alleged principle can be seen on pages 11 to 12 and then on pages 15 to 16, *supra*, of the record for the first day. Speaking, it would appear, primarily in the context of paragraph (c) of Article 38, Professor Jaenicke said:

"The Federal Republic of Germany, on the other hand, takes the position that the delimitation of the continental shelf between the States adjacent to the same continental shelf has to be achieved in such a way that each of those States gets a just and equitable share. All methods, including the equidistance method, that have been applied in State practice to determine the boundary between States adjacent to the same continental shelf, should be applied with a view to their purpose of effectuating an equitable apportionment between the States concerned."

In the opinion of the Federal Republic of Germany, the justification for the application of the one or the other method of delimitation depends *essentially on the test of whether it effects an equitable apportionment in the concrete case*. While it does not deny that the application of the equidistance method may in many cases result in such an equitable apportionment, the Federal Republic of Germany takes the view that there is no

prima facie validity of the equidistance boundary nor any rule of international law which allows a State to delimit its continental shelf vis-à-vis another State unilaterally by application of the equidistance method unless the other State acquiesces in such a boundary.

As to the delimitation of the continental shelf between the Parties in the North Sea, the legal position of the Federal Republic is the following. First: There is no obligation on the Federal Republic of Germany to accept the equidistance method, if it is not established by agreement, by arbitration, or otherwise, that the equidistance line will achieve an equitable apportionment between the Parties. Second: The equidistance method cannot be applied here because its application would result in boundaries which do not allocate a just and equitable share of the continental shelf to Germany. Third: The Parties have to agree on another boundary line which would apportion a just and equitable share to both sides, taking into account the extent of their territorial connection with the continental shelf in the North Sea."

For the moment, Mr. President, I merely ask the Court to note that here the alleged principle of the just and equitable share takes over completely as the one and only principle for the delimitation of the continental shelf. All else, including the equidistance principle and, it seems, all the general law-governing baselines, is down-graded to the rank of "method" so that the "just and equitable share" may be left in supreme command.

If the Court moves on to page 15, *supra*, of the same record, it will see clearly enough that the Federal Republic takes much the same position in the context of the equidistance special-circumstances provision in Article 6. It will be enough if I remind you of what Professor Jaenicke said on page 15, *supra*, under the head of his fourth comment, on the claimed customary law status of the equidistance special circumstances rule:

"If the special circumstances clause within that rule would be interpreted in accordance with its purpose, namely with its purpose to allow another boundary line when the equidistance method would lead to an inequitable result, then such an equidistance-special circumstances rule would not in its substance differ materially from the legal position taken by the Federal Republic of Germany. It is the position of the Federal Republic of Germany that under general international law the equidistance method cannot be applied against the State unless it is established by agreement—arbitration or otherwise—that it will achieve a just and equitable apportionment among the States concerned."

Here again, the alleged principle of the just and equitable share is made to over-ride and virtually replace the rule actually found in Article 6.

There are other passages in the Federal Republic's arguments at these hearings which throw light on its position regarding the meaning and application of the equidistance-special circumstances rule and to which I shall come later. But I want to stop here for a moment and analyse the grounds on which the Federal Republic seems to base the title of its "just and equitable share" principle to over-ride and virtually replace the rule actually stated in Article 6.

If we appreciate our opponents' argument correctly, they seem to rest their contention as to the over-riding character of their alleged principle on four legs:

First: The alleged establishment in State practice of "equitable apportionment" as the applicable "standard" of delimitation before 1958.

Second: The introduction of the equidistance line by the Committee of

Experts in 1953 as what our opponents call "a better method of achieving equitable apportionment".

Third: The reservation made by the Committee of Experts that the equidistance principle may in a number of cases not lead to an equitable solution which should then be arrived at by negotiation.

Fourth: The introduction by the Commission and the Conference of the special circumstances clause to provide for such inequitable cases.

We have dealt with these points in our Counter-Memorials—the Danish Counter-Memorial, paragraphs 60-79 and the Netherlands Counter-Memorial, paragraphs 54-73, and also in our Common Rejoinder, paragraphs 32-40. But in this concluding stage of the case we want to recall how none of these points stands up to close examination.

The Truman Proclamation of September 1945 and some other unilateral claims made prior to 1958 did contain references to the settlement of boundaries with neighbouring States on equitable principles. Others did not concern themselves with the question. The State practice, in so far as it did refer to the question, dealt with it in terms of the delimitation of boundaries on equitable principles. As to the actual delimitations, the Venezuela-Trinidad boundary could be said to be a delimitation on equitable principles and, as we have shown in paragraph 68 of our Common Rejoinder, it was significantly a modified equidistance line. The Chile-Peru and Ecuador boundaries were established on the basis of the parallels of latitude of the land boundaries, a somewhat rough-and-ready solution in which it is not easy to see any clear or conscious application of the alleged principle of the just and equitable share".

In short, the State practice prior to 1958 may have shown some recognition of the existence of a boundary question in regard to the continental shelf and of an obligation to delimit the boundary on equitable principles. But it was wholly indefinite as to the basis for determining what might constitute a delimitation on equitable principles.

I should add, Mr. President, that when I say that State practice prior to 1958 was indefinite on this point, I mean only the State practice outside the codification work of the United Nations; the latter was by no means so indefinite.

Our opponents seem, on pages 55 and 56, *supra*, of the third day's record, to try to attach their "equitable standard", now a mere alias for equitable apportionment, to the emerging doctrine of the continental shelf so as to make it the customary law rule of delimitation applicable when that doctrine eventually crystallized at the Geneva Conference. In order to achieve this desired result our opponents advance a somewhat special interpretation of the notion of the coastal State's exclusive rights.

"By 1958 [they say] there was widespread recognition that a coastal State is vested with exclusive sovereign rights for the exploitation of natural resources from the continental shelf contiguous to its coast. The rights of such a coastal State over its contiguous continental shelf are exclusive in that other States who are not contiguous to such a shelf cannot claim or acquire rights to the part which appertains to the aforementioned coastal State."

Mr. President, are our opponents asking you to believe that when the United States, in the Truman Proclamation, declared that it "regards the natural resources of the subsoil and seabed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States", it meant to claim exclusive rights in the sense only that other States not contiguous to such shelf cannot claim or acquire rights to that part

which appertains to the United States? If so, we think that their argument loses touch with the facts of life, for the United States certainly meant to exclude all States from the continental shelf appertaining to the United States.

But our opponents do seem to be advancing this contention for they go on to say that it is "This fundamental doctrine" which "is reflected in the Convention on the Continental Shelf in Article 2, paragraphs 1, 2 and 3"; and from that they argue:

"This fundamental doctrine is reflected in the Convention on the Continental Shelf in Article 2, paragraphs 1, 2 and 3. In no way then, could the general concept of the continental shelf existent at the time of the Convention, be said to enable a coastal State to acquire exclusive rights to contiguous continental shelf areas to the detriment of adjacent coastal States whose coastline is also contiguous to that same continental shelf."

In other words, they seem to be asking you to hold that the doctrine of the *ipso jure* exclusive rights of the coastal State over the adjacent continental shelf is simply an expression of the rights of other adjacent States to a just and equitable share of the continental shelf. We can only wonder, Mr. President, how the draftsmen of paragraph 2 of Article 2 of the Convention came to use such inappropriate words:

"The rights referred to in paragraph 1 of this article are exclusive in the sense that if the coastal State does not explore the continental shelf or exploit its natural resources, no one may undertake these activities, or make a claim to the continental shelf, without the express consent of the coastal State."

Are you then to understand that the words "no one may undertake these activities, or make a claim" do not include other coastal States adjacent to the same shelf or their nationals?

I now turn, Mr. President, to what I called the second and third legs of our opponents' argument, both of which concern the alleged intentions of the Committee of Experts. First I would like to recall the circumstances of the convening of the Committee of Experts.

Numerous States, and notably some of the smaller States, had raised strong objections to the Commission's proposal in 1951 that disputes concerning the delimitation of continental shelf boundaries between adjacent States should be settled by compulsory arbitration *ex aequo et bono*, and they had called for the formulation of rules of law on the subject. In other words, governments in their comments had strongly opposed the idea that continental shelf boundaries should be delimited in accordance with undetermined and unregulated notions of what is "just and equitable", even if the decision should be that of an independent arbitrator. All the more strongly, Mr. President, would they have objected to the idea that the continental shelf should be left to be delimited in accordance with the subjective notions of each State as to the justice and equity of its own situation.

In 1951 the Commission itself had accepted the equidistance principle in its median line form for opposite States. It had been led to propose arbitration *ex aequo et bono* for adjacent States primarily because, as yet, it had neither examined lateral boundaries through the territorial sea and therefore had not its starting point for the continental shelf, nor obtained sufficient technical information on this whole aspect of maritime boundaries. It was to put itself in a better position to deal with the question of maritime boundaries that the Commission had the Committee of Experts convened by its Special Rapporteur.

As the name implies and as the report itself underlines, this Committee was a body of technical experts—of hydrographical and geographical experts.

Now let us see, Mr. President, what our opponents say to you about the Committee of Experts. The main passages are on pages 13 and 14, *supra*, of the first day's record. The learned Agent observed, on page 13, that when the experts recommended the equidistance method and spoke of the principle of equidistance, they did not recommend it as a "principle of law". He said:

"They were experts on the drawing of boundaries, but they were not asked to determine questions of international law. They rather understood it as a principle of geometric construction which might be used for defining the boundary, so I do not think that it could be inferred from the use of the word 'principle' in this report of the Committee of experts that they regarded it as a 'principle of law' as our opponents will make us believe."

We are sure the learned Agent did not mean to do so, but he has misstated our contention on this point, just as he has somewhat misinterpreted the role of the Committee.

We did not, of course, contend that the experts either were, or thought they were, determining questions of international law. We thought that in their Reply our opponents were making an exaggerated and rather specious distinction between the "principle" and the "method" of equidistance. Accordingly, in Chapter 2 of our Rejoinder, we pointed out that the equidistance criterion, to use a neutral word, has the virtue of containing within itself both a principle and a practical method of delimitation. We there said, in paragraph 34:

"It supplies first a *principle* for the delimitation of the maritime areas in question, namely the principle that areas nearer to one State than to any other State are to be presumed to fall within its boundaries rather than within those of a more distant State; and at the same time a practical geometrical *method* for defining the boundary in accordance with the principle, namely the construction of a line the points of which are at equal distance from the nearest points of the respective coastlines of the two States."

And we added that this double character of the equidistance criterion as both a principle and a method was shown in the recommendation of the Committee of Experts where they actually use the expression "according to the principle of equidistance". But we did not claim that the Committee was thereby determining questions of international law. Our opponents, on the other hand, do seem to us to underestimate the significance of the Committee's role in relation to the law.

The experts, we may be sure, Mr. President, were very well aware that their opinion was being sought by the International Law Commission on a number of specific points in regard to internal waters, the territorial sea, the contiguous zone and the continental shelf, for the express purpose of assisting the Commission to formulate precise legal rules on the matters in question.

Nor, Mr. President, were they cloistered professors: they were governmental experts practised in giving advice on boundary matters arising out of the application of international law. One of them, Commander Kennedy, was indeed associated with me in a case in this Court only three years before the convening of the Committee of Experts.

Moreover, even the most cursory glance through the Committee's report shows that it was not unconscious of the use to which its advice was to be put. Thus, in its answers to Question 2 concerning bays, the Committee speaks more

than once of a bay "in the juridical sense", and refers in certain cases to the "line *inter fauces terrarum*" as one which "should constitute the delimitation between inland waters and the territorial sea".

Again, in its answers to Question 4 concerning the "general direction of the coast", it spoke of "exceptional cases especially justified by international law".

No, Mr. President, we cannot accept the idea that the experts were mere "back-room boys" unconscious of the significance of their task and of the legal implications of the answers which they were returning to the questionnaire of the Special Rapporteur of the International Law Commission.

I repeat, however, that we have never contended that the Committee was engaged in "determining questions of international law". What we contend is that the Committee knew that its advice was being sought for the purpose of formulation of rules of international law by the Commission; that it drew upon its expert knowledge of the methods and the principles used in maritime and fresh-water boundary delimitations; and that, in the light of this knowledge, it recommended the equidistance criterion as the most appropriate principle and method of delimiting lateral boundaries both through the territorial sea and the continental shelf.

And we further contend that this recommendation, endorsed as it was afterwards by the Commission and by the Geneva Conference, led to the formulation of concrete rules for the delimitation of the continental shelf which they wholly replaced, if at the same time they gave content to, the equitable principles of delimitation envisaged in certain of the earlier continental shelf proclamations.

Oddly, enough, Mr. President, on the very same page of the same record—page 13, *supra*—our learned opponent seems to have had much less hesitation in invoking the report of the experts as authority for the view that equitable apportionment is the fundamental legal principle that over-rides all else. For he there said:

"The committee of experts, which in 1953 first proposed the equidistance method as a suitable method for the drawing of maritime boundaries in territorial waters between adjacent States, restricted its recommendation for this method by the following reservation: in a number of cases this may not lead to an equitable solution, which should then be arrived at by negotiations. This clearly indicated that the application of the equidistance method for the determination of a boundary was considered dependent on the proviso that this method would yield an equitable result, and that a rule prescribing the application of the equidistance method would lose its *raison d'être* if this condition were not fulfilled."

Now, in dealing with this point, I must take account of a rather similar argument advanced by the learned Agent on pages 35-36, *supra*, of the second day's record. Asserting that it was not the idea of propinquity which had inspired the founders of the principle of equidistance to introduce it into the law of the sea, Professor Jaenicke continued:

"What they had in mind was rather to use it as a better method of equitable apportionment. The equidistance method was not regarded as a principle equitable *per se*, but rather as a method for achieving a more precise result in allocating to each party an equal share of the waters between them. For this I may quote Mr. Boggs, one of the leading experts on maritime boundaries, who was mainly responsible for the development of the equidistance method, and who was also a member of the committee of experts which recommended this method to the International Law Com-

mission. His well-known treatise on international boundaries, which was published in 1940, treats the equidistance method—which he had first expounded and elaborated in this treatise—as a better device to draw the so-called ‘middle line’. He states on page 179 of his book that the division into two equal areas seemed to him to be an important element of the equidistance principle.”

That, Mr. President, contains at least a very high testimonial to Mr. Boggs.

Now the point here in question is, of course, of interest in connection with the third question addressed to the two Governments by Judge Sir Gerald Fitzmaurice and with which I have already dealt this morning.

Mr. President and Members of the Court, there was nothing in the questionnaire given to the experts by the *Special Rapporteur of the Commission* to make them think that the questions put to them had anything to do with applying any form of the alleged “just and equitable share” principle. On the contrary, the questionnaire puts the questions before the experts exclusively as technical problems of boundary delimitation. Nowhere can this be seen more clearly than in Question 7 relating to lateral boundaries through the territorial sea. This question was formulated as follows:

How should the lateral boundary line be drawn through the adjoining territorial sea of two adjacent States? Should this be done—

- (a) by continuing the land frontier?
- (b) by a perpendicular line on the coast at the intersection of the land frontier and the coastline?
- (c) by a line drawn vertically on the general direction of the coastline?
- (d) by a median line? If so, how should this line be drawn? To what extent should islands, shallow waters and navigational channels be accounted for?

I shall not take up the time of the Court with the formulation of Question 6 regarding the territorial sea boundary between opposite States, except to say that, if shorter, it was formulated on similar lines.

Thus, it is evident from the terms of the questionnaire that the *Special Rapporteur of the Commission*, a very experienced international lawyer, was quite unconscious in 1953 of the existence in maritime international law of any such fundamental and over-riding doctrine of “equitable apportionment” in connection with the territorial sea.

The answers of the experts are equally couched exclusively in terms of boundary delimitation, and the only reference to anything equitable is in the remark in the answer to Question 7 which our opponents invoke: “In a number of cases this may not lead to an equitable solution, which should then be arrived at by negotiation.” That remark, in our view, simply cannot bear the weight which our opponents try to put upon it.

The question which I read to the Court just now, Mr. President, asked for comments on four alternative methods of delimitation, the last of which is “a median line”. And this question was accompanied by the further specific questions which I read: “how should this line be drawn?; to what extent should islands, shallow waters and navigational channels be accounted for?”

The experts did recommend this method, calling it the principle of equidistance, but they did not deal in detail with the further specific questions. All they did was to make a general remark—the general remark which is stressed by our opponents—and, surely this was intended simply for the broad comment upon the “specific” points mentioned in the question. Moreover, they dealt with the specific points mentioned in Question 6 in much the same way. True,

they did not there refer in any express terms to an equitable solution or to negotiation. But they did say, after recommending the median line for opposite States: "There may, however, be special reasons, such as navigation and fishing rights, which may divert the boundary from the median line."

In short, without specifying how the diversion from the median line is to be determined or whether this was a question of an equitable solution, the experts there also ventured a reservation about special factors which might influence the median line.

As I have indicated, we do not think that the remark of the experts, even when taken at its face value, can possibly bear the weight our opponents try to put upon it as evidence of a fundamental principle of equitable apportionment dominating the delimitation of maritime boundaries.

In truth, the Chairman of the Committee, the Special Rapporteur of the Commission, was so unaware, so unconscious of any such element or nuance in the thinking of the experts that the draft rules which he prepared for the Commission did not contain any provision whatever for special cases, but simply prescribed the median line for opposite States, and the principle of equidistance for adjacent States.

Moreover, in explaining the proposals of the experts, he merely said, on page 106, Volume I, of the Commission's 1953 *Yearbook*:

"The experts had agreed that the rules might give rise to doubts in certain specific cases, but had recognized that it would be impossible to devise a universally applicable method."

In other words, the experts had recommended what they thought should be the fundamental, general rule, and that was equidistance, but had indicated that there might be some specific cases which should constitute exceptions to the rule. This is, of course, exactly what we contend is the position under the equidistance-special circumstances rule and, in our view, the sole point is whether the present case does, or does not, constitute an exception to the general rule.

Let us now look, Mr. President, at the writings of Mr. Whittemore Boggs, whom our opponents invoked as one of the father founders of the equidistance principle, and in whom they believe that they also see an apostle of the doctrine of "equitable apportionment". The words of Mr. Boggs on which they rely are taken from his book on *International Boundaries*, published in 1940, on page 179 of his chapter on Water Boundaries. In the passage in question he said:

"The geometrical definition of 'median line', as it applies to a triangle is, of course, very simple: it is a line drawn from one vertex to the middle of the opposite side. Such a line bisects the area as well as the side of the triangle; in fact the division into two equal areas seems to be an important element of the concept. But the median line as it applies to bodies of water, with their shoreline sinuosities and their tributary inlets is less simple."

While Mr. Boggs was therefore speaking primarily in geometrical terms, we on our side naturally recognize that the principle of equidistance has within it an element, and an important element, of equality in the concept of equal distance from the coast. This, as we pointed out in our answer to Judge Sir Gerald Fitzmaurice's question, does not necessarily involve equality of sea areas even in the case of median lines. What it involves is equality in the relation of the boundary to the nearest points of the respective coasts.

Our opponents did not ask you, Mr. President, to read on to the end of that chapter in Mr. Boggs' book where, on pages 184 to 192 he turned to the question of lateral boundaries through the territorial sea. The interesting thing is

that, having considered on page 191 the problem of "complications due to the existence of islands or of a highly irregular coast line", he advocates an "equidistance principle" solution and then concludes:

"This method of delimiting and defining boundaries through the territorial sea is believed to be of general applicability in relation to international water boundaries from the coastline of contiguous states to the high sea."

Mr. Boggs' book, as I mentioned, was published in 1940, before the continental shelf doctrine began to emerge. We think it might have been more apposite if our opponents had referred the Court to an article by Mr. Boggs published in the *American Journal of International Law* in 1951, after this doctrine had begun to appear and only two years before the convening of the Committee of Experts. In this article, entitled "Delimitation of Seaward Areas", Mr. Boggs repeated his strong advocacy for the use of the equidistance principle and, *inter alia*, urged on page 253 that the use of artificial coastlines should be very limited—limited indeed to cases of prescription.

More significant, however, are Mr. Boggs' observations on pages 260 and 262 concerning continental shelf boundaries. Having on the previous page recalled his recommendation in his book for the use of the equidistance principle in lateral boundaries through the territorial sea, he proceeds:

"If it be recognized that developing technologies may bring into grasp in the relatively near future some of the great resources of the sea and of the sea bed and its subsoil at very considerable distances from shore in at least a few areas, and that states or private initiative will require assurance in advance that their interests will be generally admitted, some principle should be formulated for the delimitation of the contiguous zones between adjacent states. [He is there, of course, using contiguous zones in a general sense.] The principle here enunciated will, the writer hopes, prove to be of universal applicability.

Where a state is actually prepared to explore or to utilize the resources of the sea bed and its subsoil beyond the territorial sea (perhaps out to the 'edge' of the 'continental shelf', or to a median line in a gulf or lake), the techniques described below may be deemed so reasonable that they will be accepted by neighboring states, or even employed by one state in its assertion of jurisdiction, subject to subsequent mutual agreement or to appeal to established legal authority.

The basic principle proposed is that the lateral jurisdictional limit should be *developed progressively from the outer limit of sovereignty*, which is the seaward limit of the territorial sea. In this progressive development or extension of the line of lateral jurisdiction, greater and greater stretches of the coasts of the two adjacent states are taken into consideration, thus taking into account all of the sinuosities of the coast, including gulfs and peninsulas, large and small. That part of the line from the low-tide coastal terminus of the land boundary, through the territorial sea, has already been covered, and therefore we begin at the outer limit of territorial waters in the normal sense.

The most reasonable and just line would be one laid down on the 'median line' principle—a line every point of which is equidistant from the nearest points on the seaward limits of the territorial sea of the two states concerned."

This passage, Mr. President, is in somewhat fundamental contradiction with the position taken by the Federal Republic in regard to the equidistance prin-

ciple in the present proceedings and is in accord with our own contentions.

Furthermore, not only did Mr. Boggs there speak of the equidistance line as the one which would be "the most reasonable and just line", but in a footnote he commented:

"The method here suggested would provide the 'equitable principles' for accord between the United States and a neighbor state which are referred to in Presidential Proclamation No. 2667, signed Sept. 28, 1945."

And that proclamation was of course, Mr. President, the original Truman Proclamation, the reference in which to equitable principle was reproduced afterwards in certain other, notably Persian Gulf Proclamations.

Is it not clear that when this prominent member of the Committee of Experts spoke of what would be a "just" line, and of "equitable principles", he was thinking of what might be "just" and "equitable" in the context of the law of maritime boundaries as that law was known to him? He was not thinking of "justice" and "equity" as autonomous legal rules overriding the existing concepts, techniques and rules of maritime international law.

So much, Mr. President, for the efforts of our opponents to harness the authority of the Committee of Experts to their notions of justice and equity.

The Court rose at 1 p.m.

THIRTEENTH PUBLIC HEARING (11 XI 68, 3.20 p.m.)

[Present: See hearing of 23 X 68, Judge *ad hoc* Sørensen absent.]

QUESTIONS BY JUDGES JESSUP AND PETRÉN

Judge JESSUP: Sir Humphrey, this is a small question in regard to your explanation of chart D on Friday, the explanation appearing at page 252, *supra*, of the record of Friday. Having in mind, in connection with your explanation, the Protocol of 9 June 1965, which is printed in Annex 7 of the Memorial of the Federal Republic, could you indicate whether chart D is an official chart agreed by the two Governments and whether the dotted line is mutually agreed to be the median line, and whether the solid lines A-B and D-C are baselines officially adopted by the Parties or set forth in any agreement between them, or on the other hand, is this a chart constructed for illustrative purposes?

M. PETRÉN: Il s'agit d'une question adressée aux agents du Danemark et des Pays-Bas et la question est la suivante.

Est-ce que le Danemark et les Pays-Bas sont d'accord avec la République fédérale pour considérer que les deux compromis permettent à la Cour d'entrer dans un examen de l'effet combiné des deux lignes de délimitation proclamées par le Danemark et par les Pays-Bas?

REJOINDER OF SIR HUMPHREY WALDOCK

COUNSEL FOR THE GOVERNMENTS OF DENMARK AND THE NETHERLANDS

Sir Humphrey WALDOCK: I believe that I could answer Judge Jessup's question at once. The chart put forward was, of course, a chart for illustrative purposes. It is not one that is, as it were, agreed technically between the Parties.

The Court has, I understand, been informed of the indisposition of my colleague, the learned Agent for Denmark. I would like, on his behalf, to express his deep regret at this making it impossible for him to be present before the Court at this final stage of the case. He has given me the necessary instructions for the completion of the argument on behalf of Denmark, but as I say, he is deeply sorry he is not present here before you.

When we adjourned last Friday I was discussing what I referred to as the four legs of our opponents' equitable case. I had completed my discussion of three of those limbs of their argument and I now pass to the fourth argument by which they try to establish the overriding effect of their alleged principle of equitable apportionment in the application of the equidistance-special circumstances rule, and this is the introduction of the special circumstances clause by the Commission and the Conference.

This point was dealt with by the learned Agent on page 46, *supra*, of the second day's record. We are not in disagreement with his statement there that the clause was introduced "to provide for cases where the application of the equidistance line would lead to hardship to one of the States concerned". But the question is, of course, what are the cases of hardship which the clause was intended to cover and here we are in profound disagreement with our

opponents' all-embracing interpretation of the Commission's intentions. Indeed, when he said, at the bottom of page 46, that "the clause was deliberately left vague to cover all cases where the exigencies of an equitable apportionment would require its application", he was simply trying once again to get out of the equidistance-special circumstances rule altogether. For "the exigencies of an equitable apportionment" is a notion that would assuredly be the subject of the most diverse and subjective interpretations by coastal States.

The learned Agent seems to imply that there is no trace in the Commission's records of any restrictive intention regarding the categories of cases which may bring the "special circumstances" clause into operation. This view of the matter is, we think, in sharp contradiction with the Commission's records.

We pointed out in paragraphs 127 and 128 of the Danish and paragraphs 121 and 122 of the Netherlands Counter-Memorials that the very words "unless" and "special" stamp the clause with the hallmark of an exception. We further pointed out that in the debate members of the Commission spoke of the exception in terms of special cases of "manifest hardship", "undue hardship" and "manifest unfairness". And we then drew attention to the Commission's own considered statement of its understanding of the clause in paragraph 82 of its 1953 Report. So contrary is this statement to the ideas put forward by our opponents at these hearings that we feel obliged to recall it to the Court. This is what the Commission said:

"Moreover, while in the case of both kinds of boundaries the rule of equidistance is the general rule, it is subject to modification in cases in which another boundary line is justified by special circumstances. As in the case of the boundaries of coastal waters, provision must be made for departures necessitated by any exceptional configuration of the coast, as well as the presence of islands or of navigable channels. To that extent the rule adopted partakes of some elasticity. In view of the general arbitration clause of article 8, referred to below in paragraphs 86 *et seq.*, no special provision was considered necessary for submitting any resulting disputes to arbitration. Such arbitration, while expected to take into account the special circumstances calling for modification of the major principle of equidistance, is not contemplated as arbitration *ex aequo et bono*. That major principle must constitute the basis of the arbitration, conceived as settlement on the basis of law, subject to reasonable modifications necessitated by the special circumstances of the case."

In face of this statement, Mr. President, it really seems to us impossible to sustain the thesis of the all-pervading role of "equitable apportionment" in the Commission's proposals for the delimitation of continental shelf boundaries. Moreover, the Commission's proposals were adopted without any substantial change at the Geneva Conference and are now Article 6 of the Convention.

We accordingly submit that every single point on which our opponents seek to rest their thesis of the over-riding character of the alleged principle of the "just and equitable share" in the application of the equidistance-special circumstances rule fails them totally and that, when closely examined, each one of those points only serves to confirm and underline the primacy of the equidistance principle in the delimitation of continental shelf boundaries.

I now propose, Mr. President, to turn to some other general aspects of our opponents' position in regard to the application of the special circumstances clause for you have already heard my learned colleague, the Danish Agent, analyse their contentions as to its concrete application in the actual case before you. At times during these hearings we have seemed to detect a slight movement

towards us, on the part of our opponents, concerning the interpretation of the clause. Did not the learned Agent on page 178, *supra*, of the ninth day's record, after all the controversy in the pleadings, unmistakably concede that the "special circumstances" clause really is an "exception" to the equidistance rule, as was manifestly the intention of those who framed it? And there are other rapprochements of which I must speak later.

Towards the conclusion of my first address to the Court, on page 119, *supra*, of the sixth day's record, I drew attention to the learned Agent's definition of "special circumstances", saying that he now seemed to be in general agreement with us on this fundamental aspect of the application of the clause. That statement is to be found in the second day's record and it reads as follows:

"The criterion that the special circumstances clause cannot be invoked if the correction of the boundary is not justified with respect to a State which loses by the correction, is on its face a simple truism; I agree [with] what they say, [and he meant, of course, the two Governments] the correction must also be equitable or just to the losing Party." (*Supra*, p. 45.)

This statement, as the Court will appreciate, corresponds quite closely to the explanation of the special circumstances clause which we gave in paragraph 123 of our Common Rejoinder and which was reiterated by my learned colleague, the Danish Agent, on pages 145 to 146, *supra*, of the seventh day's record. Moreover, among the many changes of front, metaphorical and literal, that took place in our opponents' final speech, this point at least stood firm.

Indeed, Mr. President, our opponents at these hearings moved one small step further towards us when the learned Agent agreed, on page 50, *supra*, of the second day's record, that seen in isolation, the area claimed by Denmark and the area claimed by the Netherlands in these proceedings may be regarded as "natural continuations of their territories into the sea". He did so in these terms:

"Suppose you would isolate the Danish and the northern part of the German coast and disregard the existence of all other coasts of the North Sea, as if both countries were facing an open sea. Then it might be possible, under this hypothesis, to regard the areas west of both countries as a natural continuation of their territories into the sea. The equidistance line could then be regarded as normal and equitable. You could do the same with the Netherlands coast and the adjoining part of the German coast and disregard the other North Sea coasts, just as if both countries were facing an open sea to the north-north west, the areas north-north west of both coasts might then be regarded as a natural continuation of the Netherlands or German territories into the sea. The equidistance boundary might then, in such a case, be regarded as normal and equitable."

He added, I know, that such an approach would distort the general geography of the situation and asserted that:

"You cannot split up the boundary question between Denmark and Germany or between the Netherlands and the Federal Republic of Germany as if there were no other countries adjacent to the North Sea."

But he did concede that, seen in isolation, the areas claimed by Denmark and by the Netherlands constitute "natural continuations of their territories into the sea".

We cannot, of course, disregard the geographical facts, but we can look a little more closely at the Federal Republic's position in relation to them. On

page 42, *supra*, of the same record, the learned Agent justified his claim that the Court should leave out of account the "shares", as he calls them, of the United Kingdom and Norway on the ground that these other North Sea States do not profit from the application of the equidistance line at the expense of Germany. We, therefore, are entitled to ask how Denmark can be said to profit from the application of the equidistance line at the expense of the Federal Republic when the areas which she claims are, in principle, a natural continuation of her territory; and similarly with the Netherlands.

In truth, it seems to us that what the learned Agent is talking about is not geographical facts, not even the macrogeographical facts which were so suddenly brought into our learned opponents' armoury. He is really talking about political frontiers, as can be seen in a moment if we imagine a slight adjustment of the political facts. The Federal Republic and the Netherlands, it so happens, are joined together in the European Economic Community and there are some who urge a yet closer association. Let us, therefore, imagine that the Federal Republic and the Netherlands were actually united in some form of federation. Could it then be plausibly argued that the so-called bend in the German coast was a special circumstance within the meaning of Article 6? Can Denmark's exclusive rights over the continental shelf adjacent to her coast possibly be dependent on the particular state of the political relations between the Federal Republic and the Netherlands?

The Court will also recall the twice-repeated statement of the learned Agent that equidistance line boundaries off the Danish-German and Netherlands-German coasts might even be equitable if only the belt of the continental shelf before these coasts were small. He did not say just how wide that belt might be before the equidistance principle would cease to be equitable, but he clearly meant something wider than the partial boundaries. Naturally, we are intrigued by his statement. Would the equidistance lines have still been equitable if the belt of the continental shelf had reached no further than their meeting point under the Danish-Netherlands Agreement?

At any rate, Mr. President, it seems that the Federal Republic will not let us call our equidistance lines equitable merely because each of us happens to be a separate State and the continental shelf is rather wider off our coasts than the Federal Republic thinks proper. Are these really good enough grounds for taking away from us the natural continuations of our territory in the name either of equity or of special circumstances?

I would now ask you, Mr. President, to consider the Federal Republic's position from yet another angle—the accident that the two cases are before the Court together and that all three States concerned are Parties to the present proceedings. I have already addressed the Court on the question of the Special Agreements. Our opponents say that we are taking a narrow view of your competence. But this is not so, and here I touch on the question posed by Judge Petrén. We have always recognized that the Court is fully competent to determine in each case whether there is a special circumstance justifying another boundary line within the meaning of Article 6.

In each case the two Governments for which I appear believed that this was the real issue for the Court. But when the Federal Republic asks the Court to make a common pool of the area comprised within the Danish-Norwegian and the Netherlands-Belgian boundaries and distribute it in the name of equity according to what it admits to be unprecedented criteria, we think that it runs right outside the terms of the Special Agreements.

The learned Agent, on page 194, *supra*, of the tenth day's record, fully recognized that the Court has before it two separate cases. As the Court will

realise it is only because of the friendly relations between the three States and their common devotion to the judicial process in international law that the two cases are now in front of you together. This cannot, in our view, alter the legal position of the Federal Republic in either of the two cases submitted to your decision.

If, Mr. President, either Denmark or the Netherlands had insisted on the adjudication of its case separately, what would have been the position? This Court has held in the *Monetary Gold* case that it cannot deal with a matter if to do so involves taking a position with regard to the rights of a State not a party to the proceedings. If the Court had had before it the Danish-German case alone, could it possibly have listened to the Federal Republic arguing that the function of the Court was to distribute the area comprised within the Danish-Norwegian and the Netherlands-Belgian boundaries between Denmark, the Federal Republic and the Netherlands?

Could the Court equally have listened to an argument that it should determine the principles for delimiting the Danish-German boundary on the basis of particular assumptions regarding the determination of the Netherlands-German and also the Netherlands-Belgian boundaries? We do not think so, Mr. President, and we submit that the basis of the Federal Republic's legal rights vis-à-vis Denmark or vis-à-vis the Netherlands cannot differ according to whether their cases are before the Court separately or together. Certainly it was never the intention of the three-Party Protocol of 2 February 1967 to bring about any such result.

We therefore persist in our view that the whole of the Federal Republic's argument regarding the division of a specific area of the North Sea—the area between the Danish-Norwegian and the Netherlands-Belgian boundaries—among the three Parties to the present cases on some supposed basis of just and equitable shares is outside the Special Agreements.

We consider that in this argument the Federal Republic is asking the Court in the name of a supposed, and I may add somewhat versatile, concept of equity to do injustice to Denmark and to the Netherlands.

What else, Mr. President and Members of the Court, do our opponents ask you to do in the name of equity?

They are asking you to decide these cases by reference to criteria which they say are not only unprecedented but are not to form a precedent for future cases. That is on pages 36 and 37, *supra*, of the second day's record. The learned Agent there explained that this would not mean that you would be applying a rule of law hitherto unknown in international law; you would only be appreciating the equitableness and applicability of the equidistance boundary in the particular geographical situation.

I will not repeat what I said in my opening address about the *ad hoc* character of the decision that our opponents are demanding from you. Here I am concerned only with the equitableness or otherwise of our opponents' demand from the point of view of all the three States before the Court.

For our opponents, it has seemed to us, equity like charity begins at home, and in listening to them we have felt that perhaps in their eyes equity is a goddess whose beneficent rule extends only from Borkum to Sylt. In our eyes, on the other hand, an equitable apportionment to be made by reference to criteria unprecedented and not to be a precedent, and designed to transfer from us to the Federal Republic substantial areas of continental shelf forming natural and adjacent continuations of our territories, has all the appearance of clear injustice and inequity.

Whatever view is taken of the equity of our opponents' demand, it is, we

think, certainly not equity within the context of the law, it is equity outside the law. I need not repeat what was so clearly explained to the Court by my learned colleague the Danish Agent in his speech on the eleventh day. He showed how our opponents in the written pleadings and in face of the Court had been struggling to find a plausible basis on which to construct their allegedly equitable demand. In the process they have changed the very foundations of their so-called criteria and have again and again shifted and tailored their so-called coastal fronts in order to find, of all things, an equidistance line pointing in the direction that they would wish. And those so-called criteria, fluctuating with the ebb and flow of argument, are by our opponents' own admission "unprecedented and not to form a precedent". Is this really "equity" Mr. President? Is it that self-evident equity of which our learned opponents so often speak?

Our opponents themselves seem to have felt that they might be demanding too much in calling for a decision by reference to "unprecedented" criteria. For in their final speeches both the learned Agent and the counsel for the Federal Republic introduced the *Norwegian Fisheries* case into their arguments, suggesting that the present case might very well be decided along the same lines of judicial reasoning as those in the Court's decision in that case. Their arguments will be found on page 179 of the ninth and pages 194 and 195, *supra*, of the tenth day's record. They relied on well-known passages in the Court's Judgment where, referring to the deeply indented and island strewn coast of Norway, the Court set out its reasons for adopting the general direction of the coast as the criterion of the admissibility of straight baselines.

Our opponents never became very precise as to which of their several versions of the coastal fronts has to find its justification in this judicial decision, and it may be that it was intended to provide cover for each and all of them. But we have the impression that it is the Borkum-Sylt line or the line carefully placed by the learned Agent a little to seaward of the Borkum-Sylt line, on which they primarily have their eye in invoking the Court's reasoning in the *Fisheries* case.

Both of my colleagues, the two Agents, have underlined some of the factors which differentiate that case from the present cases. I shall, therefore, confine myself to presenting a few further observations on behalf of the two Governments.

Quite apart from anything else, Mr. President, the Court was in that case very far from being confronted with "unprecedented" criteria. By the time the written pleadings were completed all of us who took part in that case were, I think, a little surprised at the not inconsiderable volume of straight baseline precedents concerning island fringes that intensive research in the pleadings had brought to light.

In short, however much the Court's formulation of the general direction of the coast principle for the baselines of the territorial sea might appear novel, and I myself so regarded that formulation, it was based upon precedents in State practice.

Moreover, the Court was careful to guard itself against extravagant interpretations of its decision such as that which has appeared in the present proceedings. Thus, on page 133 of the *I.C.J. Reports 1951*, immediately after one of the passages cited by the learned Agent for the Federal Republic, the Court said:

"Among these considerations, some reference must be made to the close dependence of the territorial sea upon the land domain. It is the land which confers upon the coastal State a right to the waters off its coasts. It follows that while such a State must be allowed the latitude necessary in order

to be able to adapt its delimitation to practical needs and local requirements, the drawing of baselines must not depart to any appreciable extent from the general direction of the coast."

Consequently, the actual reasoning of the Court lends no support to the Borkum-Sylt concept of our opponents.

Nor will it have escaped the notice of the Court that our opponents' recourse to the conception of the general direction of the coast is here somewhat arbitrary. Devotees, though they are, of the macrogeographical perspective, it is the microgeographical perspective that they use when it comes to appreciating the general direction of the coast. It needs but a glance at the map, Mr. President, to see that, on any rational scale of distances, the North Sea coast has here two general directions. The first is determined by the line of the Danish-German shore and runs more or less north-south from the Skagerrak coast of Denmark into the so-called bend in the German coast. There the coast changes direction and its second general direction is west-south-west along the line of the German and Netherlands island fringes.

But if one is to take a macrogeographical view of things, is it not quite arbitrary for our opponents to pick upon the Borkum-Sylt line as following the general direction of the coast? True, Borkum and Sylt are where the political frontiers may find themselves, but what has that to do with the general direction of the coast according to the geographical facts? No, if one is to take a macrogeographical view of things, surely one should begin at the most northern tip of Denmark. Then, if one is going to think in terms of a single general direction of the coast, surely the coastal front, according to our opponents' doctrine, would run in a straight line from the north of Denmark right across to the western end of the Netherlands island fringe; and this, according to their doctrine, would entitle the three States, Parties to the cases now before you, jointly to confront both the United Kingdom and Norway with impressive new demands. We wonder why they did not suggest this to us at the time of the negotiations. But then, of course, the United Kingdom would have had some aces in her hand, for she has some convenient bumps of territory protruding into the North Sea well suited to the purposes of macrogeographical argument on the general direction of the North Sea coast. But what has this or any of this to do, Mr. President, with international law as we know it?

I return therefore to the *Fisheries* case and to the law of the continental shelf as we know it. The *Fisheries* case was, of course, decided before the codification and consolidation of the Law of the Sea at Geneva in 1958. The principles of the Court's decision in that case were, with some further definition, incorporated in Article 4 of the Territorial Sea Convention as part of the general law defining the coast of a State for the purposes of the delimitation of maritime sovereignty, of maritime jurisdiction.

I dealt with this matter in my opening speech where I showed that the rules in the Territorial Sea Convention defining the coastline of a State for the purpose of delimiting the territorial sea are incorporated, expressly or impliedly, into each of the other three Conventions. Accordingly, those rules do evidently constitute general law applicable to the delimitation of claims of sovereignty or jurisdiction over maritime areas, and the reasoning of the *Fisheries* case has been absorbed into and made part of this general law.

Article 6, as we know, provides that in the absence of agreement, and unless another boundary is justified by special circumstances, the boundary shall be determined by application of the principle of equidistance from the nearest points of the baselines from which the breadth of the territorial sea is measured.

It thus expressly makes the baselines of the territorial sea the criterion of the coastline from which is to be determined the delimitation of the continental shelf; and I have already recalled to the Court a striking passage in the International Law Commission's Report for 1953, where the Commission said of the equidistance principle:

"Such arbitration, while expected to take into account the special circumstances calling for modification of the major principle of equidistance, is not contemplated as arbitration *ex aequo et bono*. That major principle must constitute the basis of the arbitration, conceived as settlement on the basis of law, subject to reasonable modifications necessitated by the special circumstances of the case."

Now, Mr. President, the major principle of equidistance, there referred to and now expressed in Article 6, is not just any sort of equidistance determined by reference to any and every fanciful construction of a so-called coastal front. It is the principle of equidistance from the nearest points of the baselines from which the breadth of the territorial sea is measured—from the coast as it is understood and defined generally in maritime international law. Similarly, the "coast" by reference to which the exclusive rights of the coastal State are recognized by Articles 1 and 2 of the Convention is manifestly the coast constituted by the baselines of the territorial sea.

Accordingly, the very fact that our opponents etch their picture of the application of the alleged principle of the "just and equitable share" in terms of "coastal fronts" wholly divorced from the baselines of the territorial sea shows, in our view, that they are not asking the Court for a decision within the framework of the existing law. On this point there cannot be any shadow of doubt concerning the position of the Federal Republic, for the learned Agent has underlined it no less than three times at the present hearings. On page 40, *supra*, of the second day's record he said:

"This criterion, the so-called coastal front, has nothing to do with baselines used for the measurement of the territorial sea or the contiguous zone."

And then he explained:

"Our coastal front concept merely tries to define from what natural geographic basis the territory of the coastal States continues or extends into the common continental shelf."

He repeated this explanation of the Federal Republic's position with even greater emphasis on page 186, *supra*, of the ninth day's record and yet again on page 190 of the same record. In this last passage he added:

"The coastal front has in this context only the function of defining in the most plausible and ostensible way the basis from which the continental shelves converge into each other where a continental shelf area is surrounded by several States."

Why was the learned Agent so insistent upon this point if it was not because he considered, and rightly, that his coastal front criterion is completely outside anything that could be covered by the baselines of the territorial sea.

Now, in our Common Rejoinder, we underlined that the Federal Republic had not been able to muster up the courage to include its coastal front "criterion" in its submissions because it knew perfectly well that it had no basis whatever for presenting that so-called criterion as a principle or rule of international law.

Much has been heard from the Federal Republic at the present hearings about the criterion of "coastal fronts" as the basis for its claim to a supposed "just and equitable share" reaching out to the centre of the North Sea. But the learned Agent has read out to the Court the final submissions of the Federal Republic and there is still no trace whatever in those submissions of any suggestion that their "coastal front" criterion should be applied by the Court as a principle or rule of international law.

Indeed, Mr. President, our opponents have presented to you their alleged principle of "the just and equitable share" as a "self-evident" principle or as "an interpretation of the existing law", and their coastal front concept as a criterion appropriate for the situation in the south-east corner of the North Sea, or for the special case of the North Sea; and they have thrown in references to the reasoning in the *Fisheries* case in the vaguest terms.

In our view, all this is really nothing but window dressing to give an aura of plausibility to a demand that you should substitute for the legally recognized coastlines of the Parties wholly novel versions of their coasts, unknown to the law, for the sole purpose of enabling them to stretch their claims farther into the middle of the North Sea at the expense of Denmark and of the Netherlands. The Court will have observed how reticent our opponents have been concerning the legal relation of their coastal front criterion to the legally recognized coastline of the Federal Republic constituted by the baselines of its territorial sea. The reason, again, is that this relation simply cannot be expressed in any terms known to maritime international law as it exists today.

To illustrate this, I would ask the Court to imagine for a moment that it is with me on a ship sailing along the centre of the Borkum-Sylt line or along that line a little farther to seaward of Borkum-Sylt apparently preferred by the learned Agent.

If the Court were to look inwards, towards the legally recognized coast of the Federal Republic, what would you see? You would see, *inter alia*, quite a sizable expanse of continental shelf lying between the so-called "coastal front" and the German coast. But have Articles 1 and 2 of the Convention anything to say about a continental shelf lying inside as well as to seaward of a coastal front? Certainly not, and we can only conclude that our opponents have been addressing you in a language which is entirely their own and quite outside the law of the continental shelf as understood by the International Law Commission and by the Geneva Conference.

And you will also recall, Mr. President, that as my learned colleague the Danish Agent so clearly pointed out, our opponents have had to chop and change the shape of their criterion, the coastal front, to tailor it and re-tailor it several times to try to make it fit their claims, to festoon it with various equidistance triangles, and push it to seaward out beyond the Borkum-Sylt line losing all contact with the land.

Even then the learned Agent recognized that he would have to manipulate his equidistance triangles lest otherwise they result in a manifest violation of both the Partial Boundary Treaties and the Special Agreements. Are we not then again entitled to say that this so-called criterion is nothing but a formula devised *ad hoc* to suit the requirements of the Federal Republic's argument and having no basis in the applicable principles and rules of international law?

Nor is the position much different when the matter is regarded as an alleged application of the special circumstances exception. Quite apart from the proper interpretation of the "special circumstances" clause, to which I shall revert in concluding my address, the clause cannot possibly, we think, be understood as envisaging delimitations so completely detached from the actual legal coasts of

the States concerned as one based on the "coastal fronts" devised by our opponents.

Article 6, in both its paragraphs, and thus both for "median line" and "lateral line" situations, makes the baselines of the territorial sea the express basis for the application of what the International Law Commission called the "major principle" of equidistance. Is it then conceivable that when the Commission provided for what it termed "reasonable modifications" of "that major principle" "necessitated by the special circumstances of the case", it contemplated "modifications" so completely detached from the "major principle" as the "coastal front" theory of our opponents? Indeed that same "major principle" was proposed by the Commission for the delimitation of the territorial sea and that same provision for reasonable modifications was made by the Commission in the case of the territorial sea, and how could our opponents' "coastal front" theory fit into the territorial sea at all?

No, Mr. President, whatever else may be said about the meaning of the words "another boundary justified by special circumstances", we do not think that they can possibly refer to a delimitation of a territorial sea and a continental shelf adjacent and appurtenant to "coasts" quite other than the legally recognized coasts of the States concerned.

Another sign, Mr. President, that our opponents may have been becoming uneasy about your receptiveness to the "unprecedented and not-to-be-a-precident" criterion of their "coastal fronts", was the appearance in their final speeches of the "macrogeographical perspective". At any rate, it was really quite remarkable how, in the dying moments of their speeches on the tenth day, this tongue troubling phrase suddenly appeared and ran riot through their argument. Learned counsel, it is true, indulged himself with the heady wine of this new doctrine only twice, on page 195, *supra*. But the learned Agent was much less abstemious; for ten times did he have recourse to it on the last dozen pages of his speech.

Our opponents' "macrogeographical perspective", when looked at closely, turns out to be no more than another, and rather grandiose, label for their thesis that a lateral equidistance line ought to be considered as less just and less equitable than a median line because any deflection in the line may affect more extensive areas of continental shelf.

The learned Agent, as I have already recalled, made his concept of the macrogeographical perspective quite specific in his contention, three times stated, that the lateral line may be legitimate and equitable so long as the belt of continental shelf off a coast is comparatively narrow, but cease to be so if the width of the belt is more extensive. I have already dealt with that point, when I underlined that there is no trace whatever of such a concept in the reports of the Committee of Experts, the International Law Commission or in the Convention adopted at Geneva.

I have also, in answering Judge Sir Gerald Fitzmaurice's third question, shown that even median lines by no means guarantee an equal division of areas whether in a narrow or more extensive continental shelf. True, our learned opponents have referred to an article in the 1965 volume of the *Annuaire Français* by Dr. de Hartingh which, *inter alia*, touches upon France's reservations to the Continental Shelf Convention. But the article, if it makes the point about the effect of deflections in the division of wider areas of continental shelf, really adds nothing to the arguments of our opponents on the point.

I do not, therefore, think it necessary to ask the Court to examine with me once more our opponents' concept of the macrogeographical perspective and its application to the present case. In our view, that concept finds no place in the

law of the continental shelf as it was established at the Geneva Conference.

However, since our opponents have spoken so much of equity and the macrogeographical perspective, I venture to ask the Court to dwell with me a few moments longer in the macrogeographical world. Indeed, I ask you to sail with me once more along the centre of the Borkum-Sylt line and perhaps obtain a wider perspective of the equities of the three Parties in the two cases before you.

If, as our opponents demand, you turn your gaze farther outwards into the North Sea, what will you see? You will see first a not inconsiderable area of continental shelf which is nearer to the Federal Republic than to any of its neighbours. Next, you will see further areas which are nearer either to Denmark or to the Netherlands than to any other country, but of which the Federal Republic says that, according to the macrogeographical perspective, they belong to the Federal Republic.

Then, Mr. President, having been permitted to cast your gaze that far, you will immediately recall that you are not permitted by our opponents to lift your eyes one inch beyond those areas, not one inch beyond the Danish-Norwegian, Danish-United Kingdom, Netherlands-Belgian, Netherlands-United Kingdom equidistance lines. No doubt this is all just a matter of the proper understanding of the "macrogeographical perspective", but we, on our side, have to confess that we are quite deficient in that understanding. However, it is clear enough to us that, according to our opponents, the "equities" resulting from the "macrogeographical perspective" demand that you should exclude Denmark and the Netherlands from areas of the continental shelf which are nearer to them than to any other State to the benefit of the Federal Republic and give no thought at all to what justice and equity may demand for Denmark and the Netherlands.

But that is only one side of the macrogeographical perspective, and now, Mr. President, I would ask you to shift your gaze not outwards but inwards, towards the land, and to consider the case of each of the States Parties to the proceedings in turn.

What will macrogeography show you of the Federal Republic? First, as we have already seen, it will show you an area of continental shelf inside the Federal Republic's so-called coastal front. Then it will show you the legally recognized coastline of the Federal Republic with its bend of about 100 degrees and beyond that the extensive territory of a large continental State. This State, if it has a coast on the Baltic and its small North Sea coast, has inland a large area of what is essentially a continental State. Now consider, Mr. President, how geography has treated that State. For some centuries past the territory of the Federal Republic has been rich in mineral and fuel as well as agricultural resources, so much so that through the efforts of her hard-working people Germany was able to build herself an economy of great strength, and with one of the highest living standards in the world.

Turn now to the Netherlands and you will see a small, essentially coastal State which, as was emphasized in Chapter 2 of Part I of the Netherlands Counter-Memorial, has been engaged in history in a constant struggle to protect its territory from the inroads of the sea. Until recently, the Netherlands had quite minor mineral and fuel resources and it was only by unremitting efforts to make the sea and its resources serve the national interest that the State was able to build up the economy of the State and the living standards of its people.

Then turn north to Denmark and you will see another small State, an essentially maritime State, if ever there was one, its territory broken by lakes and arms of the sea. The territory of Denmark has in the past had altogether

negligible mineral and fuel resources, so that the economy of the State and the living standards of the people have been wholly dependent on agriculture, the technical expertise of its citizens and on resources won from the sea in fisheries and maritime trade.

Nor, Mr. President, is the difference in the relative natural wealth of the three Parties so very different today, as can be seen from the information published by the Statistical Office of the Department of Economic and Social Affairs of the United Nations.

The high level of the Federal Republic's economy today needs no emphasis since it is a matter of common knowledge. Of more immediate interest in the present connection is the fact that in the form of solid fuel, crude oil, natural gas and hydroelectric energy the Federal Republic produces somewhat over 65 per cent. of her energy needs. Moreover, her balance of trade—over four billion dollars—is so favourable that the purchase of the residue of her energy needs from foreign sources presents no exchange problem.

The Netherlands, it is true, has had the good fortune in recent years to uncover important sources of natural gas and some crude oil, and her position is, therefore, considerably more favourable than it was. But, according to the same source of our statistical information, she still produces only some 6 per cent. of her domestic oil consumption and, in sum, produces no more than about 40 per cent. of her domestic energy requirements.

The position of Denmark has not changed at all on this point, except to the extent that she may now have some prospect of finding oil or natural gas in the continental shelf. Otherwise, she remains as bereft of domestic sources of energy as she ever was. She is able to produce only about 3 per cent. of her energy needs and has to import the remaining 97 per cent. Moreover, she suffers from a perennial adverse balance of trade, the cost of her imports exceeding the income from her exports by over \$650 million. And of this, some \$300 million, or about 45 per cent., is accounted for by the purchase of energy from foreign sources. Clearly, therefore, the economic position of Denmark might be transformed if oil or natural gas now became available to her in the continental shelf. In this connection the Court was informed, in Chapter 1 of Part I, and in Annex 7 of the Danish Counter-Memorial, that the quite extensive exploration already carried out indicates that the only areas of promise so far discovered lie just to the north, on the Danish side, of the Danish equidistance boundary. In short, the stretching of the Federal Republic's continental shelf to the so-called centre of the North Sea in the manner demanded by our opponents may well have the result of cutting off Denmark from the one reasonable expectation which she has of acquiring appreciable domestic sources of energy.

We do not know, Mr. President, whether the observations which we have just been making properly belong to the macrogeographical perspective. We have presented them to the Court only to indicate some of the realities of the "just and equitable share" in the present cases. In our view, as we have already emphasized, the Federal Republic in these cases is really complaining of nothing more than that nature and history have given to her, like Belgium, an inconvenient window on the North Sea. She raised no question when her Baltic coast gave her a rather favourable median line to the disadvantage of Denmark. She raised no question when the low-tide elevation of the Hohe Riff gave her a quite favourable deflection of the lateral line to the disadvantage of the Netherlands. But when geography and history prove less convenient in the size and shape of her own coast, the coast they have given to the Federal Republic, that is another matter and the Federal Republic brings it to Court. Yet there are really quite a number of countries which might wish that, in regard to the

continental shelf, geography and history had given them a more convenient window on the sea.

With the cases of Belgium and Iraq the Court is already familiar, but just by way of illustration, and without any wish to discuss their particular situations, we have put on diagram E¹ (see p. 279, *infra*) four more cases of States with considerable land territories but a somewhat meagre window upon the sea. The four States are Syria, Guatemala, the Congo and Romania, and I should perhaps ask the Court to note that the four maps are not on the same scales. This is simply because of the need to fit them into the four squares for purpose of convenient presentation to the Court. We draw no conclusion from these other cases, except that the Federal Republic is not alone in having been given by nature and history something less than the coast which she might have liked for the purposes of the doctrine of the continental shelf.

The Court adjourned from 4.40 p.m. to 4.55 p.m.

Before turning to the concluding part of my speech, I must emphasize that the observations which I have just made were not put forward as part of our own case regarding the principles and rules of law which the Court should decide to be applicable as between the Parties.

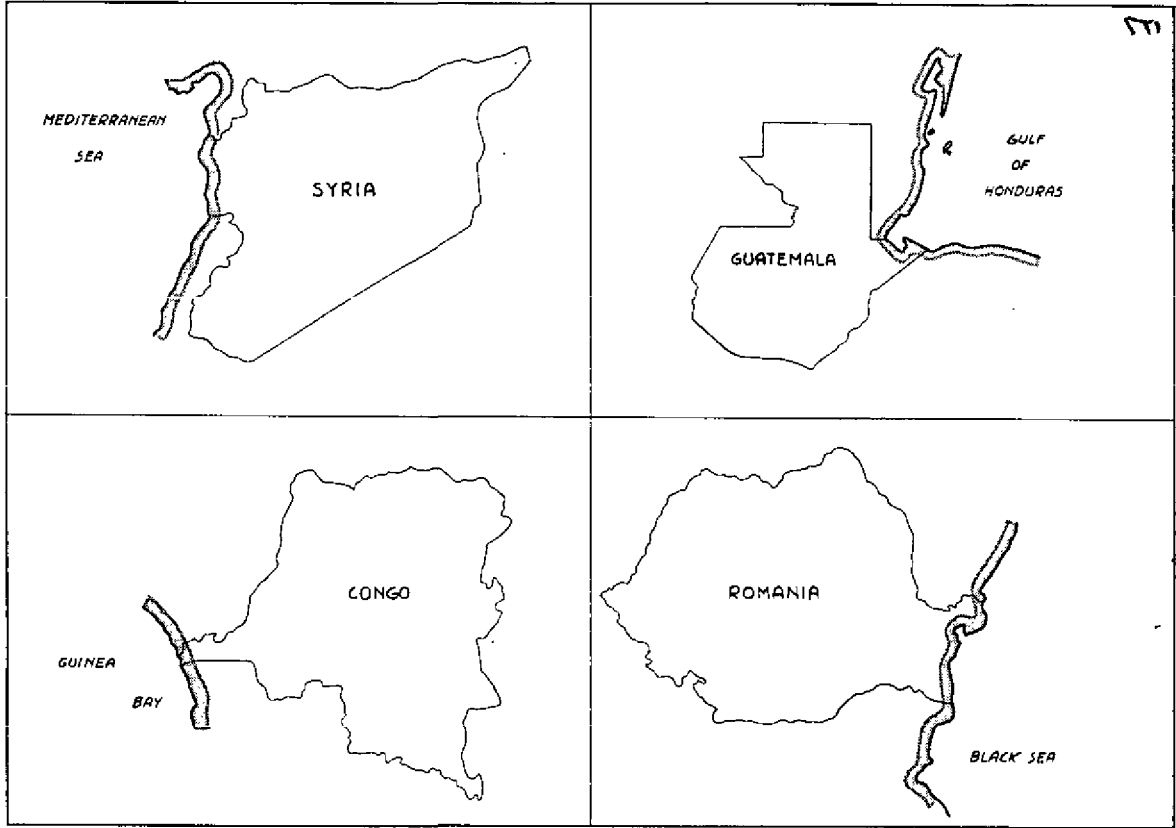
Our case, as the Court knows, is based on what we conceive to be the applicable principles and rules embodied in Articles 1, 2 and 6 of the Convention and their proper interpretation and application in the situations now before the Court. But when our opponents have made such play in their arguments with such nebulous concepts as the "just and equitable share" and the macro-geographical perspective, we considered ourselves entitled to point out some of the realities of the situation before the Court.

We are fully conscious, Mr. President, that we have directed the greater part of this our final address to criticisms of our opponents' case, but for this there is a very good reason. We take our stand on what we believe to be the generally accepted principles and rules of international law governing the delimitation of continental shelf boundaries; in short, upon the equidistance-special circumstances rule. Moreover, the stand we take within the framework of these generally accepted principles and rules is upon the equidistance principle, a principle which clearly appears as the generally applicable rule and which the Commission itself referred to as the major principle. Consequently, in the cases now before you we have believed that our equidistance boundaries must prevail unless our opponents can make out to your satisfaction some ground recognized by international law for displacing our equidistance boundaries in favour of some other boundaries.

Our arguments in support of the equidistance principle as the general and "major" principle we put before you fully in the written pleadings, and these arguments we have amplified and reinforced at these hearings in our first speech. Accordingly we have, for the most part, devoted this our final speech to destructive criticisms of the legal basis upon which our opponents seek to rest their case for displacing our equidistance boundaries. Now, however, in concluding our argument, we propose to restate briefly the positive grounds on which we ask the Court to uphold our submissions and our right, as we think, to equidistance boundaries.

We have based our own case for the application of the equidistance-special circumstances rule on three separate, autonomous grounds. We believe that by one or other of these three routes the Court must come to the equidistance-

¹ See No. 49, p. 390, *infra*.



special circumstances rule as the law governing the decision of the present cases. In asking the Court to hand down this rule as the law for the Parties in the present cases, we do not think that we can fairly be charged with asking you to do injustice or inequity to the Federal Republic.

The equidistance principle, as I have recalled to the Court, was regarded by one leading member of the Committee of Experts as the reasonable and just principle of delimitation for lateral boundaries over the continental shelf and as a means of giving effect to the "equitable principles" mentioned in the Truman Proclamation. Clearly also when the International Law Commission proposed the equidistance-special circumstances rule, it did so because it considered this rule to provide an equitable solution within the framework of the rules of maritime international law.

Similarly, when the Geneva Conference adopted the rule in the Convention, it clearly did so because it also considered the rule to provide an equitable solution within the framework of the rules on maritime international law. And can you doubt, Mr. President, that when the Federal Republic voted for Article 6 at the Conference, it did so for the same reason; and yet again when, after careful deliberation, it signed the Convention? No, Mr. President and Members of the Court, there is nothing inequitable in the submissions of the two Governments for which I appear. Our learned opponents rather suggested to the Court that here you have a contest between rigid "proximity", on the one hand, and "justice and equity", on the other. But that is not the position at all. What you have here is our demand for justice and equity within the context of the law and their demand for their notions of justice and equity outside the law.

We submit, as I have already indicated, that the burden clearly and unequivocally rests on the Federal Republic to establish a specific legal ground for displacing the application of the equidistance principle in the present cases. Even our opponents were ultimately constrained to recognize that the special circumstances clause does operate as an exception to the equidistance principle. The learned Agent, it is true, tried to make the best of the matter, on page 205, *supra*, of the tenth day's record, by speaking of a "general exception" to the rule, but this seemed to us altogether too facile a way of disposing of the word "special" in the phrase "special circumstances".

In our view the word "unless", the phrase "another boundary line", the phrase "is justified" and the phrase "special circumstances" individually and in combination categorically characterize the clause as an exception to the "general rule" or, as the Commission said, "major principle" of equidistance. Any other interpretation would, we think, be in flagrant contradiction with the natural meaning of the words in the context in which they are placed. From this it clearly follows, Mr. President, that the burden is upon the Federal Republic to establish the existence in the present cases of circumstances which fall squarely within the exception provided for in the equidistance-special circumstances rule. In short, in order to displace the equidistance principle, the Federal Republic must establish not merely "circumstances", which can be said to be "special" from one point of view or another, but special circumstances justifying another boundary line.

That the burden rests upon the Federal Republic in these cases also follows, in our view, from the fact that we are coastal States exercising our competence, recognized in the *Fisheries case*, to delimit the extent of our maritime jurisdiction, in accordance with the generally accepted rules applicable to the continental shelf. When we delimit our continental shelves with the bona fide intention of conforming to those generally accepted rules, especially when we base ourselves specifically on the "major" principle which they contain, we submit that the

burden rests upon any State, which seeks to challenge our delimitations, to establish the grounds on which our delimitations should not be accepted as valid vis-à-vis that State.

In the same way, even independently of the actual formulation of the law in Article 6, we submit that delimitations made in accordance with the proximity principle, a principle inherent and fundamental in maritime international law, are prima facie valid *erga omnes* so that again the burden rests upon any State which seeks to challenge them.

Special circumstances may, we recognize, in some cases include such non-geographical factors as a "historic title" or a prior treaty. Indeed, we have ourselves drawn attention to the presence of these factors in the Soviet-Finnish and the Norwegian-Swedish delimitations. But in the present cases, Mr. President, the Parties are agreed that you have only geographical factors to consider. The learned Agent was very clear upon this point on page 193, *supra*, of the tenth day's record in his answer to Judge Jessup's question on the location of resources and this has been our position from the very beginning.

The Parties are also agreed upon one cardinal aspect of the interpretation and application of the equidistance-special circumstances rule: the legal—and I emphasize the word "legal"—criterion for separating proper from improper claims to invoke the special circumstances clause. We formulated it in paragraph 123 of our Common Rejoinder as follows:

"The legal concept of special circumstances has found expression in the Convention in the form that special circumstances are to be taken into account only when they *justify* another boundary line. If Article 6 is applied as a rule of law this must necessarily mean that the correction of the equidistance principle which the clause clearly intends, can take place *only if deviation from the equidistance line is justified towards both States—i.e., the State which 'gains' and the State which 'loses' by the correction.* In this consideration the two Governments find an essential guidance for the understanding of the 'special circumstances' clause."

The learned Agent, in a statement on page 45, *supra*, of the second day's record to which I have twice drawn the Court's attention, expressed the Federal Republic's complete agreement with us on this point. Indeed, he referred to the point as "on its face a simple truism".

What has the Federal Republic said to the Court to justify the correction of the northern equidistance boundary with respect to Denmark to show that it would be just and equitable with respect to Denmark as well as to the Federal Republic? What has he said to you to justify the correction of the southern equidistance boundary with respect to the Netherlands to show that it would be just and equitable with respect to the Netherlands? Very, very little, Mr. President and Members of the Court. He has conceded that, when the Danish-German coasts as far south as the bend are taken in isolation, the continental shelf comprised within the Danish equidistance boundaries appears as a natural continuation of Denmark's territory into the North Sea. He has conceded the same, *mutatis mutandis*, with respect to the continental shelf comprised within the Netherlands equidistance boundaries. But then he has somewhat cavalierly observed that here there is no question of any "loss" to Denmark or to the Netherlands because they cannot be regarded as having any continental shelf to lose while the Court's decision is still pending. This seems to us to make nonsense of the equidistance-special circumstances clause and, above all, of the criterion of justice and equity with respect to both States which the learned Agent insists is a "simple truism".

The Federal Republic, Mr. President, has done absolutely nothing to demonstrate to you why the corrections for which it asks would be geographically or legally "just and equitable" with respect to Denmark, in the one case, and to the Netherlands, in the other. All that our opponents have really done is to ask you to look at justice and equity through German spectacles and to turn a blind eye to justice and equity to the west of Borkum and to the north of Sylt.

Furthermore, Mr. President, is it not obvious that the issue of "special circumstances" and of justice with respect to both States arises only because under the equidistance-special circumstances rule the "major" principle of equidistance creates a presumption that any continental shelf nearer to one coastal State than to any other State falls within the boundaries of the nearer State, and that presumption arises not only because of the particular formulation of the law of the continental shelf in Article 6 but also because of the operation of the principle of proximity as an inherent fundamental norm of maritime law. It is only in the context of that presumption that the special circumstances exception and the criterion of justice with respect to both States have any meaning. The Federal Republic's argument, therefore, simply evades the issue of justice for Denmark and the Netherlands altogether.

Nor has the Federal Republic, in our view, really attempted to fulfil its obligation to justify to the Court "another boundary line". It has thrown out suggestions of criteria, "unprecedented and not to be a precedent for other cases"; it has thrown out various versions of "coastal fronts", themselves unknown to the law; it has pointed, in the vaguest manner, to possible equidistance triangles and talked longingly of what it calls the centre of the North Sea. But has it really got down to justifying in law any specific boundary line other than the equidistance line? "Take as you like", it has said to the Court, and we do not think that this was what was intended by those who framed the special circumstances clause.

We have persistently, if politely, been charged by our opponents with taking up positions in these cases that are contrary to justice and equity. We hope that what we have said at these hearings may have shown the falseness of that charge. We have taken up positions in accordance with principles our adherence to which we made known to the world even before the Geneva Conference. We have taken up positions in accordance with the principles which we understand to have been accepted by the international community at the Geneva Conference. We have taken up positions in accordance with principles which, since the Conference, have been applied by the United Kingdom, by Norway, by Belgium, by Sweden, by Finland, by the Soviet Union, by Italy, by Yugoslavia, by Malta, by Iraq, by Kuwait, by Iran, by Saudi Arabia, by Bahrain and by Australia. We have, indeed, taken up positions in accordance with the principles which have applied in the Baltic in a manner not unfavourable to the Federal Republic, and which have been applied in the Partial Boundary Treaty with the Netherlands in a manner also not unfavourable to the Federal Republic.

We do not think that there is any inequity in our asking for these principles to be applied to the *continuations* of the Federal Republic's partial boundaries in the North Sea. We recognize that the Federal Republic has what I have called an inconvenient window on the North Sea. But it is not for us, we think, or for the Court, to remake the political frontiers of the Federal Republic or to deprive them of their normal effects in relation to the seas appurtenant to the Federal Republic. There is nothing whatever in the coasts of either of the countries for which I appear that in any way distorts the areas of continental shelf which the equidistance principle makes appurtenant to those coasts. We accordingly

submit that under the criterion for the application of the special circumstances exception, which has been accepted by all the Parties in the present proceedings, the Federal Republic has wholly failed to establish any ground for displacing the equidistance principle in either of the cases before the Court.

What we ask for is the even-handed application by the Court of the established law to Denmark and to the Netherlands as it has been applied to other coastal States in the North Sea and elsewhere. It is *that* which is true equity. We oppose utterly the idea that we should have applied to us criteria unprecedented and not to be a precedent to others.

That, Mr. President, concludes my argument on behalf of the two Governments for whom I have addressed you. It had been the intention of my learned colleague, the Agent for Denmark, to follow me for the purpose of stating the position of his Government in regard to Denmark's final submissions. In the circumstances which I mentioned in opening this afternoon, and since the learned Agent has no wish to change the submissions presented to the Court in Denmark's Counter-Memorial and in the Common Rejoinder, he has instructed me to state, on his behalf, that the Government of Denmark confirms those submissions. Moreover, as the submissions of the Government of Denmark are identical, *mutatis mutandis*, with those of the Government of the Netherlands, and as these submissions of the Netherlands will now be read to the Court by the learned Agent for the Netherlands, I respectfully suggest to the Court that this confirmation of Denmark's submissions, made by me on the instructions of the Agent, may suffice for the record.

Finally, I should like to thank the Court for its hearing of me. I should further like to express once again my sense of privilege in having been asked to participate in these proceedings on behalf of Denmark and the Netherlands, and at the same time to express my appreciation of the courtesy of our opponents which has made that participation so agreeable.

STATEMENT BY PROFESSOR RIPHAGEN

AGENT FOR THE GOVERNMENT OF THE KINGDOM OF THE NETHERLANDS

Professor RIPHAGEN: Before presenting the final submissions I would like to make the following additional observations in relation to the question posed by Judge Petré.

Each of the two separate Special Agreements deals with a different boundary line. In the Special Agreement concluded between Denmark and the Federal Republic the Court is requested to decide the following question: What principles and rules of international law are applicable to the delimitation as between the Parties of the areas of the continental shelf in the North Sea which appertain to each of them beyond the partial boundary determined by the above-mentioned Convention of 9 June 1965?

In the Special Agreement concluded between the Netherlands and the Federal Republic the Court is requested to decide the following question: What principles and rules of international law are applicable to the delimitation as between the Parties of the areas of the continental shelf in the North Sea which appertain to each of them beyond the partial boundary determined by the above-mentioned Convention of 1 December 1964?

In the opinion of the Netherlands and of Denmark, as explained in our written and oral pleadings, the principles and rules of international law which are applicable as between the Parties do not permit the location of the boundary

line between Denmark and the Federal Republic to be determined or influenced in law by the boundary line between the Netherlands and the Federal Republic. Nor do those principles and rules of international law permit the location of the boundary line between the Netherlands and the Federal Republic to be determined or influenced in law by the boundary line between Denmark and the Federal Republic.

Mr. President and Members of the Court, at the end of the oral pleadings it is incumbent upon me to present to the Court the final submissions of the Kingdom of the Netherlands. They are identical to those presented in the Counter-Memorial and in the Common Rejoinder.

These submissions are:

With regard to the delimitation as between the Federal Republic of Germany and the Kingdom of the Netherlands of the boundary of the areas of the continental shelf in the North Sea which appertain to each of them beyond the partial boundary determined by the Convention of 1 December 1964,

May it please the Court to adjudge and declare:

1. The delimitation as between the Parties of the said areas of the continental shelf in the North Sea is governed by the principles and rules of international law which are expressed in Article 6, paragraph 2, of the Geneva Convention of 1958 on the Continental Shelf.

2. The Parties being in disagreement, unless another boundary is justified by special circumstances, the boundary between them is to be determined by application of the principle of equidistance from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured.

3. Special circumstances which justify another boundary line not having been established, the boundary between the Parties is to be determined by application of the principle of equidistance indicated in the preceding submission.

4. If the principles and rules of international law mentioned in Submission 1 are not applicable as between the Parties, the boundary is to be determined between the Parties on the basis of the exclusive rights of each Party over the continental shelf adjacent to its coast and of the principle that the boundary is to leave to each Party every point of the continental shelf which lies nearer to its coast than to the coast of the other Party.

Mr. President and Members of the Court, allow me to express my profound gratitude for the patience and attention with which the Court has listened to our arguments.

CLOSING OF THE ORAL PROCEEDINGS

Le PRÉSIDENT: Je voudrais, au nom de la Cour, remercier les agents et conseils des Parties du concours qu'ils lui ont prêté en présentant leurs thèses. Je prie les agents de se tenir à la disposition de la Cour pour fournir à celle-ci les renseignements complémentaires dont elle pourrait avoir besoin. Sous cette réserve et sous réserve de toute ordonnance ou directive éventuelle de la Cour, je déclare close la procédure orale. La Cour communiquera avec les agents de la manière habituelle et les avertira en temps voulu de toute audience publique qu'elle déciderait de tenir pour la lecture de l'arrêt ou pour toute autre fin.

The Court rose at 5.30 p.m.

FOURTEENTH PUBLIC HEARING (20 II 69, 10 a.m.)

Present: [See hearing of 23 X 68.]

READING OF THE JUDGMENT

Le PRÉSIDENT: La Cour se réunit aujourd'hui pour rendre son arrêt dans les affaires du *Plateau continental de la mer du Nord*, portées devant la Cour le 20 février 1967 par la notification de deux compromis conclus entre la République fédérale d'Allemagne et le Danemark d'une part et la République fédérale et les Pays-Bas d'autre part.

Je vais donner lecture du texte français de l'arrêt.

(Le Président donne lecture de l'arrêt¹.)

Le PRÉSIDENT: J'invite le Greffier à donner lecture du dispositif de l'arrêt en anglais.

(Le Greffier lit en anglais le dispositif de l'arrêt².)

Le PRÉSIDENT: Sir Muhammad Zafrulla Khan et M. Bengzon, juges, joignent à l'arrêt des déclarations. Le Président et MM. Jessup, Padilla Nervo et Ammoun, juges, y joignent les exposés de leur opinion individuelle. M. Koretsky, Vice-Président, MM. Tanaka, Morelli et Lachs, juges, et M. Sørensen, juge *ad hoc*, y joignent les exposés de leur opinion dissidente.

Afin que la décision de la Cour soit connue le plus tôt possible et en raison des retards qui seraient intervenus si le prononcé avait dû être remis jusqu'à l'achèvement de l'impression de l'arrêt et des opinions individuelles et dissidentes, il a été jugé opportun de procéder aujourd'hui à la lecture de l'arrêt d'après un texte photocopié. L'édition imprimée présentée de la manière habituelle sortira de presse dans trois semaines environ.

The Court rose at 1 p.m.

(Signed) J. L. BUSTAMANTE Y RIVERO,
President.

(Signed) S. AQUARONE,
Registrar.

¹ *C.I.J. Recueil 1969*, p. 12-54.

² *I.C.J. Reports 1969*, pp. 53-54.