

DISSENTING OPINION OF JUDGE MORELLI

[*Translation*]

1. The two Special Agreements asked the Court to indicate “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 . . .”. It is quite clear that the principles and rules that the Court was called upon to establish could only be principles and rules which were binding for each of the two parties to each Special Agreement vis-à-vis the other party. It follows that the principles and rules which had to be the subject of the finding requested of the Court were the principles and rules of general international law and not the principles and rules contained in the Geneva Convention on the Continental Shelf of 29 April 1958 (and in particular in Article 6 thereof), which Convention, not having been ratified by the Federal Republic, was not as such binding upon it.

On this point I entirely share the opinion of the Court. Unlike the Court, however, I think that in order to find the principles and rules of general international law concerning the delimitation of the continental shelf it might be useful, whenever the circumstances so require, to take account of the Convention as a very important evidential factor with regard to general international law, because the purpose of the Convention is specifically, at any rate in principle, to codify general international law and because this purpose has been, within certain limits, effectively realized.

In connection with the Convention it may be observed that it was signed by the Federal Republic. This means that the Federal Republic participated in a technical operation which, to the extent of the Convention's avowed purpose of codification, consisted in the establishment of general international law. By its signature the Federal Republic expressed an opinion which, within the limits indicated above, may be qualified as an *opinio juris*. But it was a mere opinion and not a statement of will, which could only be expressed by ratification. For it is only by ratification that the States signatories to a Convention express their will either to accept new rules or, in the case of a codification convention, to recognize pre-existing rules as binding.

The statement that the purpose of the Geneva Convention was, at least in principle, to codify general international law is not contradicted, in my view and contrary to the opinion of the Court, by the fact that

Article 12 of the Convention recognizes the possibility of reservations (including reservations to Article 6). For the power to make reservations is entirely compatible with the codification character of a convention or of a particular rule contained in a convention. Naturally the power to make reservations affects only the contractual obligation flowing from the convention; that obligation, that is to say the obligation vis-à-vis the other contracting parties to consider the rule in question as a customary rule, is excluded in the case of the State making the reservation.

In this connection, sight must not be lost of the fact that the ambit of any codification is necessarily subjectively limited: i.e., limited to the States parties to the codifying convention. It is quite conceivable for a particular provision of the convention, through the effect of reservations, to be affected by a further limitation, in the sense that the obligation to accept the codification is, in relation to that provision, excluded for some of the parties, i.e., for those States which formulate the reservation. This circumstance in no way constitutes an obstacle to considering the provision open to reservation as a codification of general international law.

It goes without saying that a reservation has nothing to do with the customary rule as such. If that rule exists, it exists also for the State which formulated the reservation, in the same way as it exists for those States which have not ratified. The inadmissibility of the reservation is not to be deduced from this, seeing that the reservation is intended to operate solely in the contractual field, i.e., in relation to the obligation, arising out of the convention, to recognize the rule in question. For this same reason, no importance can be attached to the fact that those States which do not ratify the convention, and which consequently remain completely outside the contractual bond, have no possibility of formulating a reservation.

Having clarified my point of view so far as concerns the value to be ascribed to the Geneva Convention as evidence of general international law, I shall now consider matters from the point of view of the latter, i.e., from the same point of view as that adopted in the Judgment of the Court. I shall mention the Geneva Convention only in order to note in Article 6 it is, in substance and within certain limits, in conformity with the rules of general international law with regard to the delimitation of the continental shelf.

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2. I think it convenient to start from a point which is generally recognized, and which is not disputed by any of the Parties, namely the existence of certain rights the subject-matter of which is the continental shelf. It is not necessary, for the purposes of the present cases, to determine the nature, the content and the limits of those rights, which Article 2

of the Geneva Convention (which Article reflects, it would seem, customary international law) qualifies as "sovereign rights [over the continental shelf] for the purpose of exploring it and exploiting its natural resources".

The rights in question belong to the various States considered individually. The continental shelf cannot be conceived of, in the same way as can the high seas, as something common to all States. It is necessary in the first place to rule out any idea of a community participated in by all States and having as its object the continental shelf in general.

But the idea of a community must also be excluded with reference to any given areas of the continental shelf, as a community limited to certain States alone, those which have a given relationship with the area in question. This is of course subject to the possible effect of an agreement whereby two or more States might decide to make their respective areas of the continental shelf common as between themselves.

Apart from this hypothetical case, which is perfectly conceivable, there is no community between two or more States, the object of which is a given area of the continental shelf. Without doubt a situation can exist which gives rise to a problem of *delimitation*, namely the problem of ascertaining how a certain area of the continental shelf is *already apportioned* among two or more States. This operation of delimitation has nothing to do with the *sharing out*, among two or more States, of something common to those States.

In particular it must be denied that the North Sea continental shelf, despite its geological unity, constitutes, or constituted, something common to all the coastal States. It is quite obvious that to affirm the existence of a community in this connection would impeach the legitimacy of the bilateral delimitations, on an equidistance basis, carried out not merely between Denmark and the Netherlands, but also between the United Kingdom and the Netherlands, between the United Kingdom and Denmark, between the United Kingdom and Norway, and between Denmark and Norway. It should also be observed, with reference to these last two delimitations, that the parties did not confine themselves to applying the equidistance criterion, but did something more than that. By the application of the equidistance criterion in relation to the coastlines of the contracting States, leaving out of account the geological feature of the "Norwegian Trough", the effect of which is that the continental shelf of Norway would, from the geological point of view, be made up of a very narrow strip along the Norwegian coast, what was in substance finally effected was a transfer of certain areas of the continental shelf in favour of Norway. It is only by rejecting the idea of something held in common that those areas, having regard to the said geological feature, could be considered as appertaining to the other two contracting States, to the United Kingdom and Denmark respectively.

If it is to be excluded that the North Sea continental shelf taken as a

whole constitutes or constituted something held in common, such a régime must, *a fortiori*, be excluded in respect of the south-eastern sector of the North Sea (the sector bounded by the equidistance lines between Norway and Denmark, and between the United Kingdom and the continent). Even supposing an initial community to have existed among all the coastal States of the North Sea in respect of the continental shelf of that Sea, it is not clear how such a community could have been dissolved merely in part, to give place to an objectively and subjectively narrower community; and all this as a result, not of a collective agreement between all the States participating in the community, but rather of a series of bilateral agreements as between certain of those States, excluding the Federal Republic.

3. Once the existence of a rule of general international law which confers certain rights over the continental shelf on various States considered individually is admitted, the necessity must be recognized for such a rule to determine the subject-matter of the rights which it confers. This means, seeing that those rights are conferred on the different States individually, that the rule in question must necessarily indicate the criterion upon the basis of which the continental shelf is divided between the different States.

It is quite possible to speak of a "rule" concerning the apportionment of the continental shelf; but sight must not be lost of the fact that it is not an independent rule but rather an integral part of the same rule which confers upon different States rights over the continental shelf. It follows that failure to indicate the criterion according to which the continental shelf is apportioned would not constitute a true lacuna. A lacuna proper consists in the absence of any legal rule governing a given relationship. In the matter with which we are concerned, on the other hand, a legal rule is admitted to exist: that rule is precisely the one which confers upon different States, considered individually, certain rights over the continental shelf. Now if that rule did not indicate the criterion for apportionment, it would be an incomplete rule. But, unlike other incomplete rules which no doubt exist in the international legal system, this rule is one the incomplete nature of which would have a most particular importance, because it is the determination of the very subject-matter of the rights conferred by the rule that would be omitted. Such an omission would totally destroy the rule.

However this may be, I am of the view that a criterion for apportionment is really provided by the law: as will be seen, it is a criterion which it is possible to deduce from the very rule which confers on different States certain rights over the continental shelf.

The rule, or, more correctly, the criterion for apportionment, can only be a rule or criterion which operates automatically, so as to make it possible to determine, upon the basis of such criterion, the legal situation existing at any given moment. This requirement could not be satisfied by the rule which the Court declares as the only rule governing the matter, a

rule that would oblige the States concerned to negotiate an agreement in order to delimit the continental shelf between themselves. Such a rule, for so long as the agreement which it contemplates has not been concluded, would allow a situation of uncertainty to persist with regard to the apportionment of the continental shelf.

It must be pointed out in this connection that it would not be what might be termed a subjective uncertainty, an uncertainty inherent in almost all disputes; an uncertainty that can retroactively be dispelled by a judgment delivered on the basis of the law in force. It would, on the contrary, be an objective uncertainty, which it would not be possible to dispel upon the basis of the law in force because such law would not contain, in this connection, any immediately applicable material rule. For that it would be necessary to wait until a special rule was created by agreement between the States concerned. In the absence of such an agreement, no State could treat the continental shelf area in question as pertaining to itself.

4. The title upon which the right of a State over a certain area of the continental shelf is based is the *contiguity* (or adjacency) of that area to the territory of the State concerned.

Since, as is also stated by Article 1 of the Geneva Convention, the continental shelf is made up of the seabed and subsoil of the submarine areas outside the area of the territorial sea, and since, furthermore, the territory of a State comprises not merely the dry-land territory but also the territorial sea, to speak of the contiguity of an area of the continental shelf to the territory of a given State signifies the contiguity of that area to the outer limit of the State's territorial sea. This clarification is important, not only, as will be seen, for the purposes of delimitation, but also for the case of the existence of a "trough", contained, for its whole breadth, within the bounds of the territorial sea of a State. Such "trough" does not prevent the continental shelf lying beyond the "trough" from being considered as adjacent to the State's territory.

In this connection there may be noted a certain illogicality in the wording of the Geneva Convention. Article 1 refers to "submarine areas adjacent to the coast but outside the area of the territorial sea"; the same Article goes on to refer to "similar submarine areas adjacent to the coasts of islands". It is not clear how areas which are outside the territorial sea can properly be qualified as adjacent to the coast. Probably this is an inexact form of words employed to indicate, in fact, adjacency, not to the coast, but rather to the outer limit of the territorial sea. More correctly, Article 6 refers to adjacency "to the territories" of two or more States.

5. The notion of contiguity points to a contact by the continental shelf with the territory of a State: more precisely, a contact with the line which marks the boundary of the territory of the State toward the high

seas, a line which is identical with the outer limit of the territorial sea. It is from that line that the continental shelf appertaining to the State commences.

The criterion for determining the extent of the continental shelf which, starting from that line, appertains to a State, by comparison with the continental shelves appertaining to other States, can only be inferred indirectly from the concept of contiguity itself. This concept postulates the coincidence of the line of the boundary of the territory of a State toward the high seas, and the line from which the continental shelf of the State commences. Consequently, the criterion of contiguity cannot, in itself, be used to determine points which do not fall on the said line, being situate beyond it. Nevertheless it is possible, for the determination of these, to infer from the criterion of contiguity another criterion: that of *proximity*. On the basis of this criterion, there must be considered as appertaining to a given State all points on the continental shelf which, although not situated on the line delimiting the territory of the State, are nearer to that line than to the line delimiting the territory of any other State. In my view, there is nothing arbitrary about this deduction; it is, on the contrary, a wholly logical one.

From the criterion of proximity, the passage is almost automatic to that of *equidistance*, so that it could be said that the two criteria merge. The criterion of proximity determines points constituting a surface. But there are some points with respect to which the criterion of proximity does not operate, and that because these points are not nearer to the territory of one State than to the territory of another State, because they are equidistant from the territories of the two States. These points form the equidistance line, the line which constitutes the boundary between the continental shelves of the two States. Points situate on one side of this line, and consequently nearer to the territory of one of the two States, are part of the continental shelf of that State; for the same reason, points situate on the other side of the line appertain to the continental shelf of the other State.

6. As will be observed, I consider the rule of general international law prescribing the equidistance criterion for the delimitation of the continental shelves of various States to be a necessary consequence of the apportionment effected by general international law on the basis of contiguity. I am therefore of the opinion that it is not necessary to ascertain if a specific custom has come into existence in this connection. State practice in this field is relevant not as a constitutive element of a custom which creates a rule, but rather as a confirmation of such rule. Confirmation of the rule is also provided, within certain limits, by the provisions of the Geneva Convention.

So far as State practice is concerned, it should be observed that delimitations effected by different States unilaterally have a greater importance than bilateral acts of delimitation. The latter, whether they conform to the rule or diverge from it, may simply amount to a manifestation

of contractual autonomy in a field in which the contracting States have freedom of disposition. Thus their evidentiary value for or against the rule is very limited.

7. The criterion of equidistance is employed in Article 6 of the Geneva Convention. The first paragraph of that Article refers to the case of two or more States whose coasts are opposite each other, in which case the equidistance line is more specifically characterized as a *median* line. Paragraph 2 follows the same equidistance criterion for the case of two adjacent States. Nothing is said as to the relationship between two States which, like Denmark and the Netherlands, are not adjacent, and which cannot be considered to be opposite either.

It should be observed in this connection that the equidistance criterion is in itself capable of being used in all conceivable situations, even in the relationship between two States in the situation of Denmark and the Netherlands. Consequently, it is this general employment of the criterion which, taking into account the reasons which justify it, should be considered as contemplated by the rule of general international law which refers to that criterion.

So far as Article 6 of the Geneva Convention is concerned, interpretation of that Article can, in my opinion, only lead to a similar conclusion. In other words, it must be considered that Article 6 of the Convention too uses the equidistance criterion in a general way, even though, according to its terms, it does not expressly indicate anything more than two possible applications of that criterion.

With reference to the distinction between the case of opposite States and the case of adjacent States, which is often made use of, and which is the inspiration of Article 6 of the Convention, it should be added that this is a distinction which is very much a relative one. There are many cases, actual or simply imaginable, with reference to which it would be difficult to say whether they were cases of opposite States or adjacent States.

8. Article 6 of the Convention, both in paragraph 1 and paragraph 2, refers, in order to determine equidistance, to "the nearest points of the baselines from which the breadth of the territorial sea . . . is measured". It appears from the *travaux préparatoires* of the Conference that other proposals had been made in this connection, consisting of reference either to the low-water mark or to the high-water mark. These two methods, as well as that finally adopted by the Convention, consisting of referring to the baselines, are no more than different methods of determining what constitutes the coast of a State.

However, I consider that, for the delimitation of the continental shelf, it is not correct to relate equidistance to the coast, whether this is determined in the way indicated in Article 6, or in some other way. (Of course, quite a different problem is that of the delimitation, between two States, of the territorial sea itself.) Consequently I consider that on this parti-

cular point the Convention has diverged from general international law.

For, according to general international law, since the territory of a State extends up to the outer limit of its territorial sea, which is the line from which begins the continental shelf appertaining to that State, it is necessarily to that line, as well as to the outer limit of the territorial sea of another State, that reference must be made to determine the equidistance line which constitutes the boundary between their respective continental shelves.

It is quite possible that the application of this method might lead to a result different from that produced by the method adopted in Article 6 of the Geneva Convention, which consists in referring to the baselines from which the breadth of the territorial sea is measured. The difference in the results obtained from the two methods is quite obvious, for example, where there are two States lying opposite each other, in relation to which the breadth of the territorial sea is determined in a different way; this is so even where the coastlines of the two States are perfectly straight. But, even apart from the way in which the breadth of the respective territorial seas of the two States concerned is determined, a difference between the results of the two methods may well be the consequence of the configuration of the coastlines of the two States.

So far as concerns the relationship of Denmark and the Federal Republic and of the Federal Republic and the Netherlands, it is certain that the application of the method I consider correct gives a result different from that to which reference of equidistance to baselines leads, although that difference is very slight. In point of fact, even if the possible consequences which the configuration of the coastlines of the three States might have according as to one or other of the two methods of delimitation is used be disregarded and it be consequently supposed that the triangle resulting from the boundary line between Denmark and the Federal Republic and the boundary line between the Federal Republic and the Netherlands has always the same shape, there is no doubt that, if the method which I consider correct be employed, such a triangle would be situated further towards the centre of the North Sea, which would result in a small advantage for the Federal Republic.

9. The equidistance rule does no more than indicate the way in which the continental shelf is apportioned among different States; just as the apportionment occurs automatically, so the equidistance rule, an expression, as has been seen, of that apportionment, also operates automatically. There appertains to each State *ipso jure* a certain area of the continental shelf, as determined by virtue of the equidistance criterion.

In the first place, it is not necessary, in order that a State may become the owner of rights over a certain area of the continental shelf, for any

legal act to be performed for this purpose by the State concerned. There is a difference here from what happens in the case of the territorial sea, in respect of which there is attributed to each State the legal power to determine its breadth, within certain limits, by means of a unilateral legal act. The Convention on the Continental Shelf, in Article 2, paragraph 3, states indeed: "The rights of the coastal State over the continental shelf do not depend on occupation, effective or notional, or on any express proclamation." It follows that it is incorrect to speak, as Denmark and the Netherlands have done on several occasions, of validity and opposability *erga omnes* of a delimitation effected by a State unilaterally, in accordance with the equidistance criterion. Unilateral delimitation is not a legal act upon which the rights of the State over the continental shelf depend, and of which the validity or invalidity might be open to argument. Unilateral delimitation is simply a manifestation of State conduct, to be considered as legitimate or otherwise according to whether it is or is not in conformity with the apportionment of the continental shelf automatically effected by international law.

10. Nor is it necessary, for the equidistance rule to be able to operate, that an agreement be concluded on the question by the States concerned. An agreement in conformity with the equidistance criterion does no more than record a situation which has already arisen automatically; thus, such an agreement has only a purely *declaratory* character. But inasmuch as it is a matter of rights of which States can dispose freely, it is quite possible for an agreement between the States concerned to diverge from the equidistance criterion. In this case, the agreement has a *constitutive* character, because it modifies the existing situation, as it results from the automatic functioning of the equidistance rule.

None of this is contradicted, substantially, by the wording of Article 6 of the Geneva Convention. It is of course true that Article, in paragraphs 1 and 2, mentions agreement first, and thereafter, in case of "absence of agreement", the equidistance criterion. But this does not by any means signify that logical and chronological priority is attributed to agreement, in the sense that only in the absence of agreement can the equidistance rule operate; this would confer on that rule the character of an alternative rule. If the provisions of Article 6 were understood in this sense, several questions could be raised, to which it would not be easy to reply. At what moment would it be necessary to establish that the condition of absence of agreement, to which the functioning of the equidistance rule is subordinated, is fulfilled? What is the legal situation either before that moment or before the conclusion of an agreement if any? Is it community? What would be the extent of the continental shelf subject to such a community?

In fact, in referring to agreement, Article 6 simply means that the States concerned are always free to delimit the continental shelf, by means of an agreement, in the way they think most appropriate, even so as to modify, if appropriate, the existing situation resulting from the

application of the equidistance rule. It is to this rule that there must be attributed, even under Article 6, logical and chronological priority.

When it mentions agreement first, Article 6 adopts the point of view of a court, or of any person or body who proposes to determine the existing legal situation. In order to do this, it is necessary in the first place to ascertain whether an agreement has been concluded by the States concerned. If this is the case, there is nothing to do but hold such agreement to be decisive, because the situation prior to the agreement, and resulting from the equidistance criterion, is no longer in force. It is only in the absence of agreement that the equidistance rule must be applied, by finding for the apportionment effected by that rule, which has not been modified by any agreement.

11. The equidistance rule, as a rule of general international law codified in Article 6 of the Geneva Convention, is, as has been said, a rule which operates automatically. This characteristic of the rule does not prevent the possibility being imagined, from an abstract point of view, of its being limited by one or more exceptions. But an exception-rule properly so called would not be imaginable except as a rule also of an automatic character. Such would be a rule which, by reference to certain possible circumstances, precisely defined by the rule itself (for example, the existence of an island having certain characteristics as regards its dimensions and position, etc.), declared that in such a case the apportionment is effected (still automatically) according to a criterion other than that of equidistance, which criterion would also have to be specified by the rule.

But no such exception-rule exists in general international law. Nor can such a rule be considered to be contained in Article 6 of the Convention, which, both in paragraph 1 and paragraph 2, declares the equidistance criterion to be applicable "unless another boundary line is justified by special circumstances". With regard to this rule of the Convention, all the Parties to the present cases have always referred to it as an "exception" to the equidistance rule; the argument has been concentrated on what might be called a quantitative aspect of the matter, namely the wider or narrower scope of the so-called "exception".

In my opinion, there is no question at all of a true exception: for the simple reason that the special circumstances rule, as it is found in Article 6 of the Convention, is not capable of operating automatically. In the first place, it does not specify in any way what are the circumstances which would prevent the equidistance rule from operating. Secondly, nothing is said as to the effect which the circumstances contemplated should bring about, because the rule is no indication whatsoever of what delimitation should replace that resulting from the equidistance criterion. The determination of both these issues could only be made by agreement between the States concerned, or by an arbitral award. So long as there

is neither agreement nor award the situation remains that which results from the equidistance criterion.

It must be concluded on this issue that the equidistance rule is an absolute rule, in the sense that it is not limited by any exception-rule properly so called. Even the case of the existence of an island or promontory which has an abnormal influence on the equidistance line, does not by any means constitute an exception, because such a circumstance does not in itself prevent the equidistance rule from operating.

In my opinion the Court ought first to have stated the equidistance rule as a rule of general international law of an absolute nature (i.e., not limited by any exception), adding that that rule was applicable to the delimitation as between the Parties of the areas of the North Sea continental shelf appertaining to each of them. It follows (but this is a consequence which it was not necessary to state expressly) that the apportionment now existing is precisely that which results from equidistance.

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12. The equidistance rule is a necessary logical consequence of the apportionment of the continental shelf effected by international law by virtue of contiguity. Any consideration of equity falls outside the rule as such. It cannot be said that its purpose is to effect an equitable apportionment, so that it will only operate in cases where its application leads to an equitable result. Were it so it would be necessary to exclude entirely the equidistance rule as a rule of law and to regard the rule governing the apportionment of the continental shelf as something quite different. Such rule would be the rule of equitable sharing out. Equidistance would be but one possible method of arriving at the result of equitable sharing out aimed at by the legal rule.

But the purported rule of equitable sharing out cannot be accepted. Such a rule, as a rule the content of which is to refer the matter to equity, could not automatically effect the sharing out of the continental shelf among the various States. Such sharing out could only be the consequence of an agreement between the States concerned or else of an award which, being based upon equity, would not be a declaratory but a constitutive award. Until the moment when the agreement was reached or the award handed down there would be no apportionment. The situation would be one of community; a hardly conceivable situation which would be in contrast with the attitude of international law on this subject.

13. All that I have just said does not mean that international law does not concern itself at all with the equitable nature of the apportionment; I am merely saying that considerations of equity cannot act so as to prevent the operation, at any rate initially, of the equidistance rule. The following is, in my view, the manner in which international law has recourse, in this field, to equity.

In my opinion, the equidistance rule (an absolute rule, operating in all cases) is accompanied by another rule, which is not an exception-rule because it has an importance of its own. This latter rule envisages circumstances which exercise a certain influence on the application of the criterion of equidistance, in the sense that such application produces an inequitable result. The purpose of this rule is to correct such a result. It must be pointed out here and now that in order for it to be possible for this rule to operate it is not sufficient that just any divergence be noticed between the result of applying the equidistance rule and an absolutely equitable apportionment. On the contrary, there must be a particularly serious discrepancy.

What is the content of the rule in question? In what way, in other words, does the rule seek to attain its end?

In my opinion, the rule merely obliges the States concerned, in cases where the circumstances envisaged occur, to negotiate among themselves an agreement to revise the existing situation. In other words, the agreement modifying the existing situation, an agreement which can always be freely concluded, becomes, in the circumstances envisaged, a compulsory act. It follows that until such time as a revision agreement is concluded (or, failing agreement, an award is handed down on this subject) the situation resulting from the application of the criterion of equidistance must be considered as the situation in force.

I consider that it is the rule of general international law to which I have just referred which underlies Article 6 of the Geneva Convention when it provides that the equidistance line shall apply "unless another boundary line is justified by special circumstances". Seeing that the special circumstances rule can only be brought into operation with the agreement of the States concerned, it is precisely an agreement which the rule envisages as the subject-matter of an obligation which it lays upon the States concerned. Here too, it is a question of an agreement for the revision of the situation resulting from the automatic application of the equidistance rule, which, for the Convention also, constitutes the primary rule.

14. It is not necessary to determine what circumstances can give rise to a seriously inequitable application of the criterion of equidistance and which for that reason may, by virtue of the rule to which I have just referred, entitle a State to claim that the boundaries of its continental shelf should be modified. What matters is not the circumstances as such but rather the inequitable result to which they lead.

They may be geographical circumstances and also circumstances of a different kind. Among geographical circumstances there may be recalled the case, frequently mentioned, of a promontory or islet situated off the coast of a State. It must further be recognized that the configuration of the coastline of a State in relation to the coastline of another adjacent State may also entail an inequitable application of the criterion of equidistance. And it must be added that a circumstance having the same con-

sequence may consist in the configuration of the coastline of one State in relation to the coastlines of two other adjacent States and in the combined effect of the application of the criterion of equidistance to the delimitation of the continental shelf of the first State in relation to the continental shelves of each of the other two States. This is precisely the situation which occurs in the present cases.

15. I would point out in this connection that there is no question now of effecting an apportionment of the continental shelf among the Parties to these cases *ex novo* and that it is not a question of how the boundary lines must be drawn in order to arrive at such an apportionment: namely whether the two boundary lines (German-Danish and German-Netherlands) must be drawn conjointly or else independently of each other. It is not at all a question of drawing lines.

The problem supposes a certain apportionment already effected by the automatic operation of the equidistance rule, the equitable or inequitable character of which apportionment has to be appraised. This apportionment, characterized by equidistance lines delimiting on each side the continental shelf of the Federal Republic, is a consequence of the real geographical situation, a situation for which it is not possible to substitute purely hypothetical situations. Admittedly, if one were to start from the hypothesis that the Federal Republic constituted a single State with Denmark, the result of applying the criterion of equidistance for drawing the boundary line between that hypothetical State and the continental shelf belonging to the Netherlands might be recognized as equitable. The same thing would have to be said with regard to the boundary line between Denmark and a hypothetical State comprising the present Federal Republic and the present Netherlands.

Matters are otherwise if one considers (as must be done) the real geographical situation and the results to which, in relation to that geographical situation, the application of the criterion of equidistance leads. I am still referring to the results because it is those results that must be appraised. It is not a matter of judging the equitable or inequitable character either of a boundary line or of two boundary lines, whether considered conjointly or separately. The result can only take concrete shape, in the present case, as the combined effect of the criterion of equidistance for determining both boundary lines together.

In my opinion, the gravely inequitable nature of the result to which the application of the criterion of equidistance in the present case leads must be recognized, this inequitable character consisting in the remarkable disproportion between the area of the continental shelves pertaining to each of the three States on the one hand and the length of their respective coastlines on the other; and this is so even if for the coastline of the Federal Republic there be substituted another shorter line, such as the line Borkum-Sylt.

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16. Having indicated the solution that must be given, in my opinion, to the problem of the substantive law, I shall now turn to certain problems of a procedural nature which arise in these cases and which concern the powers of the Court.

There is first of all a problem which is connected with the substantive point which I have just examined. It is the problem, as expressed in a question put to the Parties in the course of the oral proceedings, of whether "the two Special Agreements entitle the Court to enter into an examination of the combined effect of the two boundary lines proclaimed by Denmark and the Netherlands". To this question Denmark and the Netherlands returned a negative answer.

Now it is quite true that the two disputes to which the two Special Agreements refer are quite distinct. But they are two disputes which have a certain connection with each other, because the claim advanced by the Federal Republic as against Denmark, with a view to the delimitation of the continental shelf as between the two States in a certain way, is based upon the inequitable nature of the consequences to which the criterion of equidistance would give rise if conjointly applied both to the delimitation as between the Federal Republic and Denmark and to the delimitation as between the Federal Republic and the Netherlands. The claim advanced by the Federal Republic as against the Netherlands presents similar features.

It is perfectly possible to envisage, as did Counsel for the two Kingdoms, a situation in which the Court were seised of a request for the resolution (in the real sense) of only one of the two disputes, for example, that between the Federal Republic and Denmark. Now if in such a situation the Federal Republic asked the Court to determine not only its boundary with Denmark but also its boundary with the Netherlands, there can be no doubt that it would not be open to the Court to give a decision in the absence of the Netherlands, whose rights would be at issue. In such event, it would not be inapposite to cite the Judgment of the Court in the *Monetary Gold* case. If on the contrary the Federal Republic confined itself, in the same situation, to a request in respect of delimitation vis-à-vis Denmark only, I do not see that there would be any obstacle to deciding the dispute, even in the event that, for the purposes of its decision, the Court had also to take into consideration the consequences of the criterion of equidistance on the delimitation between the Federal Republic and the Netherlands.

But these are hypothetical situations which have nothing to do with the present proceedings.

In the present proceedings the Court was confronted with two Special Agreements, each of which requested the Court not to settle the dispute to which it related but rather to determine the principles and the rules of international law applicable to the delimitation of the continental shelf as between the parties to each Special Agreement (respectively the Federal Republic and Denmark and the Federal Republic and the

Netherlands). It is altogether true that, despite the joinder of the two cases, each Special Agreement had to be considered separately. But it was quite possible for the Court, on the basis of one of the Special Agreements and leaving the other out of account (and even if the other had not existed at all), to find as to the principles and rules applicable to the delimitation of the continental shelf as between the parties to the Special Agreement under consideration; and that remains true even if the Court had thereby been led to lay down a rule requiring account to be taken of the combined effect of the equidistance line as between the parties to the said Special Agreement, and of the equidistance line between the Federal Republic and the State which was a party to the other Special Agreement. The problem of whether such a rule exists or not is one which concerns the substance, and I have already considered it, answering it in the affirmative.

17. Having regard to the terms of the Special Agreements, which speak of principles and rules applicable to "delimitation", etc., the problem arises of whether the Court had the power to lay down a rule which, like the one which I indicated, really concerns not delimitation *qua* statement of the existing situation but rather a modification of the existing situation.

In reality, from the terminological point of view, a distinction must be made between *delimitation* which consists in determining the existing situation and has merely declaratory effects, and *apportionment*, which has effects of a constitutive nature.

One may speak of apportionment, in the first place, in order to denote the result of the automatic functioning of certain rules of law. The placing on record of such a result constitutes the delimitation. This shows that delimitation implies the application of the rules concerning apportionment. It follows that the task with which the Court is entrusted by the Special Agreements, the determination of the principles and rules applicable to the delimitation, consists, in the first place and without the slightest doubt, of the task of the determination of the rules and principles by virtue of which the continental shelf is automatically apportioned as between the various States.

The term apportionment is also used to denote the sharing-out of something held in common. And one may also speak of apportionment to indicate a modification of the apportionment as it eventuates at a given time.

Consequently, if the term "delimitation" employed in the Special Agreements is understood in its proper meaning, the Court's task would have to be considered as confined to determining the rules and principles which effect, automatically, the apportionment of the continental shelf, that apportionment being indeed presupposed by the delimitation. It would not have been open to the Court to indicate either the rules, if any, concerning the apportionment of the continental shelf considered hypothetically as something held in common, or the rules which, like

the one which I declared to exist, relate to a modification of the apportionment in force. Nor would it have been open to the Court to indicate the rule which it has determined, which also relates to apportionment.

The Special Agreements must nevertheless be interpreted with due regard to the characteristics of the disputes to which they relate. Now the two disputes are characterized by the Federal Republic's claim to a certain area of the continental shelf lying on the far side of the equidistance lines. The Federal Republic has never asserted, in support of this claim, that there is a right which it enjoys by virtue of the automatic functioning of a legal rule. Rather than a delimitation on the basis of an apportionment already effected, it is an apportionment which ought to be effected to which the Federal Republic has always laid claim. Since the disputes do not concern solely delimitation *qua* recording of the existing situation, it is necessary to interpret the Special Agreements accordingly, and to hold that, despite the term "delimitation" which they employ, the Special Agreements are intended to authorize the Court to determine even the rules, if any, relating to apportionment, more particularly the rule relating to possible modification of the existing apportionment.

18. Given that the task entrusted to the Court by the Special Agreements is to determine certain principles and certain rules of international law, it might be thought that the Court ought to have confined itself to stating the rule which, in my opinion, makes revision obligatory in the event that certain circumstances occur, without finding as to whether those circumstances actually exist. It would be for the Parties, in the agreement provided for in paragraph 2 of Article 1 of the Special Agreements, to ascertain whether circumstances rendering revision obligatory actually exist and, if such circumstances are acknowledged to exist, to draw the conclusions therefrom.

It must nevertheless be pointed out that the Special Agreements request the Court to indicate the principles and the rules which 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". By referring to certain principles and certain rules as "applicable" to the delimitation of the continental shelf as between the Parties, the Special Agreements empower the Court, in my opinion, not only to state the rules and principles, but also to determine what actually is the factual situation and to declare, on the basis of what it finds, whether the rules and principles it has determined ought to be applied. Had the Court come to an affirmative conclusion on this factual point, it would still have been for the Parties, in their agreement, to work out the consequences of that finding.

As regards, in particular, the rule I have stated to exist, which renders revision obligatory, it was for the Court to determine whether the circumstances which that rule contemplates had actually occurred in the present context, more particularly with regard to the gravely inequitable

nature of the prevailing apportionment. In the event that the Court had arrived at an affirmative conclusion on that point (as I think it ought to have done), the Court would thereby have found that the rule ought to be applied; a finding equivalent to declaring the Parties to be under an obligation to negotiate an agreement for revision.

19. The rule which renders it obligatory under certain circumstances to negotiate an agreement for the revision of the existing situation, as it results from application of the equidistance criterion, is a legal rule the content of which is to refer the matter to equity, from two different aspects. In the first place, it is on the inequitable character of the prevailing apportionment that the application of the rule depends. In the second place, the rule does not directly indicate the criteria in accordance with which the revision ought to be effected, because it refers the matter to equity for that purpose also. Nevertheless, despite the fact that it refers the matter to equity, the rule does not cease to be in itself a rule of law. Hence the Court's power to lay it down, in conformity with the terms of the Special Agreements, which request the Court in terms to indicate principles and rules of international law.

Furthermore, given that the Court's task was not to settle disputes but simply to state principles and rules of law, it would be beside the point to enquire whether it was a judgment on the basis of law or a judgment on the basis of equity that the Court was called upon to render. It was, in reality, a judgment which could be given neither on the basis of equity nor on the basis of the law, for the very simple reason that the judgment was, not to apply the law, but, on the contrary, to declare it.

It is nevertheless necessary to pose a rather difficult question, the answer to which depends on the nature of the *renvoi* to equity by the legal rule. It is necessary to ask whether, after stating the rule which renders negotiation of a revision obligatory in the event that certain circumstances are present, and after finding that those circumstances exist in the present cases, the Court ought also to have indicated the criteria on the basis of which the revision should be carried out.

This question would have to be given an affirmative answer if the criteria of equity could be deemed to be an integral part of the rule of law, in view of the fact that it is to equity that the latter refers the matter. If that is the point of view adopted, it must be held that the Court, in indicating the criteria of equity would have done no more than specify the concrete content of the rule of law it was called upon to determine.

But the premise for such an answer to the question would not be correct. The fact that a rule of law makes a reference to extra-legal criteria by no means signifies that those criteria are embodied in the rule of law. They are criteria which the legal rule makes it obligatory to apply, but which remain outside that legal rule.

It must be concluded that the Court, after stating the rule which makes revision of the existing situation obligatory, ought to have refrained

from indicating the criteria of equity in accordance with which such a revision has to be effected. From that standpoint, the powers of the Court in relation to equity were different from the powers which it possessed to find the existence of circumstances rendering revision obligatory. The reason is that, where the last point is concerned, the powers of the Court went beyond a mere finding as to the rule of law; for the Court was, in addition, called upon to determine the factual situation (including the inequitable character of the prevailing apportionment) on which the applicability of the rule to the concrete case depends.

* * *

20. In examining the problem of the substantive law, I arrived at a twofold conclusion. I stated, in the first place, that the apportionment of the continental shelf between different States takes place automatically on the basis of the criterion of equidistance. I added, in the second place, that the equidistance rule is accompanied by another rule which, where the result of applying equidistance is in flagrant conflict with equity, obliges the States concerned to negotiate an agreement between themselves to revise the existing situation. This rule is applicable to the instant situation, because the circumstances which it contemplates are there present.

The Court too lays down in its Judgment a rule requiring an agreement to be negotiated. That rule refers to equity so far as concerns the criteria to which the agreement must conform, in the same way as the rule I have stated to exist refers to equity not only because it is upon the basis thereof that it must be seen whether the circumstances upon which its application depends are present, but also, precisely as in the case of the rule laid down by the Court, for the determination of the criteria to which the agreement it requires to be negotiated must conform.

The fact that the rule laid down in the Judgment likewise refers to equity for the determination of the criteria upon which the agreement must be based ought to have led the Court to state the characteristics of such a *renvoi*, in order to resolve the question of whether indicating those equitable criteria fell within the task entrusted to the Court in the Special Agreements, which was solely to determine rules of law. I think, for the same reasons as I stated in the preceding paragraph, that the answer that ought to have been given to this question, which the Court has not raised at all, is in the negative.

Between the rule laid down by the Court and the rule I have stated to exist, there are, however, profound differences, which should be stressed. Those differences concern the relationship in which each of the two rules stands towards other rules of law and, in consequence thereof, the very content of the two rules, and, in particular, the role played by the agreement which each of them contemplates.

The rule I have stated to exist is a subsidiary rule, in the sense that it presupposes another rule, which may be termed the primary rule; that rule is the rule of equidistance. Seeing that this latter rule is a rule which functions automatically, the continental shelf is *ipso jure* apportioned in a certain way. It is in relation to this situation, which is presupposed in the subsidiary rule, that the latter operates, where appropriate, in the sense of requiring the States concerned to negotiate an agreement to revise it. Once concluded, that agreement merely modifies a situation already regulated by the law in a certain way.

The rule laid down in the Court's Judgment, on the other hand, is the only rule concerning the apportionment of the continental shelf. It is a single rule, even though the Judgment distinguishes in its reasoning a first rule, which requires negotiations to be held, from what is termed the rule of equity, and even though in the operative provisions of the Judgment the Court, after having stated that delimitation is to be effected by agreement, refers to equitable principles, going on to indicate certain criteria which the agreement between the States concerned must or may apply. It is quite clear, in fact, that the reference to equity and the indication of certain criteria are merely a means of defining the contents of the rule requiring negotiation: they are by no means a formulation of independent rules or principles additional to the rule requiring negotiation.

Now the rule laid down by the Court (the only rule on this subject) is not a material rule which directly governs the apportionment of the continental shelf. It is, on the contrary, an instrumental rule, i.e., a rule which contemplates a certain way of creating the material rule. That way consists in agreement between the States concerned. For so long as no agreement has been concluded, there is no material rule and there is no apportionment at all. Hence arises that situation of a legal void to which I have already had occasion to refer; a situation which I consider almost inconceivable and in any event regrettable.

It may be questioned in this connection how the Court's view that delimitation (or, more correctly, apportionment) can only take place by means of agreement is reconcilable with what is stated in paragraphs 19 and 20 of the Judgment. In those paragraphs the Court rejects the doctrine of the just and equitable share for the reason (paragraph 19) that the rights of a State over the continental shelf, at least as regards the area that constitutes a natural prolongation of its land territory under the sea, are inherent rights existing *ipso facto* and *ab initio*, for the reason, in other words (paragraph 20), that "the notion of apportioning an as yet undelimited area considered as a whole (which underlies the doctrine of the just and equitable share), is quite foreign to, and inconsistent with, the basic concept of continental shelf entitlement, according to which the process of delimitation is essentially one of drawing a boundary line between areas which already appertain to one or other of the States affected". Despite the difficulty of grasping the exact sense in which the terms "delimitation" and "apportionment" are used in the Judgment, it

seems that in the paragraphs I have just mentioned the Court recognizes that, independently of any agreement, there are "areas which already appertain to one or other of the States affected", in other words, that there is an already existing apportionment (properly so called) of the continental shelf among the States affected, to each of which a certain area is automatically assigned.

21. The obligation which arises from the rule stated in the Judgment to constitute what is called the "first rule", i.e., the obligation to negotiate the delimitation of the continental shelf, is regarded by the Court as being identical with the obligation assumed by the Parties under Article 1, paragraph 2, of the Special Agreements (paragraph 86 of the Judgment). With regard to this assimilation, I would refer to what I shall have to say hereafter. So far as concerns the obligation imposed by the rule laid down in the Judgment, it seems that that obligation is conceived of by the Court as independent of the existence of any dispute; this emerges too from the reference made in the Judgment, in this connection, to the Truman Proclamation. This significance of the principle stated by the Court is a wholly natural one, because the requirement of a delimitation or, more precisely, of an apportionment, the need, in other words, to fill the legal void of which I have just spoken, is a requirement which occurs even apart from the existence of a dispute between the States concerned.

Now the obligation to negotiate an agreement for the apportionment of the continental shelf, according to the Court, is only a special application of a principle which is said to underlie all international relations. There is, it seems, a general obligation to negotiate which itself too is independent of the existence of a dispute.

In my opinion, it is not at all possible to recognize the existence of any general obligation to negotiate. A State which is asked by another State to enter into negotiations with a view to the conclusion of an agreement for the settlement of certain relations may, without doing anything contrary to law, refuse to do so, unless there be a specific rule requiring negotiation.

As for Article 33 of the Charter, which is mentioned in the Judgment, that Article refers only to the case of a dispute, and more precisely, to a dispute "the continuance of which is likely to endanger the maintenance of international peace and security". And, even within those limits, Article 33 by no means creates an absolute obligation to seek, by means of negotiation, a solution to the dispute. The obligation imposed by Article 33 is to seek the solution to a dispute by pacific means; negotiations are but one of the pacific means which the aforesaid Charter provision mentions as capable of being utilized. It is, in other words, an alternative obligation; so that Article 33 would by no means be violated in the perfectly conceivable hypothesis of a State's refusing to negotiate, while seeking a solution to the dispute by other pacific means.

22. It must further be made clear that the negotiations which the Parties are required to hold on the basis of the rule laid down by the Court, as well as on the basis of the rule which I have stated as a subsidiary rule applicable to the instant situation, have nothing to do, as such, either with the negotiations that were unsuccessfully carried on in 1965 and 1966 or with the negotiations envisaged in Article 1, paragraph 2, of the Special Agreements. The 1965 and 1966 negotiations were aimed at settling by agreement the disputes which had arisen between the Parties. The negotiations envisaged in the Special Agreements will have the same aim, that is to say, the conclusion of agreements for the solution of the same disputes, it being understood that such agreements will necessarily have to be based upon the principles and rules laid down by the Court. On the other hand, the obligation to negotiate arising out of the rule stated by the Court is independent of any dispute; it is aimed not at the resolution of a dispute, which, in some case other than that with which the present cases are concerned, might even be non-existent, but rather at the creation *ex novo* of a special rule concerning the apportionment of the continental shelf.

It is quite true, however, that the discharge by the Parties to the present cases of this latter obligation implies at the same time the discharge of the obligation which they assumed under Article 1, paragraph 2, of the Special Agreements. But this is a mere coincidence, resulting from the fact that the rule determined by the Court (a rule with which the agreements envisaged in the Special Agreements must conform) is not a material rule but an instrumental rule requiring the negotiation of agreements. In the event of the Court's having stated solely a material rule, there would still be an obligation to negotiate, but it would only be the obligation arising out of Article 1, paragraph 2, of the Special Agreements.

(Signed) Gaetano MORELLI.
