DISSENTING OPINION OF JUDGE TANAKA

I

In spite of my great respect for the Court, I am unable, to my deep regret, to share the views of the Court concerning some important points in the operative part as well as in the reasons of the Judgment.

What is requested of the International Court of Justice by virtue of the two Special Agreements (Article 1, paragraph 1) is to give a decision on the question:

> "What principles and rules of international law are applicable to the delimitation as between the Partie of the areas of the continental shelf in the North Sea which appertain to each of them beyond the partial [boundaries] determined [in the previous agreements concluded by them namely: the Convention of 9 June 1965 between the Kingdom of Denmark and the Federal Republic of Germany and the Convention of 1 December 1964 between the Federal Republic of Germany and the Kingdom of the Netherlands]?"

From the Special Agreements it is clear that what is requested constitutes the "principles and rules of international law" applicable to the said delimitation of the continental shelf and nothing else.

The cases before the Court are concerned with disputes relative to the delimitation of the continental shelf in the North Sea areas. The fact that such disputes arose and the decision of the Court was asked indicates the following fact. An originally geological and geographical concept, i.e., that of the continental shelf, by reason of its intrinsic economic interests (natural resources, particularly minerals such as oil, gas from the subsoil of the seabed) which have become susceptible of exploration and exploitation as the result of recent technological development, has been vested with legal interest and presents itself as a subject-matter of rights and duties subject to the rule of law and constituting an institution belonging to international law.

It is beyond the slightest doubt that this original field of international maritime law involves many new and difficult questions. The fact that after the "Truman Proclamation" of September 1945 there followed a succession of unilateral declarations, decrees and other acts issued by coastal States declaring their exclusive sovereign rights over the adjacent continental shelves was without the slightest doubt a main motive for starting the legislative work of the Geneva Conference on the Continental

Shelf prepared by the International Law Commission of the United Nations. By the Geneva Convention of 1958, the system of the continental shelf definitively acquired the status of a legal institution.

As to the idea and the fundamental principle which govern the continental shelf as a legal institution, it is evidently the realization of harmony between the two interests: the one the interest of individual coastal States for exploration of their continental shelves and exploitation of natural resources; the other the interest of the international community, particularly the safeguarding of the freedom of the high seas.

In this context one point must be emphasized, namely that the institution of the continental shelf adopts as fundamental principles that the coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources, that these rights are exclusive and that these rights do not depend on occupation, effective or notional, or on any express proclamation (Article 2, paragraphs 1-3, of the Geneva Convention). It must be noted that this fundamental concept of the continental shelf, being established as customary international law, exercises an important influence upon the decision of the question of delimitation of the continental shelf, as we shall see below.

The necessity for legal regulation on the matter of delimitation of the continental shelf between coastal States can naturally be understood from the fact that boundary disputes between them as a result of extending their jurisdiction over areas of the continental shelf may involve a serious threat to international peace, as in case of disputes over land boundaries. On the contrary, peaceful co-existence of well-ordered activities of exploration and exploitation of the seabed and subsoil natural resources by the States concerned would enormously contribute to the welfare of mankind.

From the above-mentioned viewpoint it becomes clear that the matter concerning the delimitation of the same continental shelf between two or more opposite States or between two adjacent States plays a very important role—the question which is provided in Article 6, paragraphs 1 and 2, of the said Convention. In the present cases this question is involved. In respect of the delimitation of the continental shelf, as well as of the continental shelf as a whole, rule of law and not anarchy must prevail.

II

On the matter of the delimitation, the opinions of the Parties, one the Federal Republic of Germany and the other the Kingdoms of Denmark and the Netherlands, are radically opposed. The former denies the application of equidistance to the present cases; the latter approves its

application. The core of the present cases constitutes the question of the opposability or non-opposability to the Federal Republic of Article 6, paragraph 2, which provides for the principle of equidistance.

It is evident that the 1958 Convention on the Continental Shelf, particularly its Article 6, is not opposable as such to the Federal Republic for the reason of absence of her consent. It is true that she positively participated in the work of the Convention and became one of the signatory States on 30 October 1958, but she did not ratify the Convention. This lack of ratification is the reason for the denial of her contractual obligation regarding the Convention as a whole or in part, and therefore makes it unopposable to her. Although the Geneva Convention of 1958, as a kind of "law-making" treaty, has a great number of States parties, still it cannot bind outsiders to the Convention, among which the Federal Republic belongs.

The fact that the two Kingdoms on the contrary ratified the Convention does not alter this unopposability vis-à-vis the Federal Republic. This is not contested by the two Governments. Therefore it seems unnecessary to deal with this matter further. Still I consider it to have some significance in relation to other contexts.

The following circumstances, namely in addition to the afore-mentioned German positive participation in the work of the Convention and its signature, are to be noted:

The Government Proclamation of 20 January 1964, the *exposé des motifs* to the Bill for the Provisional Determination of Rights over the Continental Shelf of 15 May 1964, and the conclusion of the two "partial boundary" treaties between the Federal Republic and the Netherlands of 1 December 1964 and between the Federal Republic and Denmark of 9 June 1965; in particular, the Proclamation of 20 January 1964 is extremely significant in the sense that the Federal Republic expressly recognized the Geneva Convention as the basis for the exclusive sovereign rights on her continental shelf. Furthermore, the conclusion of the last two treaties regarding the delimitation of the continental shelf, seems to approve the provision of Article 6, paragraph 2, of the Geneva Convention.

These circumstances, operating as a whole, contribute to justification of the binding power of the equidistance principle provided in Article 6, paragraph 2, vis-à-vis the Federal Republic should she be bound by a ground other than contractual obligation, namely by the customary law character of the Convention.

As to whether a situation of estoppel exists or not, I hesitate to recognize this latter because there is no evidence that Denmark and the Netherlands were caused to change position or suffer some prejudice in

reliance on the conduct of the Federal Republic, as is properly stated by the Court's Judgment.

If, in the first place, the Geneva Convention, including Article 6, paragraph 2, is as such not opposable to the Federal Republic, the Court, in the second place, is confronted with the task of examining the contention put forward by the two Kingdoms as to the existence of the customary law character (Article 38, paragraph 1 *(b)*, of the Statute) of the Convention as a whole or the equidistance principle of Article 6, paragraph 2, of the Convention. If the customary law character of the Geneva Convention and the principle of equidistance is established, the latter principle can be applied to the present cases, and that will be the end of the matter.

The history of the continental shelf as a legal institution indicated by the above-mentioned Truman Proclamation of 28 September 1945, does not appear to be long enough to have enabled more or less complete customary international law to have been formulated on this matter. The practical necessity of regulating a great number of claims of coastal States on their adjacent continental shelf so as to avoid a chaotic situation which may be caused by competition and conflict among them, seemed to be a primary consideration of the international community. In 1949 the International Law Commission, representing the main legal systems of the world, took the initiative by appointing the Committee of Experts for the question relating to the territorial sea including the continental shelf. This Committee of Experts terminated its Report, to which reference has been made above, in 1953.

Parallel with the efforts of the International Law Commission, various governmental and non-governmental, as well as academic organizations and institutions, contributed to promoting the legislative work on the continental shelf by study, examination and preparation of drafts.

The efforts of the International Law Commission were crowned by the birth of the Convention on the Continental Shelf adopted on 26 April 1958 by the Geneva Conference which was attended by 86 delegations.

That 46 States have signed and 39 States ratified or acceded to the Convention is already an important achievement towards the recognition of customary international law on the matter of the continental shelf.

To decide whether the equidistance principle of Article 6, paragraph 2, of the Convention can be recognized as customary international law, it is necessary to observe State practice since the Geneva Convention of 1958. In this respect it may be enough to indicate the following five Agreements as examples of the application of the equidistance principle concerning the North Sea continental shelf:

(a) United Kingdom-Norway of 10 March 1965;
(b) Netherlands-United Kingdom of 6 October 1965;
(c) Denmark-Norway of 8 December 1965;

(d) Denmark-United Kingdom of 3 March 1966;
(e) Netherlands-Denmark of 31 March 1966.

I must also mention the two partial boundary treaties concluded by the Federal Republic already indicated.

It must be noted that Norway, who is a party to two of these Agreements, acted on the basis of the equidistance principle notwithstanding the fact that she has not yet acceded to the Geneva Convention, that the Netherlands adopted the equidistance principle in her Agreement with the United Kingdom at a time when she had not yet ratified the Convention and that Belgium had recently adopted the equidistance principle for the delimitation of her continental shelf boundaries, although she is not a party to the Convention (23 October 1967 "Projet de Loi", Art. 2).

It is not certain that before 1958 the equidistance principle existed as a rule of customary international law, and was as such incorporated in Article 6, paragraph 2, of the Convention, but it is certain that equidistance in its median line form has long been known in international law for drawing the boundary lines in sea, lake or river, that, therefore, it is not the simple invention of the experts of the International Law Commission and that this rule has finally acquired the status of customary international law accelerated by the legislative function of the Geneva Convention.

The formation of a customary law in a given society, be it municipal or international, is a complex psychological and sociological process, and therefore, it is not an easy matter to decide. The first factor of customary law, which can be called its *corpus*, constitutes a usage or a continuous repetition of the same kind of acts; in customary international law State practice is required. It represents a quantitative factor of customary law. The second factor of customary law, which can be called its *animus*, constitutes *opinio juris sive necessitatis* by which a simple usage can be transformed into a custom with the binding power. It represents a qualitative factor of customary law.

To decide whether these two factors in the formative process of a customary law exist or not, is a delicate and difficult matter. The repetition, the number of examples of State practice, the duration of time required for the generation of customary law cannot be mathematically and uniformly decided. Each fact requires to be evaluated relatively according to the different occasions and circumstances. Nor is the situation the same in different fields of law such as family law, property law, commercial law, constitutional law, etc. It cannot be denied that the question of repetition is a matter of quantity; therefore there is no alternative to denying the formation of customary law on the continental shelf in general and the equidistance principle if this requirement of quantity is not fulfilled. What I want to emphasize is that what is impor-

tant in the matter at issue is not the number or figure of ratifications of and accessions to the Convention or of examples of subsequent State practice, but the meaning which they would imply in the particular circumstances. We cannot evaluate the ratification of the Convention by a large maritime country or the State practice represented by its concluding an agreement on the basis of the equidistance principle, as having exactly the same importance as similar acts by a land-locked country which possesses no particular interest in the delimitation of the continental shelf.

Next, so far as the qualitative factor, namely *opinio juris sive necessitatis* is concerned, it is extremely difficult to get evidence of its existence in concrete cases. This factor, relating to internal motivation and being of a psychological nature, cannot be ascertained very easily, particularly when diverse legislative and executive organs of a government participate in an internal process of decision-making in respect of ratification or other State acts. There is no other way than to ascertain the existence of *opinio juris* from the fact of the external existence of a certain custom and its necessity felt in the international community, rather than to seek evidence as to the subjective motives for each example of State practice, which is something which is impossible of achievement.

Therefore, the two factors required for the formation of customary law on matters relating to the delimitation of the continental shelf must not be interpreted too rigidly. The appraisal of factors must be relative to the circumstances and therefore elastic; it requires the teleological approach.

As stated above, the generation of customary law is a sociological process. This process itself develops in a society and does not fail to reflect its characteristic upon the manner of generation of customary law. This is the question of the tempo which has to be considered.

Here can be enumerated some sociological factors which may be deemed to have played a positive role in the speedy formation of customary international law on the subject-matter of the continental shelf, including the principle of equidistance.

First, the existence of the Geneva Convention itself plays an important role in the process of the formation of a customary international law in respect of the principle of equidistance. The Geneva Convention constitutes the terminal point of the first stage in the development of law concerning the continental shelf. It consolidated and systematized principles and rules on this matter although its validity did not extend beyond the States parties to the Convention. Furthermore, the Convention constitutes the starting point of the second stage in the

development of law concerning the continental shelf. It has without doubt provided the necessary support and impetus for the growth of law on this matter.

The coming into existence of the Geneva Convention itself would psychologically and politically facilitate the adherence of non-party States to the Convention or the introduction of the equidistance principle into their practice.

The role played by the existence of a world-wide international organization like the United Nations, its agency the International Law Commission, and their activities generally do not fail to accelerate the rapid formation of a customary law. It is similar to the way in which a customary commercial law speedily evolves from a standard contract drafted by experts of business circles to a universal commercial custom. The Geneva Convention of 1958 on the Continental Shelf, first *lex ex contractu* among the States parties, has been promoted by the subsequent practice of a number of other States through agreements, unilateral acts and acquiescence to the law of the international community which is nothing else but world law or universal law.

Secondly, the legal, scientific and technical, and less political character of the Convention, and the fact that its birth is mainly due to the activities of the International Law Commission composed of highly qualified internationally well-known legal scholars representing the main legal systems of the world in collaboration with a group of experts, would not fail to exercise rapidly a positive influence for the formation of *opinio juris sive necessitatis* in the international community.

Thirdly, the urgent necessity of avoiding international conflict and disorder which may be feared to occur between coastal States in proportion to the rapidly increasing economic necessity of the exploration and exploitation of natural resources in the subsoil of submarine areas, has become a matter of serious preoccupation not only to coastal States, but to the whole international community in which consciousness of solidarity is more than ever intensified.

Fourthly, it can be recognized that the speedy tempo of present international life promoted by highly developed communication and transportation had minimized the importance of the time factor and has made possible the acceleration of the formation of customary international law. What required a hundred years in former days now may require less than ten years.

Fifthly, the circumstance that with regard to the continental shelf, including the equidistance principle, there had been no legal system in existence, either written or customary law, and that therefore a legal vacuum had existed, has certainly facilitated the realization of the Geneva Convention on the Continental Shelf and customary law on the

same matter. Similar circumstances can be recognized in the fields of air law and space law.

In short, the process of generation of a customary law is relative in its manner according to the different fields of law, as I have indicated above. The time factor, namely the duration of custom, is relative; the same with factor of number, namely State practice. Not only must each factor generating a customary law be appraised according to the occasion and circumstances, but the formation as a whole must be considered as an organic and dynamic process. We must not scrutinize formalistically the conditions required for customary law and forget the social necessity, namely the importance of the aims and purposes to be realized by the customary law in question.

The attitude which one takes vis-à-vis customary international law has been influenced by one's view on international law or legal philosophy in general. Those who belong to the school of positivism and voluntarism wish to seek the explanation of the binding power of international law in the sovereign will of States, and consequently, their attitude in recognizing the evidence of customary law is rigid and formalistic. On the other hand, those who advocate the objective existence of law apart from the will of States, are inclined to take a more liberal and elastic attitude in recognizing the formation of a customary law attributing more importance to the evaluation of the content of law than to the process of its formation. I wish to share the latter view. The reason for that is derived from the essence of law, namely that law, being an objective order vis-à-vis those who are subject to it, and governing above them, does not constitute their "auto-limitation" (Jellinek), even in the case of international law, in which the sovereign will of States plays an extremely important role.

In this context, I venture to quote the statements of two eminent writers which appear to be valuable for the affirmative conclusion on the formation of customary international law concerning the matter of the continental shelf.

J. L. Brierly, in *The Law of Nations*, 6th edition, 1963, page 62:

> "The growth of a new custom is always a slow process, and the character of international society makes it particularly slow in the international sphere. The progress of the law therefore has come to be more and more bound up with that of the law-making treaty. But it is possible even today for new customs to develop and to win acceptance as law when the need is sufficiently clear and urgent. A striking recent illustration of this is the rapid development of the principle of sovereignty over the air."

D. P. O'Connell, in *International Law*, I, 1965, pages 20-21:

> "Much of the traditional discussion of customary law suffers from the rigidity and narrow-mindedness of nineteenth-century positivism, which was itself the product of a static conception of society. The emphasis that the positivist places on the will of the State over-formalises the law and obscures its basic evolutionary tendency. He looks to positive practice without possessing the criteria for evaluating it, and hence is powerless to explain the mystical process of *lex ferenda*, which he is compelled to distinguish sharply, and improperly, from *lex lata* . . ."

III

In the event that the customary law character of the principle of equidistance cannot be proved, there exists another reason which seems more cogent for recognizing this character. That is the deduction of the necessity of this principle from the fundamental concept of the continental shelf.

The starting point is the concept of the continental shelf. This concept is clearly expressed in Articles 1-3 of the Geneva Convention.

Before we examine this concept, we shall clarify its nature, namely its customary law character.

There is no doubt that Articles 1-3, which constitute the fundamental concept of the continental shelf, are mainly formulated on the basis of the State practice established since President Truman's Proclamation of September 1945, and that, accordingly, they have the character of customary law. Therefore, even those States which have not ratified or acceded to the Convention could not deny the validity of these provisions against them. Denying the principles enunciated in Articles 1-3 would deprive the non-contracting States of the basis of all rights over their continental shelves.

The fundamental principle upon which the institution of the continental shelf is based constitutes the recognition of the sovereign rights of the coastal State for the purpose of its exploration and the exploitation of its natural resources (Article 2, paragraph 1, of the Convention). These sovereign rights are exclusive in the sense that if the coastal State does not explore 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 (Article 2, paragraph 2, of the Convention). These rights of the coastal State do not depend on occupation, effective or notional, or on any express proclamation (Article 2, paragraph 3, of the Convention).

The fact that the coastal State exercises over the continental shelf exclusive sovereign rights, and that these rights do not depend on oc-

cupation or any express proclamation, explains eloquently the legal status of the continental shelf as an institution. First, the continental shelf does not constitute *res nullius* which is susceptible of occupation by any State—not only an adjacent coastal State but any other State. Next, the continental shelf does not constitute a *res communis* of the coastal States which must be jointly exploited or divided by them. The continental shelf belongs exclusively to the coastal State according to the principle fixed by law which gives the definition of the continental shelf. According to Article 1 of the Convention, the term "continental shelf" is used as referring to the seabed and subsoil of the submarine areas adjacent to the coast. By this provision the law prescribes the only condition for a coastal State to be able to have sovereign rights over the continental shelf. This condition is of a geographical nature; the existence of the relationship of adjacency between the continental shelf and the coastal State is required.

The criterion of adjacency—or proximity, propinquity, contiguity—seems a most reasonable one if one adopts the principle of the sovereign rights of the coastal State, excluding the régime of *res nullius* or *res communis*. The idea that the continental shelf constitutes the natural continuation or extension of the coastal State is most natural and reasonable from the geographical and economic viewpoints.

The principle which governs the delimitation of the continental shelf and which is provided for in Article 6 is the corollary of the concept declared in Articles 1 and 2. The present cases are related to Article 6, paragraph 2. This stipulates:

> "In the absence of agreement, and unless another boundary line 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 of each State is measured."

The equidistance principle which is incorporated in Article 6, paragraph 2, flows from the fundamental concept of the continental shelf as the logical conclusion on the matter of the delimitation of the continental shelf. The equidistance principle is integrated in the concept of the continental shelf. The former is inherent in the latter, being inseparably connected with it. Therefore, if the law of the continental shelf were devoid of the provision concerning delimitation by means of the equidistance principle, satisfactory functioning of the institution of the continental shelf could not be expected.

The Federal Republic denies the opposability of the Geneva Convention as a whole, and consequently denies the opposability of its part, namely Article 6, paragraph 2. However, the Federal Republic has not the slightest doubt that she exercises sovereign rights over the continental shelf of the disputed area. But on what title can she exercise such rights?

There should be no other possibility of justification other than by customary law on the matter of the continental shelf. And indeed she recognizes the applicability of Articles 1-3 of the Geneva Convention vis-à-vis herself on a customary law basis. Can the Federal Republic deny the application of Article 6, paragraph 2, concerning the delimitation of the continental shelf which she claims as her own? The answer is in the negative.

The viewpoint of the Federal Republic is to consider the question of delimitation separately from the fundamental concept of the continental shelf. However, the rule with regard to delimitation by means of the equidistance principle constitutes an integral part of the continental shelf as a legal institution of teleological construction. For the existence of the continental shelf as a legal institution presupposes delimitation between the adjacent continental shelves of coastal States. The delimitation itself is a logical consequence of the concept of the continental shelf that coastal States exercise sovereign rights over their own continental shelves. Next, the equidistance principle constitutes the method which is the result of the principle of proximity or natural continuation of land territory, which is inseparable from the concept of continental shelf. Delimitation itself and delimitation by the equidistance principle serve to realize the aims and purposes of the continental shelf as a legal institution. The Federal Republic, in so far as she insists upon her rights on the continental shelf, cannot deny the application of its delimitation by means of the equidistance principle. As I have said above, the equidistance principle provided for in Article 6, paragraph 2, of the Convention, is inherent in the concept of the continental shelf, in the sense that without this provision the institution as a whole cannot attain its own end.

The doctrine that the equidistance principle is inherent in the institution of the continental shelf would certainly make a highly controversial impression. However, even if Article 6, paragraph 2, did not exist or is not opposable to the Federal Republic, the interpretation of Articles 1-3 would produce the same conclusion. Customary law, being vague and containing gaps compared with written law, requires precision and completion about its content. This task, in its nature being interpretative, would be incumbent upon the Court.

The method of logical and teleological interpretation can be applied in the case of customary law as in the case of written law. Even if the Federal Republic recognizes the customary law character of only the fundamental concept incorporated in Articles 1-3 of the Convention, and denies it in respect of other matters, she cannot escape from the application of what is derived as a logical conclusion from the fundamental concept,—a conclusion which, in respect of the delimitation of the continental shelf, would reach the same result as Article 6, paragraph 2, of the Convention.

* * *

The Federal Republic, referring to the right of the States parties to the Convention to make reservations to articles other than to Articles 1-3 (Article 12 of the Convention), argues in favour of the non-applicability *a fortiori* of Article 6 to the Federal Republic, which is not a State party to the Convention. This question has been very extensively discussed. However, if a reservation were concerned with the equidistance principle, it would not necessarily have a negative effect upon the formation of customary international law, because in this case the reservation would in itself be null and void as contrary to an essential principle of the continental shelf institution which must be recognized as *jus cogens*. It is certain that this institution cannot properly function without being completed by some method of delimitation provided by law. It is obvious that a State party to the Convention cannot exclude by reservation the application of the provision for settlement by agreement, since this is required by general international law, notwithstanding the fact that Article 12 of the Convention does not expressly exclude Article 6, paragraphs 1 and 2, from the exercise of the reservation faculty. The possibility of reservation could apply to the application of the special-circumstances clause, but not to that of the equidistance principle, which, as indicated above, constitutes an integral part of the continental shelf régime. In short, a reservation to Article 6, paragraph 2, so far as the application of the equidistance principle is concerned, is not permissible, because it would produce a legal vacuum and thus prevent normal functioning of the institution of the continental shelf.

The Danish and Netherlands Governments have sought to establish their claim to apply the equidistance principle either by way of the applicability of Article 6, paragraph 2, of the Convention, or by way of direct inference from the fundamental concept of the continental shelf which is supposed to be inherent in Articles 1 and 2 of the Convention.

For the reasons mentioned above, the contention of the Danish and Netherlands Governments as to the customary law character of the equidistance rule applicable to non-contracting States of the Convention, including the Federal Republic, is well-founded.

The equidistance principle provides a method of delimiting the continental shelf which must be deemed most practical and appropriate. Specifically, concerning a boundary matter, it is desirable that the method be objective and clear. This is the requirement from the standpoint of the international community's need for certainty.

In this connection I would like to make some observations on the logical relationship between law and technique for the purpose of considering the nature of the equidistance rule.

We have before us a technical norm of a geometrical nature, which is called the equidistance rule, and may serve a geographical purpose. This norm, being in itself of a technical nature, constitutes a norm of

expediency which is of an optional, i.e., not obligatory character, and the non-observation of which does not produce any further effect than failure to achieve the result it would have rendered possible. This technical norm of a geometrical nature can be used as a method for delimiting the continental shelf. The legislator, being aware of the utility of this method for legal purposes, has adopted it as the content of a legal norm.

Thus the equidistance method as a simple technique is embodied in law, whether in Article 6, paragraph 2, of the Geneva Convention or in corresponding customary international law. By being submitted to a juridical evaluation and invested with the character of a legal norm, it has acquired an obligatory force which it did not have as a simple technical norm.

The incorporation of the equidistance rule as a geometrical technique into a legal norm exemplifies an extremely widespread phenomenon which can be observed in regard to several kinds of extra-legal, social and cultural norms and in such fields as usage, ethics and technique which has drawn the attention of Professor Gustav Radbruch, who characterizes it as the investing of one and the same material with a dual axiological character (*Umkleidung desselben Materials mit doppelten Wertcharakter: Rechtsphilosophie*, 3rd ed., 1932, p. 43). He has also described the same phenomenon as "naturalization". In the case of the equidistance principle, a technical norm of geometrical nature, after being submitted to juridical evaluation has become incorporated or naturalized in law as a legal norm vested with obligatory force.

This distinction between the rule of equidistance as a mere technique and as a norm of law is very important in relation to the correct discharge by the Court of the task laid upon it by the Special Agreements.

In the present context, I would like to add that there is a wider possibility of applying scientifico-technical methods to the delimitation of territorial sea and continental shelf areas than in the case of frontier-demarcation on land. This is because in the former the particular and individual features in the historical, ethnological, social and cultural sense, which are usually to be found in the latter, do not exist. Here technique can have full play, as in the case of the delimitation and division of newly discovered and uninhabited territories, which permit of automatic demarcation by the drawing of geometrical lines.

Therefore technique, particularly geometrical technique, can have particular importance for the delimitation of the territorial sea and continental shelf. It is understandable that in the maritime field the relation between law and techniques should be more intimate than in the field of the delimitation of land territory, that elements of uniformity and abstraction should be prevalent, and that the role of technique utilized by law should be an outstanding one.

In short, law can be more consistent with its idea of objectivity and certainty in maritime international law than in other fields of law.

The following opinion of Lord McNair in the *Fisheries* case (*I.C.J. Reports 1951*, p. 161) may be appropriately cited in justification of the applicability of the equidistance principle in the present cases:

> "The method of delimiting territorial waters is an objective one and, while the coastal State is free to make minor adjustments in its maritime frontier when required in the interests of clarity and its practical object, it is not authorized by the law to manipulate its maritime frontier in order to give effect to its economic and other social interests. There is an overwhelming consensus of opinion amongst maritime States to the effect that the baseline of territorial waters, . . . is a line which follows the coastline along low-water mark and not a series of imaginary lines drawn by the coastal State for the purpose of giving effect, even within reasonable limits, to its economic and other social interests and to other subjective factors."

IV

Article 6, paragraph 2, of the Geneva Convention provides:

> "2. Where the same continental shelf is adjacent to the territories of two adjacent States, the boundary of the continental shelf shall be determined by agreement between them. In the absence of agreement, and unless another boundary line 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 of each State is measured."

This provision determines the application of the equidistance principle. However, this application is not absolute and immediate. It presupposes the existence of two negative conditions: namely the absence of agreement and the absence of special circumstances. The one is of a procedural, the other of a substantive nature.

The boundary of the continental shelf shall in the first place be determined by agreement between the two States before recourse to other means. The principle thus recognized by the said provision is fully in the spirit of the Charter of the United Nations, Article 33 (1) of which lays down that "the parties to any dispute . . . shall, first of all, seek a solution by negotiation", it is also appropriate from the psychological and political viewpoint. Besides, the validity of an agreement concerning delimitation as between two States can be justified on the ground that the interests involved are of a disposable nature between them.

For the settlement of a dispute on delimitation, therefore, the régime of the continental shelf requires, as a necessary step for the application of the principle of equidistance, an agreement between the parties to the dispute. This agreement must be preceded by negotiations.

This requirement is evident. If we adhere too closely to the wording of the Article, the conclusion would be that the simple fact of the non-existence of agreement would always authorize the application of the equidistance principle. But this mere parsing of the words is surely insufficient to elicit the real meaning of the provision. It is a precondition that genuine negotiations must have taken place and that, notwithstanding, no agreement was reached.

Regarding the present cases, no difference of view appears to exist concerning the above-mentioned interpretation of the phrase "in the *absence* of agreement" and the prior holding of effective negotiation between the States concerned.

The second condition for the application of the equidistance principle is the absence of special circumstances justifying another boundary line.

The *raison d'être* of this provision is that the mechanical application of the equidistance principle would sometimes produce an unpalatable result for a State concerned. Hence the necessity of supplementing the prescription of the equidistance principle with a clause that provides for special circumstances and constitutes an exception to the main principle of equidistance.

It is argued on behalf of the Federal Republic that the special-circumstances clause does not constitute an exception to the principle of equidistance, but that these two rules are valid on an equal footing, so that the equidistance principle has no priority over the special-circumstances clause. However, it may be submitted that it could not have been the intention of the legislator to leave the matter in a legal vacuum, to be decided by the nebulous criteria of justice and equitableness, but that, to ensure certainty and stability, he would have prescribed some precise rule to be applied in principle for so long as the existence of exceptional circumstances did not exclude its application.

It follows from the foregoing that the condition of the non-existence of special circumstances for the application of the equidistance principle has quite a different significance from that of the condition of the absence of agreement. The latter condition is a *sine qua non* for the application; therefore the absence of agreement despite genuine negotiations must be proved by the party wanting to rely on the equidistance principle; it is not, on the contrary, necessary that such party prove the former condition, namely the non-existence of special circumstances, because the equidistance principle is available to immediately and automatically fill the gap produced by the absence of agreement.

From what is stated above, the limit and scope of the application of the special-circumstances clause should be apparent. The Federal Republic,

minimizing the significance of the equidistance principle, advocates a broad interpretation of this clause, covering the case where a so-called "macrogeographical" configuration would give rise, on the equidistance basis, to an unjust and inequitable apportionment. On the other hand, it is argued on behalf of the two Kingdoms that the application of this clause should be limited to such cases as the existence of insignificant islands, promontories, etc., which should be ignored in drawing the equidistance line. This view seems well-founded. The clause does not constitute an independent principle which can replace equidistance, but it means the adaptation of this principle to concrete circumstances. If for the foregoing reasons the exceptional nature of this clause is admitted, the logical consequence would be its strict interpretation. *Exceptiones sunt strictissimae interpretationis.* Accordingly, the configuration of the German coastline which by application of the two equidistance lines would produce unsatisfactory consequences for the Federal Republic, cannot be recognized as special circumstances within the meaning of Article 6, paragraph 2, of the Convention.

It is maintained on behalf of the Federal Republic, from the viewpoint of just and equitable apportionment on which her arguments are based, that the special circumstances clause constitutes an expression of the just and equitable principle, and it is sought to deny the relationship of major principle and exception existing between the equidistance principle and the special circumstances clause.

It is certain that the equidistance principle, being of a technical nature, does not possess in itself a moral qualification such as justness or equitableness. However, when this principle was incorporated in the Convention as a legal norm, it must have been the intention of the legislator that in ordinary cases the automatic application of this principle would bring a just and equitable result. Accordingly, it would not be very far from the truth if we say that the consideration of just and equitable apportionment is inherent in the equidistance principle. But this does not mean that there is no need of an exception which constitutes the special circumstances clause.

The special circumstances clause presents itself as a manifestation of the same spirit of the main principle. This clause implies some degree of correction or, as I have said above, adaptation intended to attain what is really sought by the equidistance principle. The special circumstances clause, therefore, does not abolish or overrule the main principle, but is intended to make its functioning more perfect.

In short, the special circumstances clause in Article 6, paragraph 2, second sentence, does not signify an independent principle which may compete with the equidistance principle on an equal footing, but constitutes an exception recognized in concrete cases to correct the possible harsh effect which may be produced by the automatic application of the equidistance method. This conclusion is clear from the wording of Article 6,

paragraph 2, second sentence which provides ". . . and *unless* another line is justified by special circumstances". [Italics added.] This only means correction in special, individual cases by drawing another *line* and not the substitution of another *principle* in place of the equidistance principle.

V

If what has been said above is correct, and the equidistance principle is, on a customary law basis, binding vis-à-vis the Federal Republic, this is the end of the matter and there would be no need to examine certain other questions which were energetically discussed during the course of the written and oral proceedings. Among these questions, two must be considered. The first question is concerned with the alternatives of delimitation and just and equitable apportionment or share. The second question is concerned with the indivisibility of the two cases before the Court and the combined effect of the two Danish-German and German-Netherlands boundary lines.

Although to answer these questions is not absolutely necessary for the purpose of deciding the present cases, I consider it to be significant to deal with them, because they are fundamentally related with the German contention that the application of the equidistance principle should be replaced by just and equitable apportionment in the present cases and therefore their consideration assists in the understanding of the intrinsic value of the equidistance principle.

First, we shall consider the question of whether the present cases are concerned with the question of delimitation or that of just and equitable apportionment.

The two Kingdoms take their stand on delimitation by the equidistance principle. The Government of the Federal Republic on the other hand, advocates the principle of just and equitable apportionment.

As we have seen above, delimitation by the equidistance principle constitutes a logical conclusion derived from the fundamental concept of the continental shelf provided in Articles 1-3 of the Geneva Convention. It is aimed at the delimitation, namely the drawing of a boundary line, between the continental shelves already belonging to two States, and not to division.

It can be said that delimitation constitutes an act of a bilateral nature. If more than two States are interested in the same continental shelf and participate in the common negotiation, the solution must be not of a multilateral nature but of a bilateral nature, namely a combination of bilateral relationships.

Consequently, the delimitation is individualistic in the sense that it is made between two parties without regard to a third party. If it is carried out by the application of the equidistance principle, delimitation would be effected in an automatic and neutral way in so far as special circumstances do not exist.

On the other hand, the alleged principle of just and equitable apportionment which is contended for on behalf of the Federal Republic seems to be collectivistic. It implies the concept that delimitation is not demarcation of two sovereign spheres already belonging to two different States, but an act of division, or sharing among more than two States of *res nullius* or *res communis*. Therefore, the concept of apportionment is necessarily constitutive and multilateral. It requires some criteria for the purpose of the apportionment of the continental shelf among the States concerned. It can be said abstractly that the apportionment should be just and equitable; however, it is not easy to demonstrate in what way apportionment is, under given circumstances, in conformity with justice and equitableness.

That the present cases are not concerned with the apportionment of the continental shelf but its delimitation, is derived from the fundamental concept of the continental shelf. Besides, the Special Agreements request from the Court a decision on the principles and rules of international law applicable to *delimitation* and not to apportionment.

The Judgment of the Court is right in rejecting the argument of the Federal Republic which maintains the viewpoint of apportionment and not delimitation.

It is to be noted that the Federal Republic complains of the unjust and inequitable consequences of delimitation by the equidistance principle applied to the present cases; she does not limit herself to the correction of the alleged injustice and inequitableness resulting from such delimitation, but puts forward a quite new claim for just and equitable apportionment, which belongs to an entirely different concept from delimitation, as I have indicated above.

First, it is necessary to examine whether the application of the equidistance principle to the present cases would really produce injustice and inequitableness at the expense of the Federal Republic, as she argues.

What are the reasons why the application of the equidistance principle would result in an inequitable effect on the German part in the delimitation of the continental shelf in the North Sea and why is the Federal Republic opposing the application of this principle to the present cases?

The reasons may be summarized as follows:

First: The German part of the continental shelf would be reduced, by the effect of the two equidistance lines, to a small fraction of the whole North Sea area, not corresponding to the extent of its contact with the North Sea (Memorial, p. 73, figure 18).

Secondly: 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 (Reply, p. 430, figure 5).

Thirdly: The 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 would be

out of proportion to the breadth of their respective coastal front facing the North Sea (Hearing of 23 October 1968). The shares of the Federal Republic, Denmark and the Netherlands would be in the ratio 6:9:9 respectively if they are measured by the breadth of contact of the coast with the sea—the country's coastal frontage (Memorial, para. 78, p. 77).

Are these reasons put forward on behalf of the Federal Republic well-founded?

I consider that the German contention is a simple assertion without foundation because the German part constitutes a consequence of the natural configuration (concavity) of the coastline, namely the rectangular bend in the Danish-German-Netherlands coastline that causes both equidistance lines to meet before the German coast thereby limiting the German share.

Furthermore, such a geographical configuration cannot be considered as causing this case to constitute an example of the application of the special-circumstances clause provided in Article 6, paragraph 2, of the Convention.

Examples are not lacking of a large State, because of being given too small a window on the open sea as a result of a special geographic configuration, getting a very small portion of the continental shelf quite disproportionate to its large land territory (for instance, Syria, Congo, Guatemala, Romania). (Sketch map E, submitted by the Agent for Denmark, Hearing of 7 November 1968.)

Moreover, the alleged proportionate smallness of the German part compared with the Danish or the Netherlands part is not to be considered as the result of the two equidistance lines only, but is caused by other factors: relations on the one hand between Denmark and Norway (Agreement of 8 December 1965), and on the other hand between the Netherlands, Belgium (*Projet de Loi* of 23 October 1967, Article 2 determining Belgium's boundary with the United Kingdon and France and the Netherlands), and the United Kingdom (Agreement of 6 October 1965). The treaties on the delimitation of the continental shelf between these States are not concerned with the present cases. Accordingly what seems to make the Danish and the Netherlands parts bigger in comparison with the German part largely comes from elsewhere, not at the cost of German sacrifice.

For the above-indicated reasons, the contention on behalf of the Federal Republic that the application of the equidistance principle to the delimitation of the continental shelf in the present cases produces injustice and inequitableness, is not, I consider, well-founded.

The Federal Republic however, on the hypothesis that delimitation on the basis of the equidistance principle is unjust and inequitable, put forward a contention for the replacement of this principle. This is the idea of just and equitable apportionment or sharing.

It is not clear whether the Federal Republic presses this idea consistently or whether she would be satisfied simply to replace the equidistance principle by some other methods. At any rate, she proposes first the so-called coastal frontage, namely a straight baseline between the extreme points at either end of the coast concerned, taking into account the special configuration of the German coast. Then the sector principle is proposed in consideration of the particularity of the North Sea.

It seems that these proposals are intended indirectly or directly to realize the principle of just and equitable apportionment. However, so far as the coastal frontage is concerned, this imaginary line cannot be recognized as a basis for the delimitation of the continental shelf of the States concerned, the sea area being unable to be treated identically with a solid land-mass from the concept of the continental shelf, namely the natural prolongation or continuation of the land territory of the coastal State. So far as the sector principle is concerned, this idea seems directly derived from the principle of just and equitable apportionment, and involves the re-examination and rewriting of boundary agreements on the continental shelf of the North Sea, not only between the States parties to the present cases but between them and third States. Such consequences cannot be tolerated.

The standpoint which conceives the delimitation of the continental shelf as a bilateral relationship independent of the relationship with a third State and recognizes the effect thereof, may certainly be exposed to the criticism that it would result in *prior in tempore, potior in jure*. Of course every agreement between States on boundary matters must be in conformity with international law, therefore it cannot infringe the rights of a third party. However, since boundary demarcation of the continental shelf can be made by bilateral agreement, there is no reason to deny that the agreements concluded between Denmark or the Netherlands and a third State, or between third States on matters of delimitation of the continental shelf in the North Sea should be *prima facie* valid *erga omnes*. For the sake of the security of the international legal order, the situation must be avoided whereby the validity of an earlier agreement might be questioned because it would produce an unsatisfactory effect from the point of view of a third party effecting a subsequent act. Such unsatisfactory effect must be tolerated so far as the present system of delimitation of the continental shelf is based on the principle of the priority of agreement by negotiations on this matter (Article 6, paragraphs 1 and 2).

In the event of the principle of just and equitable apportionment instead of the delimitation by the equidistance principle being applied, what would be the criteria for dividing the continental shelf among the coastal States of the North Sea? Besides the above-mentioned principles of the coastal frontage and sector many other factors could enter into consideration, for instance, length of the coastline, continuation of the land frontier, vertical line drawn on the general direction of the coastline

proportion of size of land territories of the States concerned, etc. Finally the distribution of subsoil natural resources and the unity of the deposit might also become an important factor for consideration. The reconsideration and rewriting of the existing continental shelf boundary lines between the North Sea States are a very complicated matter. It is the same with the three States Parties to the present cases. Consequently, the application of the principle of equidistance can be highly appreciated even from the standpoint of its negative function, namely the avoidance of complications which might be produced by the introduction of the idea of apportionment.

For the above-mentioned reasons, the German contention that the delimitation of the continental shelf between the Parties in the North Sea should be governed by the principle of just and equitable apportionment is not well-founded.

From what is said above, the following questions, which presuppose the application of just and equitable apportionment or at least the just and equitable principle, are to be set aside from the examination as irrelevant for the purpose of deciding the present cases:

(a) Questions which are concerned with the boundary agreements on the continental shelf concluded between Denmark or the Netherlands and a third State, i.e., the United Kingdom or Norway.

(b) Questions which are concerned with the validity of the boundary agreement on the continental shelf between Denmark and the Netherlands.

(c) Questions which are concerned with the details of the definition of the continental shelf, and its outer limits.

(d) Questions which are concerned with the particularity of the North Sea continental shelf.

(e) Questions which are concerned with the nature and the location of natural resources of the seabed and subsoil of the North Sea.

(f) Questions which are concerned with the joint exploitation of a deposit situated on both sides of the boundary of the States concerned.

VI

The second question which is now to be considered is related to the indivisibility of the two cases before the Court and the combined effect of the two Danish-German and German-Netherlands boundary lines, or whether the two cases should be considered separately.

First, it must be noted that this question is essentially linked with the foregoing one, namely the question of delimitation as against just and equitable apportionment. If the answer to the latter question is in favour of delimitation, the answer to the former must be the recognition of the divisibility of the two cases. If the answer to the latter is in favour of the apportionment, the answer to the former must be the recognition of the combined effect.

It is evident that two cases are pending before the Court: one between Denmark and the Federal Republic and the other between the Federal Republic and the Netherlands. They are concerned with different areas of the North Sea continental shelf. They were brought before the Court simultaneously but by separate Special Agreements. However, the questions at issue in these cases are legally identical, and Denmark and the Netherlands are in the same interest. That is the reason that the Court ordered (26 April 1968), in implementation of the tripartite Protocol, the joinder of the proceedings in the two cases and the appointment of one Judge *ad hoc* by the Governments of Denmark and of the Netherlands.

But the joinder of the two cases from the viewpoint of procedural expediency does not imply that there is from the substantive viewpoint one case instead of two cases. There is not one and the same case as occurred with the *South West Africa* cases.

In reality the two cases with which the Court has to deal are concerned with two different boundary lines, namely the Dano-German and the German-Netherlands lines. The result of this is that, in dealing with the merits of the two cases, the Court should not take into consideration the simultaneous existence and mutual relationship or "combined effect" of the two lines which from a procedural point of view does not exist.

Nevertheless, the arguments on behalf of the Federal Republic, which constitute the contention of unjustness and inequitableness, are based on the doctrine of the combined effect. What the Federal Republic complains of is concerned with an area which is delimited by the two equidistance lines and which seems to be unsatisfactory to her.

We must pay attention to the fact that there was no necessity for simultaneous presentation of the two cases to the Court. If the two Governments could have foreseen that their procedural co-operation might produce, by reason of the "combined effect", an unfavourable result, they would have preferred to adopt the procedure of postponing for some years the presentation of one case to the Court or presenting the two cases with some interval between them.

For the reasons mentioned above, the two cases must not be considered, from a substantive viewpoint, as one and the same case, but be conceived as separate and independent ones.

VII

One of the issues which I consider as important is concerned with the hierarchical relationship between two kinds of legal norms, namely that between natural law and positive law. It may be worth while to draw the attention of students of law to the fact that this time-honoured academic theme has found its way into the written pleadings and oral arguments as a contention on behalf of the Federal Republic.

The Federal Republic denied, in the first place, the opposability of the equidistance principle incorporated in Article 6, paragraph 2. Next she sought to deny also its character as customary international law. Finally, she tried to attain the same effect from legal-philosophical considerations concerning the two kinds of norms: natural law and positive law.

According to the contention of behalf of the Federal Republic, the application of Article 6, paragraph 2, of the Convention, which incorporates the equidistance principle, should be subordinated to a higher norm of law which is nothing but the principle of just and equitable apportionment deriving from the idea of "distributive justice" *(justitia distributiva)* (Memorial, para. 30, p. 30), "the general principles of law recognized by civilized nations" (Article 38, paragraph 1 *(c)*) and the so-called natural law of nations (Hearing of 5 November 1968).

Briefly, the Federal Republic seems to deny the application of Article 6, paragraph 2, of the Convention for the reason that this would produce a harsh effect and insists that the norm of just and equitable apportionment be applied overruling the equidistance principle. This contention reminds us of an appeal to the mitigating role of equity versus common law in English law. In the present cases the Federal Republic appeals to the corrective or complementary function of natural law with regard to positive law.

However, from the viewpoint of traditional natural law doctrine, the overruling of a positive law rule by a natural law principle does not seem to include such issue in question. Natural law does not venture to interfere with positive law except in the case that positive law rules are manifestly immoral and violate the principles of natural law. Such a case cannot occur in the matter of the equidistance principle. Natural law should not very easily permit the validity of positive law rules to be contested by invoking natural law to the effect that such rules are not in conformity with the idea of justice and equity, and therefore contrary to natural law. It should not open a door to all subjective and arbitrary contentions denying the validity of positive law at the expense of security and expediency. If a positive law rule is supposed to produce a harsh or inconvenient effect, the correct course is not to deny the validity of this rule on account of its unjustness and inequitableness, but to propose its amendment.

In the present cases the application of the equidistance principle produces neither injustice nor inequitableness as is argued on behalf of the Federal Republic. In reality, the question regarding the equidistance principle is concerned with that of expediency, namely what method is more practical and convenient for the purpose of delimitation of the continental shelf and therefore it is of a technical character and not of a character subject to moral evaluation and overruling by a natural law

principle. Of course, the application of the technical rule of equidistance may produce an unjust and inequitable result. The Federal Republic insists on the existence of such a result in the present cases. However, as it has been indicated above, such unjust and inequitable result cannot be recognized in the application of the equidistance principle to the delimitation of the present cases.

Incidentally, one of the three Aristotelean justices, *justitia distributiva* which was referred to on behalf of the Federal Republic, appears to have only very slight association with her cause. *Justitia distributiva* is to govern the relationship between a corporate body and its members, namely the obligation of a corporation versus its members. If we wish to apply some category of *justitia*, it would be the *justitia commutativa* which prevails in the relationships between individual members in a corporate body, because the issue is concerned with justice between individual States in the international community and not an obligation in the international community versus individual States as its members.

In short, the reference by the Federal Republic to natural law or distributive justice as a basis for the principle of just and equitable apportionment does not mean more than asserting the idea: *jus est ars boni et aequi.*

The Federal Republic puts forth an argument, namely the principle of just and equitable delimitation, as an alternative to the principle of just and equitable apportionment for the purpose of denying the exclusive application of the equidistance principle. It seems to me that the difference between the two alternatives is only nominal in the sense that just and equitable delimitation implies in itself the idea of apportionment. We can see it from the fact that in both cases the factors to enter into consideration to achieve justness and equitableness are identical. Therefore, I venture to say that the above-stated reasons denying the principle of just and equitable apportionment advocated on behalf of the Federal Republic can be *mutatis mutandis* applied to the principle of just and equitable delimitation.

In this context we must recall that the Judgment has categorically rejected the principle of just and equitable apportionment. However, so far as the Judgment recognizes the factors to be considered which were put forth by the Federal Republic under the said principle, there is no substantial difference from recognizing that principle itself. The principle of just and equitable delimitation does not mean more than the repetition of the idea of law.

Next the same can be said concerning the Federal Republic's reference to Article 38, paragraph 1 *(c)*, as a basis for the principle of just and equitable apportionment in the sense that this principle being vague and abstract cannot offer any criterion for the decision of the present cases.

The character of "general principles of law" is more notably to be

recognized in the principle of equidistance than in the alleged principle of just and equitable apportionment. I consider that the legislative process of the Geneva Convention and, parallel with it, the formation of customary international law on the matter of the equidistance principle indicate the existence of a principle or method of a technical, therefore universal character on this matter as a common denominator for conventional law and customary law.

My conclusion is that the application of the principle of equidistance is not overruled by the principle of just and equitable apportionment or delimitation. The reference of the Federal Republic to natural law doctrine or the general principles of law is out of place.

* * *

For the reasons indicated above, my conclusion is as follows:

1. The first principle of international law to be applied to the delimitation as between the Parties of the areas of the continental shelf in the North Sea is that of obligation to enter into negotiations with a view to arriving at an agreement as I stated above. Accordingly, I agree on this point with the view of the Court, which is incontrovertible. This conclusion cannot be denied by the fact that the presentation of the two Special Agreements was preceded by detailed negotiations between the Governments of the States Parties. The repeated effort to arrive at agreement by effective negotiation is not excluded at this stage, but is obligatory.

2. The priority of negotiation and agreement is a principle of a procedural nature. A question arises concerning what kind of substantive principle must prevail in the matter of delimitation of the continental shelf: the equidistance principle or the equitable principle?

I regret that, contrary to the Court's decision, I share the view in favour of the equidistance principle instead of the equitable principle for the reasons indicated above. Particularly, I cannot agree with the Court's view of the application of the latter principle to the present cases by the reason that it amounts to the following three points:

First, the Court recognizes that delimitation by the application of the equidistance principle would produce in the present cases an unjust and inequitable effect detrimental to the Federal Republic of Germany, which is not the case, as stated above.

Secondly, on this hypothesis, the Court admits in favour of the Federal Republic an appeal to higher ideas of law such as justice, equity or equitableness, and reasonableness, which are self-evident but which, owing to their general and abstract character, are unable to furnish any

concrete criteria for delimitation in the present cases. Reference to the equitable principle is nothing else but begging the question.

Thirdly, the factors which may be taken into consideration to carry out the equitable principle are of diverse nature and susceptible of different evaluations. Consequently, it appears extremely doubtful whether the negotiations could be expected to achieve a successful result, and more likely that they would engender new complications and chaos.

It may be said that the Court's answer amounts to the suggestion to the Parties that they settle their dispute by negotiations according to *ex aequo et bono* without any indication as to what are the "principles and rules of international law", namely juridical principles and rules vested with obligatory power rather than considerations of expediency—factors or criteria—which are not incorporated in the legal norm and about which the Parties did not request an answer.

It may be said also that the Court seems, by this decision, to be making a legislative consideration on the apportionment of the continental shelf which is not of declaratory but of constitutive nature contrary to the concept of the delimitation and which has been denied by it.

The important matter in connection with the present cases is that the Parties should have a guarantee of being able to terminate the possibly endless repetition of detailed negotiations by the final application of the equidistance principle. Another important matter should be that, the Court by according the equidistance principle the status of a world law would make a contribution to the progressive development of international law.

(Signed) Kotaro TANAKA.