## SEPARATE OPINION OF JUDGE JESSUP

I concur in the Judgment of the Court and especially in its conclusion that the equidistance method or principle is not established as obligatory in international law. It would be possible to emphasize by more detailed quotations how crystal clear it is that neither the International Law Commission nor its Committee of Experts considered that "equidistance" was prescribed by existing law or that it was a concept inherent in the very nature of the continental shelf.

In my opinion, more extended discussion than is to be found in the Judgment of the Court may usefully be devoted to what, in the words of Counsel for Denmark and the Netherlands, are "some of the realities of the 'just and equitable share' in the present cases". At the same time, I agree with the Court that the contentions of the Federal Republic in favour of this concept cannot be accepted in the form given to them.

Although, for reasons which were not fully disclosed, but which may be surmised, the Parties in this case chose to deal obliquely in their pleadings with the actuality of their basic interests in the continental shelf of the North Sea, it is of course obvious that the reason why they are particularly concerned with the delimitation of their respective portions is the known or probable existence of deposits of oil and gas in that seabed.

The North Sea is one of the great historic fishing grounds of the world, but there is no indication in the pleadings of the Parties in this case that, in connection with delimiting the shelf, they were in any way concerned about control over such living organisms as are described in paragraph 4 of Article 2 of the 1958 Convention on the Continental Shelf.

In addition to the Parties in this case, Great Britain and Norway are also actively interested in the exploitation of North Sea oil and gas, but the petroleum industry has not evinced any interest in the area of the continental shelf appertaining to Belgium or to France.

As indicated in the Court's Judgment, a series of seven international bilateral agreements among pairs of the littoral States have plotted lines delimiting portions of the shelf which the Parties consider to be appurtenant to themselves and to each other. In these various areas during the last five years, there has been a steadily increasing activity in the exploration and drilling for oil and gas, although private interests for a time

naturally hesitated to make the very large investments required [1] until the enactment of national laws revealed the terms on which concessions would be granted [2] and until the settlement of disputed national claims to certain areas. The ambivalence which characterized the pleadings of the Parties in regard to the relevance of the mineral resources of the continental shelf will appear from a few passages in both the written and the oral pleadings.

*The Federal Republic of Germany*

The Memorial of the Federal Republic, in Part I, Chapter I, opens with a physical description of the continental shelf of the North Sea. It notes (in section 7):

> "After the discovery of a very rich field of natural gas near Slochteren in the Dutch province of Groningen close to the mouth of the Ems, the first test drillings were made in 1963. Since then a number of finds have been made, including several exploitable deposits of natural gas in the British area . . ."

References are made to various governmental acts of Denmark, the Federal Republic, Great Britain and the Netherlands, relative to future development of these mineral resources (sections 12-15).

As the Memorial (in Chapter I of Part II) begins to develop the legal theory of "the just and equitable share", there is clear reference to natural resources (sections 29 and 30). The emphasis on resources is strengthened in sections 34 and 35 especially by the invocation of the law on the apportionment of the waters of a river basin. In section 48, Judge Hudson is quoted as stating that "the economic value of proven deposits of minerals" should be taken into consideration in the delimitation of the continental shelf. In section 66, one reads:

> "From the point of view of exploitation and control of such submarine areas, the decisive factor is not the nearest point on the

[1] E.g., the cost for a fixed platform in 100 ft. of water has been estimated at $3,500,000; in 500 ft. of water, at $14,250,000. Another estimate is for £6,000 a day during drilling operations. The pipe-line from the productive wells on Leman Bank to the shore terminal in Great Britain, a distance of some 30-40 miles, is said to have cost £7 million to £8 million.

[2] The United Kingdom and German orders, laws or decrees were not in effect until mid-1964 and final Dutch regulations were operative only in 1967. The Federal Republic faced difficulties like those encountered in the United States, that is to say, the respective rights of the Federal Government and of the separate States or Länder.

> coast, but the nearest coastal area or port from which exploitation of the seabed and subsoil can be effected. The distance of an oil, gas or mineral deposit from the nearest point on the coast is irrelevant for practical purposes, even for the laying of a pipe-line, if this point on the coast does not offer any possibilities for setting up a supply base for establishing a drilling station or for the landing of the extracted product."

As the Memorial proceeds to develop the argument about "special circumstances", there are references and quotations to the effect that the location of "indivisible deposits of mineral oil or natural gas" may constitute such circumstances (section 70). These references are repeated in section 79, where it is said that—

> "the literature on the subject attributes relevance also to historical, economic, and technical factors, in particular to the geographical distribution of the mineral resources of the continental shelf and to the maintenance of the unity of their deposits" [1].

It is not wholly clear from the text, however, whether this is the "geographical criterion" to which the Federal Republic would attribute primary importance. However, in the following section, the Memorial, in arguing for the "principle of equality", asserts that all the coastal States of the North Sea are interested, *inter alia*, "in the appropriate exploitation of the mineral deposits of the seabed in order to avoid wasteful or harmful methods of extraction which would lead to despoliation". Here reference is made to the Supplementary Agreement of 14 May 1962 to the German-Netherlands Ems-Dollard Treaty of 8 April 1960, which provides for joint exploitation and sharing of costs and profits in the Ems Estuary [2].

Finally the Memorial, in section 95, at least hints that the Court would be free to indicate that the location of mineral resources may be one of the criteria to be taken into account "in order to achieve a just and equitable apportionment".

In the Reply (section 31) there is a discussion of allegations in the

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[1] The citations could be supplemented by reference to the prestigious authority of Gidel (A/CN. 4/32), by Admiral Mouton's reiteration of his view in his article in *Marineblad*, January 1959 and in his Tehran lectures in October 1959, and by the opinions of Pearcy, Geographer of the United States Department of State and Commander Kennedy (IV Whiteman's *Digest*, 329 and 913).

[2] In 1963 this co-operative arrangement was applied on a fifty-fifty basis to gas wells on the German side of the line near Groothusen and on the Dutch side near Bierum, according to *Petroleum Press Service*, 1963, p. 377 and 1964, p. 332. On the adjacent land areas, there is the great Groningen field in the Netherlands, and the large German resources found between the Netherlands frontier and the Ems and further eastward to the Weser.

Danish Counter-Memorial to the effect that the Federal Republic had been influenced by recently acquired knowledge of the prospects for finding oil and gas in the continental shelf. The Reply asserts that—

> "the German explorations referred to in the Counter-Memorial could not possibly provide the Federal Republic of Germany with reliable information about the existence of oil and gas deposits in the disputed area. Only actual drilling as undertaken in 1967 under a Danish concession, might have resulted in such information."

It is added that "German explorations were stopped on the request of the Danish Government in the disputed area" but that the latter granted drilling concessions there.

*Denmark*

Chapter I of the Danish Counter-Memorial at once draws attention to the interest in mineral resources by leading off in section 7 with a somewhat detailed discussion of explorations and drillings in the North Sea beginning as early as 1963 with the single Danish concessionnaire making its first drillings in 1966. The reader is referred to Annex 7 of the Counter-Memorial which is a memorandum by the Adviser to the Danish Concessionnaire together with a map showing the location of what then (1967) were deemed the most promising locations for wells. The memorandum also called attention to the existence of a ridge extending about 220 kilometres into the North Sea known as the "Fyn-Grindsted High". It is stated that due to its geological structure, this ridge is "considered devoid of hydrocarbon prospects of importance, and . . . consequently reduces the prospective area of Denmark and the Danish North Sea continental shelf considerably". In Chapter II of the Counter-Memorial, sections 14-16 set forth further details concerning exploration and exploitation of oil and gas in the continental shelf area claimed by Denmark, including mention of the 1963 concession to the A. P. Møller Companies. In Chapter II, sections 21 and 22 describe German explorations in the North Sea continental shelf "including the southern part of the Danish shelf area". Reference is made to the Danish protest and assertions which have been mentioned in connection with the Reply of the Federal Republic. It is also remarked that the German proclamation of 1964 concerning the exclusive rights in the continental shelf was probably inspired by press reports that an American company [1] was planning to drill outside the German territorial sea.

[1] Presumably Amoseas.

In sections 31 and 34, which deal with the negotiations between Denmark, the Federal Republic and the Netherlands, reference is made to the German suggestions of possible joint utilization of resources in certain areas, but no opinion is expressed.

Later, in section 49, the Danish Counter-Memorial argues that the German Memorial confuses the question of "space" with the question of "resources" and in this connection rejects the invoked analogy of the waters of a river basin.

In section 125, the Danish Counter-Memorial replies to the point made in section 66 of the German Memorial to the effect that the important coastal point must be one useful in connection with drillings and extractions of minerals. The Counter-Memorial states that—

> "experience shows that, if a deposit is exploited, the nearest points on the coast, even if theretofore unused or scarcely inhabited, may be developed into important elements of support for the exploitation . . .".

In section 149 there is reference to certain bilateral agreements between North Sea States providing for consultation in regard to the exploitation of resources bordering the boundary line [1].

*The Netherlands*

The Counter-Memorial of the Netherlands, like that of Denmark, but in less detail, opens Chapter I with some references to the early drillings in the North Sea. The discussion is expanded in section 11, showing that gravity measurements and seismic explorations had been conducted by Netherlands interests (especially Nederlandse Aardolie Maatschappij —N.A.M.) in the North Sea since 1956. Since 1960 "these activities have been especially concentrated on the northern part and up to the median lines which separate the Netherlands part from the German and Danish parts of the shelf". Between August 1962 and 1966, a total of 24 licences had been granted to about 19 companies or groups of companies representing American, Belgian, British, French, German and Italian interests; these licences "cover all of that part of the continental shelf which comes under the jurisdiction of the Netherlands on the basis of the equidistance principle".

Further licences have been issued since the new Netherlands legislation went into effect in early 1967. Figure 2 on page 315 of the Netherlands

[1] The Special Agreement between the United Kingdom and the Netherlands of 6 October 1965 concerning the exploitation of a single geological structure, is not mentioned.

Counter-Memorial shows the charting of the blocks for which licences are granted.

In section 18, the Counter-Memorial explains that the domestic legislation and international agreements of the Netherlands—

> "take into account the possibility of the presence of single geological structures extending across the dividing line between parts of the continental shelf under the North Sea".

Section 29 refers to the Special Agreement with the Federal Republic concerning co-operative activities in the Ems Estuary where the international frontier "has been disputed for centuries".

As in section 49 of the Danish Counter-Memorial, the Netherlands Counter-Memorial in section 43 replies to the German argument invoking the rules on sharing waters of a river-basin. Similarly, section 119 develops the same argument as that in the Danish Counter-Memorial in section 125, in respect of the relative importance of various points on the coast. Likewise, in section 143, one finds the discussion of special agreements covering situations in which there are "indivisible deposits of mineral oil or natural gas".

The Common Rejoinder of Denmark and the Netherlands adds little to the general picture already presented. But in section 20, where the issue of the distinction between "space" or "area" and "resources" is further developed, it is stated that—

> "there is no necessary connection between the surface of an area and the amount of exploitable resources therein. . . . Indeed the total amount of the natural resources of the area, indicated as the continental shelf beneath the North Sea, is unknown and the same goes for the location of those resources."

In section 21, where there is further rebuttal of the argument based on the use of waters of international rivers, there is the following statement which is not lacking in significance:

> "Surely it is possible that a *single geological structure* extends across a boundary line on the continental shelf, as it is possible that a single geological structure extends across the delimitation lines between concession areas on the part of the continental shelf appertaining to one State. Both municipal legislations and the international practice of States show that the problems arising from such a situation are *not* solved by a modification of the boundaries of the concession area or of the continental shelf as the case may be, but by different methods which do not affect those boundaries. In this connection reference is made to paragraph 18 of the Netherlands Counter-Memorial . . ."

—which deals with consultations in case of imbrications or overlaps. Section 22 argues that the Federal Republic itself renounced basing its claim on the sharing of "resources".

In section 51, it is recalled that in both the Counter-Memorials (Danish, paragraph 88 and Netherlands, paragraph 82) it had been pointed out that there had not been much occasion for States to make treaties concerning lateral boundaries "before the question of exploiting the mineral resources of the seabed and subsoil arose".

It is apparent from the above extracts that the problem of the exploitation of the oil and gas resources of the continental shelf of the North Sea was in the front of the minds of the Parties but that none of them was prepared to base its case squarely on consideration of this factor, preferring to argue on other legal principles which are sometimes advanced with almost academic detachment from realities.

In the oral proceedings, there are a number of statements which are of interest in considering whether the known or probable location of mineral resources is a key factor.

From the side of the Federal Republic, its Agent, in his opening address on 23 October stated flatly:

> "The main consideration that influences State practice in the acquisition and delimitation of continental shelf areas is the idea of getting a share in the potentialities of the continental shelf that have accrued to the coastal States by the progress of modern technology."

All of these various but often ambivalent references to the natural resources of the shelf, considered in the light of the German argument for a "just and equitable share", led one Member of the Court to put the following question to the Agent of the Federal Republic on 25 October:

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

The German Agent replied to this question on 4 November in the following terms:

> "In response to this question I would like to state the following:
>
> First, the criteria to be taken into account in determining what

is a just and equitable share of the continental shelf are primarily, *but not exclusively*, geographical factors. The consideration of other factors and the weight which should be attributed to them depends on their merits under the circumstances of the concrete case.

Secondly, if, as in the North Sea, *there is no reliable information about the actual location of economically exploitable resources of considerable importance*, the geographical situation alone determines the equitable apportionment. Once agreement had been reached on the delimitation of the continental shelf, later knowledge as to the location of such resources should not affect the agreed boundary.

Thirdly, *economically exploitable resources of considerable importance, located in areas where the boundary is disputed or yet undetermined may*, under the principle of the just and equitable share, *be taken into account in determining the allocation of areas to one or the other State. This may be accomplished either by changing the course of the boundary line, or by means of joint exploitation if the latter is feasible. Such a case may arise in particular if the boundary line would cut across a single deposit.* Since there are no such resources in the North Sea, the delimitation of the continental shelf should be made on the basis of the geographical situation, along the lines suggested by the Federal Republic of Germany. (Emphasis supplied).

In this context, I may add that the simplest way to have achieved an equitable apportionment with respect to known or unknown resources would have been to place the areas of the continental shelf of the North Sea situated farther off the coast under a régime of joint control and exploitation. The Federal Republic had advocated such a solution in the earlier stages of the negotiations: since the North Sea States had begun to divide the continental shelf among themselves by boundaries, such a situation seems to be outside the realm of reality. In the present situation, a division by sectors reaching the centre of the North Sea is an effective way to give the Parties an even chance with respect to the potentialities of the continental shelf."

It is difficult to reconcile the statement that "there are no such resources in the North Sea", i.e., where the boundary line would cut across a single deposit, with the statement that "there is no reliable information about the actual location of economically exploitable resources of considerable importance" in the North Sea. Presumably the Agent had in mind only that part of the North Sea which is in dispute in this case.

Subsequently, on the same day, the German Agent made the following comments:

> "If there are several States adjacent to the same continental shelf, this transfer of jurisdiction [to the exclusive jurisdiction of the coastal States] involves a partitioning, among those States, of area, *and the potential resources* therein, which have accrued to the coastal State from the common fund of mankind. The making of such an apportionment implies that the self-evident principle of the just and equitable share must be given effect. The necessary criteria will have to be developed from the concept of the continental shelf and adapted to the situation of the particular case." (Emphasis supplied.)

Then, after further invocation of the rules for the uses of waters of international rivers:

> "As I have . . . pointed out . . . the delimitation of continental shelf areas is in its essence not a mere extension of sovereignty. It is primarily a distribution of submarine areas in which each coastal State is given an exclusive right to exploit the potential resources of those areas. Since the resources of the continental shelf which have to be distributed among several adjacent States are as much limited as are the resources of an international water-basin, the law is in both cases faced with the same problem, namely the equitable distribution of such resources."

The sum total of these comments is somewhat ambiguous when one seeks a direct answer to the question posed by a Member of the Court. Nor is the matter greatly clarified by noting certain remarks of Professor Oda, Counsel for the Federal Republic. On 25 October Professor Oda cited an agreement between Iran and Saudi Arabia concerning a disputed offshore area whereby they did not divide the area—

> "by a median line or another geometrical demarcation but rather by a novel, so-called 'economic' solution. This has been done by dividing all of the 'recoverable oil' in the previously disputed area into two equal parts. Ideas which had been advanced earlier, of dividing the 'oil in place' were discarded. The equal share now relates instead to all 'recoverable oil' contained in the pertinent geological structure."

On the other side, argument for Denmark and the Netherlands did not fail to take account of the realities of the location of resources of oil and gas. On 28 October, the Agent for Denmark made the following statement:

> "At the same time the Danish Government must consider this case as being of the utmost importance. Denmark has so far had no natural resources or riches. In the modern search for oil and gas

> extensive exploration has taken place without positive results, apart from the fact that not very far north of the boundary line in question oil and gas have been found. Even if it is not yet known whether commercial exploitation is possible, the position of the boundary line must be considered as being of the utmost importance."

On 31 October, the Netherlands Agent hinted, as had the Agent for the Federal Republic, at the possibility of certain difficulties being overcome by means other than changing a boundary line, *scilicet*, by joint exploitation. He said:

> "In both cases there may be said to be an element of artificiality in part of the truly equidistant boundary line . . . Furthermore, international law and practice demonstrate that there are other means of solving the problems arising from the artificiality of boundary lines—other means than the drawing of a different boundary line.
>
> In this connection, I may make reference, by way of example, to the United Kingdom/Netherlands Agreement concerning the exploitation of single geological structures overlapping the boundary line."

On 7 November the same Agent, after dealing again with the invocation of the rules governing the use of the waters of international rivers, said that while the Federal Republic relied on those rules—

> "at the same time and on the other hand does not consider the actual or probable location of known or potential resources on or in the continental shelf in the North Sea as one of the criteria for its scheme of so-called equitable apportionment. This, at least [said the Agent] seems to be the upshot of the reply given by the learned Agent of the Federal Republic to one of the questions . . ."

put by a Member of the Court, as described heretofore.

On the last day of the oral proceedings, 11 November, Counsel for Denmark and the Netherlands, in the course of a somewhat satirical discussion of what he called the "macrogeographical" approach, made a somewhat detailed comparison of the economic and particularly of the mineral resources of the three States parties to the case. He noted that the Federal Republic "has been rich in mineral and fuel" whereas, "until recently, the Netherlands had quite minor mineral and fuel resources". Denmark, in turn, "in the past had altogether negligible mineral and fuel resources". He continued to note that the Netherlands in recent years has uncovered "important sources of natural gas and

some crude oil" [1]. As for Denmark, its economic position—

> "might be transformed if oil or natural gas now became available to her in the continental shelf. In this connection the Court was informed, in Chapter I of Part I, and in Annex 7 of the Danish Counter-Memorial, that the quite extensive exploration already carried out indicates that the only areas of promise so far discovered lie just to the north, on the Danish side, of the Danish equidistance boundary. In short, the stretching of the Federal Republic's continental shelf to the so-called centre of the North Sea in the manner demanded by our opponents may well have the result of cutting off Denmark from the one reasonable expectation which she has of acquiring appreciable domestic sources of energy."

All of these observations, Counsel informed the Court, were presented "only to indicate some of the realities of the 'just and equitable share' in the present cases". Finally, he was more dogmatic in asserting that the German Agent's reply to the question from a Member of the Court constituted an agreement that the Court has only to consider "geographical factors"; in other words he was maintaining that despite his own observations on relative wealth of the three States in mineral fuel resources, the Court was not called upon to take such resources in the continental shelf into account if it sought to determine what is a "just and equitable share".

Although the arguments in the pleadings were deflected by the Parties away from outright reliance on the location of hydrocarbons under the North Sea, their bilateral and trilateral negotiations were specifically related to such resources and indicated that more was known about their location than the pleadings indicate [2].

The Government of the Federal Republic made it clear from the outset (that is, in the spring of 1964) that it was primarily interested in reaching an agreement with the Netherlands in the area close to shore so that "the German oil companies will be able to commence drilling operations at the points near the coast in which they are at present mainly interested". (German Docs., No. 8.) The area in question was seaward of the Ems Estuary beyond that part already covered by the 1962 agreement for co-operative exploitation of the mineral resources

[1] The reserves in the Slochteren gas field have been estimated at more than 40 million million cubic feet. It is probably the second or third largest field in the world.

[2] The documents furnished in response to a request from the Court contain only excerpts from the governmental records.

there. Both Governments noted that national legislation had not yet been enacted and that there was danger of an "uncontrolled and hence probably inefficient hunt for oil and gas". But the ultimate reach of the dividing line between the two national areas in the North Sea was always reserved, it being noted that the value of various areas was still unknown. The situation was summarized in a paper dated 10 August 1964, prepared for the Cabinet of the Federal Republic:

> "However, in view of the drilling operations for natural gas started by a German syndicate this summer in the western part of the German Bight, an early settlement of the boundary problem in the coastal area was urgently required. Hence the first step was to agree with the Netherlands on the partial boundary laid down in the present draft treaty; it does not prejudice the further course of the boundary in view of the reservations stated by both Parties in the attached Joint Minutes of the Negotiations of 4 August 1964, and it clarifies the situation in the area near the coast on which the German mineral oil industry sets great hopes in view of the large natural gas deposits found in the Netherlands northern province of Groningen." (German Docs., p. 23.)

The agreement was concluded on 1 December 1964.

From the point of view of the Government of the Federal Republic:

> "As far as can be judged at this stage [6 October 1964], the talks with Denmark will not be of the same economic importance as those with the Netherlands, as so far there are no definite suppositions that any mineral oil and natural gas deposits worth prospecting are to be found in the German-Danish boundary area . . ." (German Docs., p. 26.)

On the Danish side, the concessionnaire, A. P. Møller Companies, Ltd., who worked closely with the Government, shared a view which had been expressed in the Netherlands-German negotiations, namely that the German-Netherlands inshore agreement was due to pressure from the oil companies, and that the German-Danish boundary area held very slight prospects.

According to a Danish Government memorandum dated 17 February 1965:

> "At a meeting held to deal with the question of continuing the

> negotiations with Germany and attended by representatives of the Ministry of Foreign Affairs, the Ministry of Public Works, and the Danish Syndicate which has been granted an exclusive concession to explore and exploit deposits of hydrocarbons in the Danish underground and the continental shelf, the representative of the Syndicate said that it was not actually or concretely interested in having established a Danish-German equidistance line of demarcation in the North Sea area next to the coast, because in view of the results of the explorations made in that area and in view of other information available it was to be assumed that there was only little likelihood of finding deposits of gas or oil there; the Syndicate would not be particularly active there. However, there were appreciably greater possibilities of finding deposits of gas or oil further to the west, i.e. towards the middle of the North Sea in the border regions adjacent to Germany, the Netherlands, and Great Britain. The Syndicate is particularly interested in that area, which area would naturally be lost if the German aspirations were realized." (Danish Docs., p. 6.)

The concessionnaire accordingly hoped that Danish-Netherlands negotiations would begin soon. But the Danish-German inshore agreement was signed on 9 June 1965 and the Danish-Netherlands agreement was not signed until 31 March 1966, after the close of the tripartite negotiations.

It is of course true that there is no rule of international law which requires States surrounding an area such as the North Sea to delimit their respective sections of the continental shelf in such a way as to apportion to each State a "fair share" of the mineral resources on or in that shelf. Such a rule would be impossible of application since it would require as a condition precedent precise knowledge of the location and size or productivity of all parts of the area. Such knowledge is not complete for the North Sea even today, some five years after numerous wildcat operations were undertaken; scientific surveys had begun much earlier, and the Slochteren discovery goes back to 1959. The first British licences for drilling in the North Sea were granted in 1964; the first Dutch licences were issued between 1962 and 1966. The Danish concession was extended to the continental shelf in October 1963 but the first wells spudded in were not commercially exploitable. As already noted, more promising results are now indicated in drillings slightly north of the Danish-German "equidistance" line. In the German sector, 11 or 12 dry holes were drilled in three years, 1964-1967.

If the argument for a "just and equitable share" had been rested on a notion of apportioning natural resources, the counter-argument might have insisted (as indeed it hinted) that resources on the adjacent main-

land or in the bed of the territorial sea must also be taken into account. This would have been disadvantageous to the Federal Republic because of its terrestrial supplies notably between the Dutch frontier and the River Weser.

It has been stated that "the oil industry is strictly international" and in many of the explorations in the continental shelf in the North Sea the interests of one petroleum company are not confined to a single national sector and are frequently blended in a group or consortium which may contain as many as a dozen separate companies. The same drilling rigs, barges or platforms are chartered to operate first in one national sector and then in another.

> "The process of exploring acreage which has already been explored by another company using different ideas and with different hypotheses goes on continually. It frequently happens that significant discoveries of oil and gas are made on acreage which a competitor has given up after completing what he considers an adequate exploration programme." (*North Sea Gas*, [U.K.] Labour Party: Report of the North Sea Study Group (August 1967), p. 15.)

However, the interests of the petroleum companies are, of course, not identical with those of the Governments of the several States. The latter are concerned with the national revenue to be derived from fees, taxes, royalties or profit-sharing, with increases in national productivity, and also with the impact on the national balance of payments if imports of fuels to meet domestic needs are eliminated or reduced by the production of natural gas in the State's portion of the continental shelf.

The Court must assume that the Parties have acted in good faith. This means that Denmark and the Netherlands, in concluding their delimitation agreement on 31 March 1966, believed that their action, which was based on the equidistance method, was justified by existing international law. In my view it would not be equitable to take the position that since the Court has now held that the equidistance method has not been made obligatory by international law, any acts such as the granting of licences or concessions in the areas of the shelf claimed by Denmark or the Netherlands are to be treated as null and void *ab initio*. Rather, I think there should be applied the following conclusion of the Arbitral Tribunal which, in the *Grisbadarna* case, on 23 October 1909, decided the delimitation of a certain part of the maritime frontier between Norway and Sweden:

> ". . . in the law of nations, it is a well established principle that it is necessary to refrain as far as possible from modifying the state of

> things existing in fact and for a long time; . . . that principle has a very particular application when private interests are in question, which, once disregarded, can not be preserved in an effective manner even by any sacrifices of the State, to which those interested belong . . ." (Wilson, *The Hague Arbitration Cases*, 1915, pp. 111, 129).

The Parties to the instant case have in effect recently acted upon this same principle in respecting habitual fishing practices: Fisheries Convention of 9 March 1964, Articles 3 and 4, 581 *United Nations Treaty Series*, pages 58, 60. That Convention provides for a transitional period in which such established rights may be phased out, a provision which would not be suitable in dealing with drilling operations already undertaken. But it may also be noted that while in the *Grisbadarna* case the Tribunal spoke of a state of things "existing . . . for a long time", the Fisheries Convention considers as "habitual", exploitations during a period of ten years. Considering the rapidity of the progress of exploitation in the petroleum industry in the North Sea, no restrictive limit should be placed on the elapsed time. The existence of actual drilling or exploitation in a certain place cannot be considered in the present circumstances to base a title on prescription, or on prior user or occupation; nor is it to be assimilated to "historic title" which is mentioned as a "special circumstance" in Article 12 of the 1958 Convention on the Territorial Sea. Nevertheless, the Parties might well bear in mind a provision in the 1897 treaty between Great Britain and Venezuela which provided that:

> "In determining the boundary line, if territory of one party be found by the tribunal to have been at the date of this treaty in the occupation of the subjects or citizens of the other party, such effect shall be given to such occupation as reason, justice, the principles of international law, and the equities of the case shall, in the opinion of the tribunal, require." (5 Moore, *International Arbitrations*, p. 5018.)

In any event, an agreed delimitation of the continental shelf by the three States in conformity with the Judgment of the Court, would not seem to impinge upon most of the areas which have already proved productive, but would involve an area for wildcatting. In the British sector, the major producing fields, e.g., Leman Bank and Indefatigable Bank, are located south of the 54th degree of latitude and between 2° and 3° E. The West Sole Field and the Hewett Field are even further to the west. All of these lie to the west of the median line between the Federal Republic and Great Britain. The widely heralded, but still unproved, Mobil gas strike in November 1968 in Netherlands Block P-6, is south of the 53rd parallel and therefore not in an area to which the Federal Republic could justly lay claim. The productive locations in the Norwegian sector

are north of the median line between the Federal Republic and Norway. The promising locations in the Danish sector could be involved in a new delimitation of the Federal Republic's portion, and to them the *Grishadarna* principle might, in all equity, be applied. These would seem to be the only locations where exploitation has already produced promising results, within the limits of the sector delineated in the chart No. 6 introduced by the Agent of the Federal Republic on 4 November 1968. This sector is marked by the lines B-F and D-F on map No. 3 which is included in the Judgment of the Court. The Agent of the Federal Republic stated that "the present claim of the Federal Republic of Germany is within the limits of such an equitable sector". He stated that they accepted or acquiesced in the partial boundary lines agreed upon with the Netherlands on 1 December 1964 and with Denmark on 9 June 1965. Accordingly, any possible claim to the shelf north of the Danish line or west of the Netherlands line must be deemed to be relinquished. Moreover, the westernmost point of such a German triangular sector could not justifiably lie to the west of the true median line between the Federal Republic and the United Kingdom, or to the north of the true median line between the Federal Republic and Norway.

However, as the Judgment of the Court points out, there will be areas in which, in accordance with rules and principles indicated by the Court, two States may have equally justifiable claims, or, in other words, areas in which those claims will overlap. As the Court indicates, in such situations the solution may be found in an agreed division of the overlapping areas or in an agreement for joint exploitation "the latter solution appearing particularly appropriate when it is a question of preserving the unity of a deposit" (paragraph 99).

Of the existing North Sea agreements relating to joint exploitation and mentioned in paragraph 97 of the Judgment of the Court, that between the Netherlands and the Federal Republic applying to the Ems Estuary is, as already noted, the most complete example of full cooperation in both exploitation and profit-sharing. The Agreement of 6 October 1965 between the Netherlands and the United Kingdom calls for consultation on the most effective exploitation of overlapping deposits and on "the manner in which the costs and proceeds relating thereto shall be apportioned". If the two Governments fail to reach agreement, the matter is to be referred, at the request of either one, to an arbitrator whose decision is binding. If licensees are involved, their proposals are to be considered by the Governments. The other agreements in general call for consultation with a view to agreement; in the United Kingdom-

Norway Agreement of 10 March 1965 there is again provision for consulting any licensees.

Outside the North Sea, the problem of a deposit extending across a boundary line is dealt with in a similar manner in the Agreement between Italy and Yugoslavia of 8 January 1968 concerning the delimitation of their respective areas of the intervening continental shelf in the Adriatic. In the Persian Gulf, there are examples of agreements for shared exploitation and shared profits at least in the Kuwait-Saudi Arabia Agreement of 7 July 1965, and the Bahrein-Saudi Arabia Agreement of 22 February 1958. An equal division of recoverable oil seems to have been provided for in a recently initialled agreement between Iran and Saudi Arabia which was mentioned by both sides in the oral proceedings.

Most of the North Sea agreements, and the agreement in the Adriatic, specifically relate to a deposit which extends across a boundary line, but the German-Dutch Agreement on the Ems Estuary and agreements in the Persian Gulf provide for joint exploitation or profit-sharing in areas of considerable extent where the national boundaries are undetermined or had been recently agreed upon subject to the provision for joint interests, as particularly in the case of the Partition of the Neutral Zone. Therefore, while, as the Court states, the principle of joint exploitation is particularly appropriate in cases involving the principle of the unity of a deposit, it may have a wider application in agreements reached by the Parties concerning the still undelimited but potentially overlapping areas of the continental shelf which have been in dispute.

Nor is it irrelevant to recall that the principle of international co-operation in the exploitation of a natural resource is well established in other international practice. The Federal Republic invoked the Helsinki Rules of the International Law Association concerning the sharing of the waters of a river basin traversing or bordering more than one State. Whether or not those Rules are the most accurate statement of the existing international law, as to which I express no opinion, there are numerous examples of co-operative use and of sharing of fluvial resources. The history of ocean fisheries is full of examples of co-operative agreements and the Preamble of the 1958 Geneva Convention on Fishing and Conservation of the Living Resources of the High Seas recites—

> ". . . that the nature of the problems involved in the conservation of the living resources of the high seas is such that there is a clear necessity that they be solved, whenever possible, on the basis of international co-operation through the concerted action of all the States concerned . . .".

A striking example of co-operation in the exploitation of a living resource is the Convention between the United States, Canada, Japan and the Soviet Union concerning the fur seals of the North Pacific Oceans; the United States and the Soviet Union harvest the pelts and then share the proceeds with Canada and Japan (cf., 314 *United Nations Treaty Series*, 106).

On land, Austria and Czechoslovakia have agreed upon co-operative exploitation of an oil pool which crosses under the frontier, and as far back as 1866 Bolivia and Chile agreed to divide the produce of the guano deposits in an area where they were defining the common boundary.

Moreover, "Today, the municipal laws of most of the oil-producing nations of the world have passed through the earlier phases of non-regulation and limited co-relative rights and now contain specific provisions requiring co-operative development of a shared petroleum resource pool by all common interest-holders". Many laws require the interested parties to "adopt a unitized plan of development under which competition is now altogether eliminated and co-operation is required on co-ordinating such points as number and spacing of wells tapping the same common source". (Onorato, "Apportionment of an International Petroleum Deposit", 17 *International and Comparative Law Quarterly*, 85 (1958).) The British and Norwegian, and apparently the Dutch regulations all provide for ministerial action to avoid irrational operation when a deposit underlies more than one concession area. Co-operative executive action for a like purpose deals with comparable situations across state borders in the United States. (Morris, "The North Sea Continental Shelf: Oil and Gas Legal Problems", 2 *The International Lawyer*, 191, 210 ff. (1968).)

Clearly, the principle of co-operation applies to the stage of exploration as well as to that of exploitation, and there is nothing to prevent the Parties in their negotiations, pending final delimitations, from agreeing upon, for example, joint licensing of a consortium which, under appropriate safeguards concerning future exploitation, might undertake the requisite wildcat operations.

I am quite cognizant of the fact that the general economy of the Court's Judgment did not conduce to the inclusion of the detailed, and largely factual, analysis which I have considered it appropriate to set forth in this separate opinion, but I believe that what is stated here, even if it is not considered to reveal an emerging rule of international law, may at least be regarded as an elaboration of the factors to be taken into account in the negotiations now to be undertaken by the Parties. Beyond

that, I hope it may contribute to further understanding of the principles of equity which, in the words of Judge Manley O. Hudson, are "part of the international law which it [the Court] must apply". (*Diversion of Water from the Meuse, P.C.I.J., Series A/B, No. 70*, 1937, p. 77.)

I wish to state also that I associate myself with the points made in the Declaration of Judge Sir Muhammad Zafrulla Khan.

Difficult as the problems are, it is fortunate that the three States which confront them are expressly committed to various methods of amicable settlement. They are aware of their right, under Article 60 of the Statute, to return to this Court for further guidance, or they may, if the need should arise, resort to the procedures of arbitration and conciliation set forth in the treaties of 1926 which are cited in the Special Agreements of 2 February 1967.

*(Signed)* Philip C. JESSUP.