DISSENTING OPINION OF VICE-PRESIDENT KORETSKY

To my great regret, I am unable to concur in the Court's Judgment, for the reasons which I state below.

* * *

The Judgment denies the possibility of applying Article 6, paragraph 2, of the Geneva Convention on the Continental Shelf to these cases on a purely conventional basis. It is a fact that the Federal Republic of Germany has not ratified the Convention. Therefore, despite the Federal Government's having recognized the doctrine of the continental shelf as embodied in Articles 1 to 3 of the Convention, despite its reliance thereon in proclaiming its sovereign rights over the continental shelf, despite its having announced a bill for ratification, and despite its conclusion with the Netherlands and Denmark of respective treaties that fix partial continental shelf boundaries following "to some extent . . . the equidistance line" or adopting a "seaward terminus . . . equidistant from" the coasts concerned (Memorials, para. 60) and are thus more than consistent with paragraph 2 of Article 6, the Federal Republic of Germany has disputed the possibility of regarding that provision as binding upon it. It may be noted that, during the negotiations which took place with the Netherlands and Denmark, the Federal Republic contested this possibility only after a certain delay, and that it was not consistent in doing so, since it even assumed as an alternative possibility in its final Submissions that the rule contained in the second sentence of paragraph 2 of Article 6 could be applicable between the Parties, adding that "special circumstances within the meaning of that rule would exclude the application of the equidistance method in the present case". In this Submission (No. 2) the Federal Republic linked the principle of equidistance (though calling it a "method") with the "special circumstances" rule, and it may be recalled that, during the oral proceedings, Counsel for Denmark and the Netherlands had combined them in the form of the "equidistance/special-circumstances" rule.

The Judgment acknowledges that "such a rule was embodied in Article 6 of the Convention, but as a purely conventional rule" (paragraph 69). However, as the Federal Republic has not ratified the Convention, the

Judgment considers that "*qua* conventional rule . . . it is not opposable to the Federal Republic of Germany" *(ibid.)*. It may be regretted that the Judgment did not deal fully with the question as to whether "special circumstances" could in fact be established with regard to the maritime boundaries between the Federal Republic and the Netherlands, and between the Federal Republic and Denmark, respectively.

In its first finding, the Judgment uses the following words in respect of each case: "(A) the use of the equidistance method of delimitation not being obligatory as between the Parties." It thus disjoins the equidistance principle from the other two components of the triad: agreement-special circumstances-equidistance. These three interconnected elements are embodied in the Convention, as also in the Convention on the Territorial Sea and the Contiguous Zone, and have entered into the province of the general principles of international law, being consolidated as a combined principle of customary international law. Each of these three elements plays its part in the determination of a boundary line between two maritime areas, such as areas of the continental shelf in particular.

Agreement is deemed to constitute the principal and most appropriate method of determining the boundaries of the areas of any continental shelf. This is confirmed by the practice of States. The Convention itself gives it pride of place, and this was quite natural, as the issue was one concerning the geographical limits of the sovereign rights of States. It was unnecessary to prescribe at that stage any directives as to the considerations on the basis of which parties ought to arrive at agreement. Provided there is no encroachment on the sphere of the sovereign rights of any other State, parties are free to agree on whatever terms they wish for the delimitation of boundaries, bearing in mind, generally, both legal and non-legal considerations: relevant political and economic factors, related considerations of security and topography, the relations ("good-neighbourly" or otherwise) between the States concerned, and whatever imponderables may escape hard and fast classification. The assessment of such considerations is a political and subjective matter, and it is not for the Court as a judicial organ to concern itself with it unless the parties submit to it a dispute on a question or questions of a really legal character.

The next element of the triad—the "special circumstances" situation—is, however, an objective matter, concerning as it does, for instance, the unusual geographical configuration of the coastline to either side of a frontier, and a disagreement as to whether or not a certain situation could be regarded as a case of "special circumstances" justifying an appropriate boundary line would be a justiciable dispute.

And it is only after the failure of these two elements of the triad, in the event of a deadlock, that the third element—the equidistance principle—makes its appearance as the last resort, offering a way out of the impasse in a geometrical construction which introduces a mathematical

definitude and a certainty of maritime boundaries. The Judgment itself agrees that "it would probably be true to say that no other method of delimitation has the same combination of practical convenience and certainty of application" (paragraph 23).

* * *

If it be held that the principles and rules inseparably embodied in paragraph 2 of Article 6 of the Convention are no more than treaty provisions and are not, as such, opposable to the Federal Republic, then one may ask whether these principles and rules are or have become an institution of international law, either as general principles developed in relation to the continental shelf, or as an embodiment of international custom. There are sufficient grounds for considering them to qualify in both these ways, but I am inclined to consider them rather as principles of general international law, seeing that established doctrine lays much stress on the time factor as a criterion of whether a given principle belongs to customary international law: by and large, customary international law turns its face to the past while general international law keeps abreast of the times, conveying a sense of today and the near future by absorbing the basic progressive principles of international law as soon as they are developed.

Contemporary international law has developed not only quantitatively but more especially qualitatively.

There has been far-reaching development of the work of the codification of international law which has been organized in the United Nations on a hitherto unknown scale. In the first stage, drafts of international multilateral conventions were prepared by the International Law Commission, composed of jurists "of recognized competence in international law", which in response to its request, received numerous comments and observations from almost all governments. There followed, upon the themes of those drafts, an increased amount of special literature (books or articles) and the work of universities and research institutes, including the Institute of International Law, and various learned societies (e.g., the International Law Association). Then came the discussions in the General Assembly of the reports and drafts prepared by the International Law Commission. This preparatory work led finally to the convocation of special intergovernmental conferences in which the great majority of States participated. The scale and thoroughness of this process for the forming and formulation of principles and rules of international law should lead to the consideration in a new light of what is accepted as the result of such work of codification.

Where it used to be considered indispensable, for determining certain

general principles of international law, to gather the relevant data brick by brick, as it were, from governmental acts, declarations, diplomatic notes, agreements and treaties, mostly on concrete matters, such principles are now beginning to be crystallized by international conferences which codify certain not inconsiderable areas of international law. Elihu Root, the well-known jurist and statesman, one of the framers of the Statute of the Permanent Court of International Justice, wrote (in his Prefatory Note to the *Texts of the Peace Conferences at The Hague, 1899 and 1907*, Boston 1908):

> "The question about each international conference is not merely what it has accomplished, but also what it has begun, and what it has moved forward. Not only the conventions signed and ratified, but the steps taken towards conclusions which may not reach practical and effective form for many years to come, are of value."

Elihu Root wrote this in connection with the Peace Conferences of 1899 and 1907. Certain principles which were embodied in The Hague Conventions at that time have been acknowledged as principles of general international law, though States have been slow to put them into practice.

The 1958 Conference on the Law of the Sea, with the Conventions adopted there, among them the Convention on the Continental Shelf, introduced substantial definitude in this field of international law; and the principles and rules of the international law of the sea formulated therein have become the general principles of that law with almost unprecedented rapidity.

The rapid technical progress in the exploration and exploitation of submarine oil and gas resources has entailed the necessity for corresponding legal principles and rules. The practice of States has predetermined the course of development of the doctrine as also of the principles and rules of international law relating to the continental shelf.

The Anglo-Venezuelan Treaty Relating to the Submarine Areas of the Gulf of Paria, 1942 (*U.N. Legislative Series: Laws and Regulations on the Régime of the High Seas*, Vol. I (1951), p. 44) was followed in a comparatively short time by numerous unilateral governmental acts, such as the Presidential Proclamation concerning the policy of the United States with respect to the natural resources of the subsoil and seabed of the continental shelf (1945), the Presidential Declaration (of Mexico) of the same year with respect to the continental shelf, and decrees, laws and declarations by almost all the other Latin American States (in the period 1946-1951), and by the Arab States, Pakistan and others (*U.N. Legislative Series, Laws and Regulations on the Régime of the High Seas*, ST/LEG/SER.B/1).

As a result of the inclusion in the work of the United Nations of the task of determining the principles and rules of international law relating

to the continental shelf, the general principles of the law of the continental shelf had already taken shape before the Conference, though not in a finally "polished" form, on the basis of governmental acts, agreements and scientific works. The Geneva Conference of 1958, in the Convention on the Continental Shelf which was adopted, gave definite formulation to the principles and rules relating thereto. These were consolidated in subsequent practice in a growing number of governmental acts, international declarations and agreements (as mentioned in the written and oral proceedings), which in most cases referred to the Convention or, when they did not do so, made use of its wording. All this has led to the development, in great measure organized and not spontaneous, of the general principles of international law relating to the continental shelf, in not only their generality but also their concreteness. Thus, by a kind of coalescence of the principles, a genuine *communis opinio juris* on the matter has come into being. States, even some not having acceded to the Convention, have followed its principles because to do so was for them a recognition of necessity, and have thereby given practical expression to the other part of the well-known formula *opinio juris sive necessitatis*.

And this conclusion might be reached also by deducing these principles as "direct and inevitable consequences" of the premises and considering their binding force to be that of historically developed logical principles of law (see *Lotus*, Dissenting Opinion by Judge Loder, *P.C.I.J.*, *Series A*, *No. 10*, p. 35).

This finds confirmation in the doctrine which regards the continental shelf as being an actual continuation of the submarine areas of the territorial sea, which, in its turn, is a continuation of the mainland of the coastal State. The United States Presidential Proclamation of 1945, asserting the right of the United States to exercise jurisdiction over the natural resources of the subsoil and seabed of the continental shelf, regarded that shelf "as an extension of the land-mass of the coastal nation and thus naturally appurtenant to it". In 1946 an Argentine decree stated: "The continental shelf is closely united to the mainland both in a morphological and a geological sense." The Peruvian Presidential Decree of 1947 stated that "the continental submerged shelf forms one entire morphological and geological unit with the continent", and the decrees of almost all other Latin American countries employ virtually identical expressions. (*U.N. Legislative Series*, *Laws and Regulations on the Régime of the High Seas*, ST/LEG/SER.B/1). The Judgment also recognizes that the submarine areas of the continental shelf" may be deemed to be actually part of the territory over which the coastal State already has dominion—in the sense that, although covered with water, they are a prolongation or continuation of that territory, an extension of it under the sea" (paragraph 43).

But what conclusion can be drawn from this premise—in relation to principles and rules of international law which govern or should govern the delimitation of a given part of the continental shelf? Bearing in mind that the continental shelf constitutes, as is stated in the operative part of the Judgment, under (C) (1), "a natural prolongation of" each Party's "land territory into and under the sea" (including, may I add, the territorial sea appertaining to the same coastal State), the question might be asked as to whether there exist, for the delimitation of the continental shelf as between "adjacent" States, any special principles and rules different from those which have been established (in State practice, treaties, agreements, etc.) in relation to the delimitation of such maritime areas as the territorial sea. Concerning any possible connection between the conceivable principles—whether similar or different—governing the delimitation, respectively, of the territorial sea and of the continental shelf, it may be noted, in the first place, that the sovereign rights of a coastal State over its territorial sea and over the continental shelf are different in scope.

In relation to the territorial sea three "strata" (to use that term) may be distinguished: *(a)* the maritime area, *(b)* the seabed and its subsoil and *(c)* the air-space. The sovereignty of a coastal State extends to all three of these strata with regard to the territorial sea adjacent to its coast.

In relation to a contiguous zone the coastal State has certain rights in connection with a delimited maritime area.

In relation to the continental shelf, that is to say, to the seabed and subsoil of submarine areas adjacent to a given coast, but outside the area of the territorial sea (*ergo*, submarine areas of the contiguous zone included), the coastal State has "sovereign rights for the purpose of exploring it and exploiting its natural resources", not affecting "the legal status of the superjacent waters as high seas, or that of the air-space above these waters".

Thus, there has occurred some kind of bifurcation of the legal régimes of the territorial sea and of the continental shelf. The maritime and air "strata" over the continental shelf are outside the sphere of the rights of a given coastal State. But the continental shelf itself is within the sphere of the special territorial (though limited) rights of the coastal State to which it is appurtenant, on the ground of the close physical relationship of the continental shelf with the mainland (*via* the submarine area of its territorial sea), as being its natural prolongation, as was recognized by the Court and has become the generally recognized concept of international law. Although Bracton might have considered the sea coast "*quasi maris accessoria*", which was historically understandable, not only the territorial sea but also the continental shelf may now be considered as "accessories" of or, in the words of the Judgment in the *Fisheries* case, as "appurtenant to the land territory" (*I.C.J. Reports 1951*, p. 128; in French, more explicitly, "*comme accessoire du territoire*

terrestre") [1]. To apply the old adage *accessorium sequitur suum principale*, this appurtenance may be considered as entailing common principles for the delimitation of maritime spaces, that is to say for both the territorial sea and the continental shelf.

This explains why, in the International Law Commission, almost from the beginning, it was frequently said that the question of the delimitation of the continental shelf is, in the words of M. Cordova, a former Judge of the International Court, "closely bound up with the delimitation of territorial waters" (*I.L.C. Yearbook*, 1951, Vol. I, p. 289).

The starting-point for determining the boundaries of a continental shelf is formed by the definitive boundaries of the territorial sea of a given State (Article 1 of the Convention on the Continental Shelf defines the continental shelf, as has been recalled, as adjacent to the coast but *outside* the area of the territorial sea), and it was for that reason that Professor François, the rapporteur of the International Law Commission, was able to state as follows in 1951:

> "It seems reasonable to accept, as demarcation line between the continental shelves of two neighbouring States, the prolongation of the line of demarcation of the territorial waters" (A/CN.4/42, p. 717).

The Committee of Experts, which was composed not of mere draftsmen but of very experienced specialists acquainted with the practice of States in the matter of the determination and delimitation of maritime boundaries, who were the representatives of cartography as a science within the field of political geography which is intimately connected with "public law", stated in their report, in answer to, *inter alia*, the question of how the lateral boundary line should be drawn through the territorial sea of two adjacent States:

> "The committee considered it important to find a formula for drawing the international boundaries in the territorial waters of States, which could also be used for the delimitation of the respective continental shelves of two States bordering the same continental shelf" (A/CN.4/61, Add. 1, Annex, p. 7).

It will be observed that the two Geneva Conventions of 1958—that on the Territorial Sea and the Contiguous Zone and that on the Continental

---

[1] Cf. *Grisbadarna* award: "the fundamental principles of the law of nations, both ancient and modern, according to which the maritime territory is essentially an appurtenance of a land territory" *[translation by the Registry]*. (U.N.R.I.A.A., XI, p. 159.)

Shelf—formulated very similar and, in substance, even identical principles and rules for the delimitation of both the territorial sea and the continental shelf [1]. It is particularly noteworthy in this respect that Article 6 of the Soviet/Finnish Agreement concerning boundaries in the Gulf of Finland actually provides for the boundary of the territorial sea to constitute that of the continental shelf (*U.N. Treaty Series*, Vol. 566, pp. 38-42).

If both the territorial sea and the continental shelf are regarded as a natural prolongation of a given mainland and if, in this sense, it is considered that they have a territorial character, it must be still borne in mind that their delimitation should be effected not in accordance with the principles and rules applicable to the delimitation of land territories themselves, but in accordance with those applicable to the delimitation of maritime areas covering such a prolongation of a territory.

Until recently, attention was mainly directed to the delimitation of the territorial sea and contiguous zone and, to some extent, of the continental shelf, in a seaward direction, since the complexities of inter-State relations and contradictions gave rise to problems concerning the correlation of the freedom of the high seas with the sovereignty of coastal States over their territorial sea and, associated therewith, problems of navigation, innocent passage, fisheries, etc. Questions of policy and, in the words of Article 24 of the Convention on the Territorial Sea and the Contiguous Zone, questions concerning the prevention of infringements of a given State's customs, fiscal, immigration or sanitary regulations, committed within its territory, or within its territorial sea, gave rise to certain problems concerning lateral boundaries. When the exploitation of the natural resources of the subsoil of the sea became a real possibility, and the problems connected with the delimitation of the continental shelf area not only in a seaward direction but more especially between neighbouring States whose continental shelf is adjacent to their coasts, became more acute, the character of the "territoriality" of the sovereign rights of a coastal State called for more certainty and more definiteness and almost, indeed, for mathematical precision.

Inevitably, the definition of the boundary of a given part of the continental shelf must be effected not on the shelf itself but on the waters which cover it. This entails the application to the delimitation of the continental shelf of principles and rules appropriate to the delimitation

[1] It may also be noted that the delegate of the Federal Republic of Germany to the Geneva Conference of 1958, Professor Münch, declared that he was in agreement with the wording of Article 6, paragraphs 1 and 2, "subject to an interpretation of the words 'special circumstances' as meaning that any exceptional delimitation of the territorial waters would affect the delimitation of the continental shelf" (U.N. Conference on the Law of the Sea, *Official Records*, VI, 4th Committee, p. 98).

of sea areas and accordingly of the territorial sea, the boundaries of which can be described as mathematically, geometrically constructed in a manner that is as simple as is permitted by the configuration of the coast or by the baselines.

Article 6, paragraph 2, of the Convention envisages cases where the same continental shelf is adjacent to the territories of *two* adjacent States. It follows that when it is a question of delimiting the boundary of the continental shelves of two coastal States in conformity with existing principles and rules, and even if the presence of special circumstances is observed and confirmed, those special circumstances can only justify a deviation from the normal line if they are located comparatively near to the landward starting-point of the boundary line of the continental shelf adjacent to the territories of the two *(and only two)* adjacent States. Moreover, the boundary line will generally be constructed with reference to the baselines of the territorial sea, in the drawing of which due allowance will already have been made for certain irregularities of configuration. At all events, the factors concerned should be considered only in relation to the determination of a single boundary line between two adjacent States, while the influence of any special circumstances on both must be taken into account. All "macrogeographical" considerations are entirely irrelevant, except in the improbable framework of a desire to redraw the political map of one or more regions of the world.

If "special circumstances" were recognized to exist in relation to a given part of the continental shelf, in what way would they affect the application in these cases of the general principles governing the delimitation of the boundary line? The Federal Republic of Germany maintains that, within the meaning of the "special circumstances" rule, that rule would exclude the application of the equidistance method. But the absence of any mention of another principle to be regarded as alternative to the one specified might be interpreted to mean that the equidistance principle would not be eliminated, excluded or replaced, but rather modified or inflected. This is to say that there may be a certain deviation from the strict mathematical course of an equidistance line or that, still taking the equidistance principle as the basis of the delimitation, the direction of the boundary line, after initially taking the equidistant course, may be changed after an appropriate point.

Thus the presence of special circumstances might introduce a corrective or might only amend the principle which serves as the starting-point. It is conceivable that in the middle, or towards the end—but not at the beginning—of a boundary line, a change of direction, corrective of the line, may be effected under the influence of special circumstances. This could be the case if there were some geographical hindrance to continuing the line in the same direction, so that a deviation in some section of the line arose in conformity with the very nature of the special circumstance involved. The possibility is not excluded of exercising a certain flexibility

in the actual drawing of the line but without, of course, substituting an alternative basis of delimitation.

* * *

The Judgment attaches special significance to the fact that, under Article 12 of the Convention, any State may make a reservation in respect of Article 6, paragraph 2, from which it concludes that Article 6, paragraph 2, comes within the category of purely conventional rules and that therefore the principles and rules embodied in it are excluded from the province of the general principles and rules of international law and from that of customary international law. The Judgment states this while reasoning that the use of the equidistance method for the purpose of delimiting the continental shelf which appertains to the Parties is not obligatory as between them.

It must be noted once more that Article 6, paragraph 2, embodies not only the principle of equidistance, but also two other principles concerning respectively the determination of the boundary of the continental shelf by agreement (and it would be impossible to imagine that anyone could oppose this principle or wish to make a reservation with regard to it) and the "special circumstances" clause as a corrective to the equidistance principle. These three elements of Article 6, paragraph 2, are, as I have already noted, intimately interconnected in constituting a normal procedure for the determination of a boundary line of the continental shelf as between adjacent States. It is therefore impossible to apply to this provision the logical method of separability, just as it is impossible to separate the principles and rules of Article 6, paragraph 2, from the general doctrine of the continental shelf as enshrined in the first three articles of the Convention.

From a consideration of the reservations—comparatively few in number—which were made by governments to Article 6, paragraph 2, it will be seen that not one of the governments opposed in any general way the principles and rules embodied in this Article. They stated only (as in the instances of Venezuela and France) that, in certain specific areas off their coasts, there existed "special circumstances" which excluded the application of the principle of equidistance.

Thus, for instance, the Government of the French Republic stated that:

> "In the absence of a specific agreement, the Government of the French Republic will not accept that any boundary of the continental shelf determined by application of the principle of equidistance shall be invoked against it: . . . if it lies in areas where, in the Government's opinion, there are 'special circumstances' within the meaning

of Article 6, paragraphs 1 and 2, that is to say: the Bay of Biscay, the Bay of Granville, and the sea areas of the Straits of Dover and of the North Sea off the French Coast" *[translation by the Registry]* (Status of Multilateral conventions in respect of which the Secretary-General performs depositary functions; ST/LEG/SER.D/1).

And the Government of Yugoslavia made a reservation in respect of Article 6 of the Convention which can easily be understood in view of its positive attitude to the principle of equidistance [1]. In its instrument of ratification, the Government of Yugoslavia stated: "In delimiting its continental shelf, Yugoslavia recognizes no 'special circumstances' which should influence that delimitation" *(idem)*.

* * *

What are, in effect, the principles and what has been the practice, with regard to the delimitation of the territorial sea?

Sovereign rights over the territorial sea, like all territorial rights, have an inherent spatial reference, and every such right is subject to certain limits which are determined by historically developed principles. The territorial sea as a maritime space is inseparably connected with the land territory of which it is an appurtenance.

As recalled above, the question of the boundaries of the territorial sea arises mainly in connection with the measurement of its breadth, but the lateral boundaries (as they have not given rise to the kind of serious dispute so common in regard to the breadth, so that not all the documentation on them has been published) are usually, as far as we know, determined in treaties, conventions, or in administrative agreements concerning, particularly, customs jurisdiction and fisheries.

It has been estimated that there are some 160 places where international boundaries have been extended from the coast, but the documentation in this connection is scant. It is clear however, that there has been a very general tendency in defining these boundaries to employ, for the sake of clarity and certitude, virtually mathematical concepts expressed in the use of geographical co-ordinates, parallels of latitude, geometrical constructions, charts showing points connected by straight lines, per-

[1] It is worthy of note that, at the conference on the Law of the Sea, the Delegation of Yugoslavia proposed to delete from Article 72 (now Article 6) the words "and unless another boundary line is justified by special circumstances" (A/CONF. 13/42, p. 130) and the Delegation of the United Kingdom, in its amended draft of the same Article, omitted the same words (*ibid.*, p. 134).

pendiculars, produced territorial boundaries, and even in such straightforward visual means as the alignment of topographical features. There has also been a tendency to apply the principle of equidistance [1], which as a result had historically evolved. The principles and methods for delimiting the territorial sea have become—to use the expression of a well-known specialist on boundary questions, S. Whittemore Boggs—*implicit* in the concept of the territorial sea. These principles and methods are summed up in Article 12 of the Convention on the Territorial Sea and the Contiguous Zone, which premises the baseline from which the breadth of the territorial sea of each of the two States concerned is measured, the different questions connected with the method of determining baselines having been dealt with in Articles 3 to 9 of the same Convention.

* * *

The Judgment (paragraphs 88 ff.) refers to the "rule of equity" as a ground for the Court's decision, and apparently understands the notion of equity in a far wider sense than the restricted connotation given to it in the Common Law countries. It states: "Whatever the legal reasoning of a court of justice, its decisions must by definition be just, and therefore in that sense equitable" (paragraph 88). Any judge might be pleased with this statement, but the point it makes appears to me purely semantic. The International Court is a court of law. Its function is to decide disputes submitted to it "in accordance with international law" (Statute, Article 38, paragraph 1), and on no other grounds. It is true that the Court may be given "power . . . to decide a case *ex aequo et bono*", but only "if the parties agree thereto" (*ibid.*, paragraph 2). It might be held that in such circumstances the Court would be discharging the functions of an arbitral tribunal, but the measure of discretion which the *ex aequo et bono* principle confers upon a court of law as such is at all events something which the International Court of Justice has never enjoyed. This principle is accordingly nowhere to be found in the decisions either of the present Court or of its predecessor, because there never has been any case in which the parties agreed that the Court might decide *ex aequo et bono*.

[1] A typical attitude is expressed in the following extract from a letter addressed by the French Ministry of Foreign Affairs to the International Law Commission on 2 August 1953: "If . . . the International Law Commission were to deem indispensable a choice between the three definitions" it has "proposed, the French Government considers that delimitation by means of a line every point of which is equidistant from the nearest points on the coastline of each of the two adjacent States should be chosen, as being likely to yield the best solution in the greatest number of cases" *[translation by the Registry]* (Doc. A/CN./4/71/Add.2; *I.L.C. Yearbook*, 1953, Vol. II, pp. 88 f., *in fine*).

This negative fact seems to indicate that States are somewhat averse to resorting to this procedure [1] and it was not on this basis that the Court was asked to give a decision in the present case. The Court itself states in its Judgment that "There is . . . no question in this case of any decision *ex aequo et bono*" (paragraph 88); nevertheless it may be thought to have tended somewhat in that direction.

The notion of equity was long ago defined in law dictionaries, which regard it as a principle of fairness bearing a non-juridical, ethical character. Black, for example, cites: "Its obligation is ethical rather than jural and its discussion belongs to the sphere of morals. It is grounded in the precepts of the conscience, not in any sanction of positive law" (4th edition, 1951, p. 634) [2]. The science of ethics has been and still is the subject of somewhat heated debates and of ideological differences concerning the content and meaning of equity and of what is equitable. I feel that to introduce so vague a notion into the jurisprudence of the International Court may open the door to making subjective and therefore at times arbitrary evaluations, instead of following the guidance of established general principles and rules of international law in the settlement of disputes submitted to the Court. Thus the question of the actual size of the area of continental shelf which would fall to the Federal Republic on application of the equidistance principle is not in itself relevant for the present cases, where the issues raised are, in the words of Lord McNair, "issues which can only be decided on a basis of law" (*Fisheries*, dissenting opinion, *I.C.J. Reports 1951*, p. 158).

To demonstrate the necessity for applying the rule of equity, reference has been made to the United States Presidential Proclamation of 1945, which stated that: "In cases where the continental shelf extends to the shores of another State, or is shared with an adjacent State, the boundary shall be determined by the United States and the State concerned in accordance with equitable principles", but here this means nothing more than calling upon neighbouring States to conclude agreements.

Certain other proclamations, while stating that boundaries will be determined in accordance with equitable principles, use qualifying terms. For example, the Royal Pronouncement of Saudi Arabia (1949) affirms

[1] It may be recalled as an example that, in its letter to the International Law Commission concerning the delimitation of the territorial sea, the Government of the United Kingdom stated: "4. Where the adjacent States are unable to reach agreement . . . Her Majesty's Government consider that as a rule recourse should be had to judicial settlement. Such settlement should be according to international law rather than *ex aequo et bono*" (*I.L.C. Yearbook*, 1953, Vol. II, p. 85).

[2] Professor Max Huber understands it "as a basis independent of law" *[translation by the Registry]* (*Annuaire de l'Institut de droit international*, 1934, p. 233).

that the boundaries "will be determined in accordance with equitable principles by *Our Government* [1] in accordance with other States . . . of adjoining areas"; the Proclamation of Abu-Dhabi (1949) places more emphasis on the unilateral character of the delimitation: the Ruler proclaims that the boundaries are to be determined ". . . on equitable principles, *by us after consultation* [1] with the neighbouring States" (*U.N. Legislative Series, Laws and Regulations on the Régime of the High Seas*, ST/LEG/SER. B/1).

* * *

The Court, rejecting the application of the equidistance method [2] in these cases and observing that there is no other single method of delimitation the use of which is in all circumstances obligatory [3], has found that "delimitation is to be effected by agreement in accordance with equitable principles" (Judgment, paragraph 101 (C) (1)) thus envisaging new negotiations (even though, before they requested the Court to decide the dispute between them, the Parties had already carried on somewhat protracted but unsuccessful negotiations).

At the same time, the Court has considered it necessary to indicate "the *factors* to be taken into account" by the Parties in their negotiations (paragraph 101 (D)). The factors which have been specified could hardly, in my opinion, be considered among the principles and rules of international law which have to be applied in these cases. The word "factor" indicates something of a non-juridical character that does not come "within the domain of law". The Court has put forward considerations that are, rather, economico-political in nature, and has given some kind of advice or even instructions; but it has not given what I personally conceive to be a judicial decision consonant with the proper function of the International Court.

It may be appropriate to recall in this connection the observation made by Judge Kellogg in the *Free Zones* case to the effect that the Court could not "decide questions upon grounds of political and economic expediency" (*P.C.I.J., Series A, No. 24*, 1930, p. 34). Interpreting Article 38 of the Statute, he noted that "it is deemed impossible to avoid the conclusion that this Court is competent to decide only such questions as are susceptible of solution by the application of rules and principles of

---

[1] Italics supplied.

[2] The Convention speaks of the equidistance *principle* but the Court uses the term "equidistance *method*", thereby reducing the significance of the principle to that of a technical means.

[3] It may be noted that the Court was asked to indicate not a *method* of delimitation which could be applied in *any or all* circumstances, but the principles and rules of *international law* which are applicable in the circumstances that were indicated in these cases and referred to in the Special Agreements.

law" (*ibid.*, p. 38); and he cited the statement which was made by James Brown Scott in his address at The Hague Peace Conference of 1907: "A court is not a branch of the Foreign Office, nor is it a Chancellery. Questions of a political nature should . . . be excluded, for a court is neither a deliberative nor a legislative assembly. It neither makes laws nor determines a policy. Its supreme function is to interpret and apply the law to a concrete case . . . If special interests be introduced, if political questions be involved, the judgment of a court must be as involved and confused as the special interests and political questions [1]."

* * *

Although I feel obliged to disagree with the whole of section (C) of the operative part of the Judgment, I consider it necessary to refer here only to sub-paragraph (2) of that section; in which the Court, envisaging a case where "the delimitation leaves to the Parties areas that overlap", decides that such areas "are *to be divided* between them in agreed proportions or, failing agreement, *equally* [2]". Here, the Judgment goes beyond the province of questions relating to the delimitation of the continental shelf and enters upon that of questions of distribution, despite the fact that the Court itself has earlier stated that "its task in the present proceedings relates essentially to the delimitation and not the apportionment of the areas concerned" (paragraph 18) [3].

To draw a boundary line in accordance with the proper principles and rules relating to the determination of boundaries is one thing, but how to divide an area with an underlying "pool or deposit" is another thing and a question which the Court is not called upon to decide in the present cases.

It may be sufficient to recall that Article 46 of the Treaty between the Kingdom of the Netherlands and the Federal Republic of Germany concerning Arrangements for Co-operation in the Ems Estuary (Ems-Dollard Treaty signed on 8 April 1960) stated:

> "The provisions of this Treaty shall not affect the question of the course of the international frontier in the Ems Estuary. Each Contracting Party reserves its legal position in this respect" (*United Nations Treaty Series*, Vol. 509, pp. 94 ff.).

---

[1] See *Proceedings of The Hague Peace Conferences. Conference of 1907*, Vol. II, New York, 1921, p. 319, where the text is given more fully.

[2] Italics supplied.

[3] It may be appropriate to mention here that, when analysing the former Judgments of the Court on "Contestations relatives au tracé de la frontière", Professor Suzanne Bastid has noted that in them "can be discerned certain tendencies showing that there is a distinction to be made between conflicts concerning frontiers and those to do with the attribution of a territory" *[translation by the Registry]* (*Recueil des Cours de l'Academie de droit international*, Vol. 107 (1962), p. 452).

And the Supplementary Agreement to this Treaty, signed on 14 May 1962 (*ibid.*, p. 140), which was concluded with a view to co-operation in the exploitation of the natural resources underlying the Ems Estuary, leaves the existing frontiers of both parties intact. And, naturally, for the exploitation, even in common, of a given part of the continental shelf it is necessary first to know the boundaries of the continental shelf of each of the parties. I need scarcely say that common exploitation does not create common possession of the continental shelf, or common sovereign rights in a given area.

Generally speaking, such agreements are in fact concluded with a view to preserving the sovereign rights of the individual parties in a given area of the continental shelf. Only in the unthinkable contingency of its being desired to internationalize an entire continental shelf would a departure from this standpoint appear apposite.

It would be as well to cite, in addition, Articles 4 of the two agreements concluded by the United Kingdom with, respectively, Norway and Denmark, concerning the delimitation of the continental shelf as between each pair of countries (*United Nations Treaty Series*, Vol. 551. A/AC. 135/10; reproduced in Memorials, Annexes 5 and 12). Article 4 of the Anglo-Norwegian Agreement reads:

> "If any single geological petroleum structure or petroleum field, or any single geological structure or field of any other mineral deposit, including sand or gravel, extends across the dividing line and the part of such structure or field which is situated on one side of the dividing line is exploitable, wholly or in part, from the other side of the dividing line, the Contracting Parties shall, in consultation with the licensees, if any, seek to reach agreement as to the manner in which the structure or field shall be most effectively exploited and the manner in which the proceeds deriving therefrom shall be apportioned" (*United Nations Treaty Series*, Vol. 551, p. 216).

Here we have a special rule which is concerned with relations between licensees and with the possibility of bringing them together in a working-arrangement, but not a rule concerning the actual boundary of a given part of the continental shelf or the possibility of changing that boundary.

* * *

In sum, I consider that the principles and rules of international law enshrined in Article 6, paragraph 2, of the Convention on the Continental Shelf ought to be applied in these cases at least *qua* general principles and rules of international law.

But even if one does not agree that this provision is applicable in these cases in its entirety or in part, it is nevertheless necessary that the prin-

ciples and rules which are applied in the delimitation of a lateral boundary of the continental shelf should have a natural connection with the three interconnected principles and rules—agreement, special circumstances, equidistance—which determine the boundaries of a territorial sea.

For, considering that it is a continuation, a natural prolongation of the territorial sea (its bed and subsoil), the continental shelf is not unlimited in extent, whether seaward or laterally, but lies within limits consistently continuing the boundary lines of the territorial sea in accordance with the same principles, rules and treaty provisions as provided the basis for the determination of the territorial sea between the two given adjacent States; that is, in these cases, between the Netherlands and the Federal Republic of Germany on the one hand and between Denmark and the Federal Republic of Germany on the other.

(Signed) V. KORETSKY.
