SEPARATE OPINION OF VICE-PRESIDENT ODA

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INTRODUCTION

1. I am somewhat concerned by the rather incorrect manner in which Denmark formulated its Application and submissions and the way in which the Court responded to them. I will accordingly begin my opinion by pointing out that Denmark appears to have misunderstood certain concepts of the law of the sea, such as the exclusive economic zone and the continental shelf, as reflected in its submissions (Part I of this opinion).

2. However, the principal reason why I am inclined to criticize the Judgment lies in my belief that, as a matter of principle, the delimitation of maritime boundaries, whether of the exclusive economic zone or of the continental shelf, does not fall within the sphere of competence of the Court unless the Court is specifically requested, by agreement of the parties, to effect a delimitation of that kind, applying equity within the law or determining a solution *ex aequo et bono.* Hence I believe that the Application unilaterally submitted by Denmark in the present case should have been dismissed (Part II).

3. Even assuming that the Court is competent to draw a line or lines of delimitation of the exclusive economic zone or the continental shelf, the single line drawn in the Judgment (paras. 91-92) does not appear to be supported by any cogent reasoning, although of course that line or another line could have been decided by agreement of the Parties (Part III).

PART I. DENMARK'S MISUNDERSTANDING OF CERTAIN CONCEPTS OF THE LAW OF THE SEA AS REFLECTED IN ITS SUBMISSIONS

1. The Submissions of Denmark

4. In its Application of 16 August 1988, Denmark asked the Court

> "to decide, in accordance with international law, where a single line of delimitation shall be drawn between Denmark's and Norway's *fishing zones* and continental shelf areas in the waters between Greenland and Jan Mayen" (emphasis added).

In its submissions of 31 July 1989 contained in the Memorial, Denmark asked the Court

> "(1) To adjudge and declare that Greenland is entitled to a full 200-mile *fishery zone* and continental shelf area vis-à-vis the island of Jan Mayen; and consequently
>
> (2) To draw a single line of delimitation of the *fishing zone* and the

> continental shelf area of Greenland in the waters between Greenland and Jan Mayen at a distance of 200 nautical miles measured from Greenland's baseline" (emphasis added).

In the submissions presented on 31 January 1991 in its Reply, Denmark added concrete map references to submission (2). A further request, dated 25 January 1993, was added in the final submissions presented at the close of the oral phase, to the effect that

> "(3) If the Court, for any reason, does not find it possible to draw the line of delimitation requested in paragraph (2), Denmark requests the Court to decide, in accordance with international law and in light of the facts and arguments developed by the Parties, where the line of delimitation shall be drawn between Denmark's and Norway's *fisheries zones* and continental shelf areas in the waters between Greenland and Jan Mayen, and to draw that line" (emphasis added).

5. It appears to me that Denmark fails to appreciate certain concepts of the law of the sea. *In the first place*, it does not seem to grasp the proper concept of the exclusive economic zone, the concept adopted in the 1982 United Nations Convention on the Law of the Sea. As a matter of fact, this misunderstanding is not only displayed by Denmark but is also to be observed in the position taken by Norway in these proceedings as well as by some other countries in various contexts (Sec. 2 below). *Secondly*, Denmark seems to pay little heed to the régime of the continental shelf which is fated — at least under the contemporary law of the sea — to exist in parallel with the régime of the exclusive economic zone (Sec. 3 below). *Thirdly*, Denmark seems to confuse *title* to the continental shelf or the exclusive economic zone with the concept of *delimitation* of overlapping sea-areas (Sec. 4 below).

2. *Problem 1: The Fishery Zone (However Called) Is Not Identical to the Exclusive Economic Zone*

6. What exactly is meant by the "fishing zone", "fishery zone" or "fisheries zone" extending "200 miles from the coast", to which Denmark refers in its Application and submissions? Denmark indeed claimed a 200-mile "fishing territory" in its Act No. 597 of 1976, but it has never relied upon the concept of the exclusive economic zone, which was adopted in the 1982 United Nations Convention on the Law of the Sea. This consideration leads me to present some reflections on the development of the coastal State's exercise of jurisdiction over offshore areas.

(a) *The period prior to the 1950s*

7. Until the time of UNCLOS I in 1958, neither Denmark nor Norway had ever considered the possibility of jurisdiction over, or control of, off-

shore fisheries beyond a distance of 1 league (3 nautical miles) or at most 4 nautical miles from the coast.

8. While the post-war claims of some Latin American countries to wider offshore areas of maritime sovereignty (extending over a 200-mile distance from the coast) for exploitation as their own fishing grounds were eventually asserted jointly in the Santiago Declaration of 1952, both Denmark and Norway lodged their respective protests at the position being taken by those countries. The areas claimed by those Latin American countries were sometimes referred to as "fishery zones" or "fishing zones", but they never gained universal recognition in international law.

(b) *UNCLOS I (1958)*

9. One of the most important issues at UNCLOS I (a conference convened in 1958 in Geneva after being prepared over several years by the International Law Commission) consisted in the determination of the limit of the territorial sea. This problem was characterized at the Conference as a confrontation between the narrower limit (3 or 4 miles) and the wider limit (12 miles), and the concept of a "fishery zone" to be established outside the territorial sea but within 12 miles from the coast was proposed by States favouring the narrower territorial-sea limit as a compromise to be offered those wanting a 12-mile limit within which to exercise exclusive offshore fishing rights.

10. The very concept of the "fishery zone" was thus proposed as a substitute for the extension of the territorial sea to 12 miles, which was not then acceptable to some States (mostly the Western States), and it is important to note that the outer limit of the fishery zone thus mooted was to be 12 miles from the coast. It cannot be over-emphasized, moreover, that the concept of the fishery zone discussed at UNCLOS I was different in nature from that of the maritime sovereignty straightforwardly claimed around 1950 by the Latin American States, to cover 200-mile offshore areas.

11. UNCLOS I narrowly failed in its attempt to fix the limit of the territorial sea, and for that reason there were no further references to the concept of the fishery zone, which had been put forward only in that connection.

(c) *The 12-mile fishery zone in the period following UNCLOS I*

12. In the upshot, UNCLOS I neither fixed a 12-mile limit to the territorial sea in the Convention on the Territorial Sea and the Contiguous

Zone, nor introduced the concept of the 12-mile fishery zone as compensation for the retention of the narrower territorial sea. Nevertheless, the concept of the 12-mile "fishery zone" which had not been recognized in 1958 began to take root in the period after UNCLOS I.

13. One after the other, both Denmark and Norway unilaterally established a 12-mile zone for fishery purposes. However, the unilateral establishment of such a fishery zone at that time was, of course, not limited to Denmark and Norway. Indeed, States began increasingly to agree among themselves that they should be entitled to establish such a zone. The 1964 Fisheries Convention concluded among European countries including Denmark (but not Norway), represented a type of such an agreement in which each contracting State recognized the right of any other contracting party to establish a belt 6 miles wide in which the coastal State would have the exclusive right to fish and exclusive jurisdiction in matters of fisheries, together with an outer 6-mile belt in which the continuation of traditional foreign fishing would be guaranteed.

14. The concept of the 12-mile fishery zone, which was never accepted at UNCLOS I, had thus rapidly gained general recognition. By the mid-1970s, that same fishery zone, while not provided for in any of the universal documents concerning the law of the sea, existed as a firmly established institution.

15. Iceland was unique in claiming a 50-mile fishery limit by its 1971 policy statement and the 1972 resolution adopted by the Althing. That Icelandic claim occasioned objections by the Federal Republic of Germany and the United Kingdom, and was in issue in proceedings before the International Court of Justice in the *Fisheries Jurisdiction (United Kingdom* v. *Iceland)* and *Fisheries Jurisdiction (Federal Republic of Germany* v. *Iceland)* cases. In its Judgments, the Court found that the unilateral extension of the exclusive fishing rights of Iceland to 50 miles was "not opposable to" the United Kingdom or the Federal Republic (*I.C.J. Reports 1974*, pp. 34 and 205).

(d) *Emergence of the new concept of the exclusive economic zone*

16. One of the new trends in UNCLOS III during the 1970s was that the claim to a 200-mile zone (which had been advanced by some Latin American nations as an area of maritime sovereignty in the post-war period but had met with strenuous objections from other countries), had now become recognized — but *only* in the form of the "exclusive economic zone". In comparison with the progress made by the concept of the 200-mile "exclusive economic zone", which rapidly gained world-wide support, the concept of a 12-mile "fishery zone" lost all its significance. However, the concept of the "exclusive economic zone", which on the one hand was much wider in scope than that of the fishery zone because of the inclusion of control by the coastal State not only over fishing but also over various other activities, did on the other hand envisage for the coastal

State certain obligations concerning the control and management of fisheries.

(e) *Claims to a 200-mile fishery zone since the mid-1970s*

17. While the régime envisaged for the exclusive economic zone was still in a chaotic state at the early stages of UNCLOS III (the Caracas session in 1974 and the Geneva session in 1975), a number of States, which had discerned the general trend of expansion of coastal jurisdiction over extended offshore areas, vied with each other, prior to the adoption of the Convention at the Conference in 1982, in bluntly claiming their fishery interests in those areas.

18. Denmark established a 200-mile "fishery territory" by Act No. 597 of 17 December 1976 to replace its Act No. 207 of 1964, and Norway established a 200-mile "economic zone" by its Act No. 91 of 17 December 1976 and its Royal Decree of the same date. Other States were meanwhile making haste to declare a 200-mile fishery zone in order to secure exclusive control of fishing in their respective offshore areas, disregarding the concept of the exclusive economic zone (which was to be suggested at UNCLOS III for incorporation into the as yet unfinalized Convention).

19. This unilateral process does not alter the fact that, under the 1982 United Nations Convention on the Law of the Sea, whose rules in most respects are widely held to have superseded earlier law, the claim to a distance of 200 miles is permissible only in respect of the exclusive economic zone (defined in detail and in strict terms in Part V of the Convention), in which due consideration is given to the common interest of the rest of the world — that is, to the conservation and optimum utilization of fishery resources.

(f) *"Fishery zone" not a legal concept*

20. There is certainly no provision in the 1982 Convention that relates to a 200-mile "fishery zone" as such. The "fishing zone" (or "fishery zone") which Denmark and Norway established respectively (and which Denmark mentions in its Application) is *not* the exclusive economic zone as defined in that Convention.

21. However, it is undeniable that today a number of States have claimed a 200-mile "fishery zone" or "economic zone" — but *not* an "exclusive economic zone". These States include Canada, Germany, Japan, the Netherlands and the United States, all of which would have been strongly opposed to the exercise of exclusive fishing rights by coastal

States in offshore areas beyond the limit of the territorial sea even if the latter had been extended from its traditional 3-mile to a 12-mile limit. It may for this reason be contended that, thanks to these repeated claims made by certain States, including both developed and developing countries (many of which have been asserted during the past decade), the concept of the 200-mile fishery zone has become customary international law quite independently of the 1982 Convention.

22. It is noted that the respondent State, Norway, has also and in the same manner laid claim to a 200-mile "fishing zone". Thus I am ready to accept that the Court was bound, in these proceedings, to proceed with the "fishery zone" as an established concept, setting aside that of the "exclusive economic zone".

(g) *The Court's position on the 200-mile offshore fisheries*

23. As the concept of the "fishery zone" has no standing, at least in the 1982 Convention, and still remains a merely *political* concept, I would have liked the Court to have taken a clear stance with respect to the confusion (by not only the Applicant but by both Parties) between the concepts of the "exclusive economic zone" and the "fishery zone". Its failure to do so leads me to wonder what will become in future of the concept of the exclusive economic zone, as provided for in that Convention. I am afraid that the concept of the "exclusive economic zone" will appear completely obsolete, even before the 1982 Convention has come into force.

3. Problem 2: The Régime of the Continental Shelf Is Independent of the Concept of the Exclusive Economic Zone

24. In its Application, Denmark asked the Court to "decide . . . where a single line of delimitation shall be drawn between Denmark's and Norway's fishing zones and continental shelf areas" and in its subsequent submissions requested the Court "to draw a single line of delimitation of the fishing zone and the continental shelf area of Greenland . . . at . . .".

25. How is it possible for Denmark to presuppose the identity of the boundary of the exclusive economic zone (for that is what it really alludes to) with that of the continental shelf, when both régimes originated against different backgrounds and exist in parallel? Is it the intention of Denmark to contend that the original, or proper, régime of the continental shelf has completely crumbled away, to be replaced by the new régime of the exclusive economic zone? An examination of the emergence and evolution of the concept of the continental shelf may be in order, given these considerations.

(a) *Emergence and evolution of the legal concept of the continental shelf*

26. There can be no doubt that the political concept of the continental shelf was initiated by the Truman Proclamation of 1945. At that time, neither Denmark nor Norway indicated any specific attitude either for or against it. In other words, they appeared indifferent to the problem of the continental shelf.

27. It was UNCLOS I that produced the legal concept of the continental shelf, defined as:

> "the sea-bed and subsoil of the submarine areas adjacent to the coast... to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas" (Convention on the Continental Shelf, Art. 1).

(In the last-quoted phrase, the word "admits" has been generally interpreted as meaning "ceases to admit", which is of course a necessary gloss.) Later, the definition of the continental shelf seems to have been further affected by the 1969 Judgments in the *North Sea Continental Shelf* cases, in which it was seen as constituting a "natural prolongation of [the] land territory into and under the sea" (*I.C.J. Reports 1969*, p. 53).

28. The fact is that few States at UNCLOS I had any firm idea concerning the concept of the "exploitability test", and may well have entertained nothing more than a very vague notion that the exploitation of the submarine areas should be *permitted* somewhere — even beyond a depth of 200 metres — if the development of technology were to allow that possibility, and that it should remain subject to some degree of national control. If there was any question of delimitation at that time, what was really at issue related simply to submarine areas up to the 200-metre isobath. In 1958, at any rate, few delegates realized where the novel introduction of submarine technology into the debate might ultimately lead.

(b) *Post-UNCLOS I*

29. The Geneva Convention on the Continental Shelf became effective in June 1964; Denmark had ratified it in 1963 and Norway acceded to it in 1971. In 1968, Denmark also ratified the Optional Protocol of Signature concerning the Compulsory Settlement of Disputes; Norway neither ratified nor acceded to the Optional Protocol.

30. The concept of the continental shelf as a geographical entity subject to a special régime rapidly became established in customary international

law. At all events, the actual institution in law of the continental shelf has not been challenged since the adoption of the Convention.

31. Whether the national continental shelf requires the specific claim of each State, or whether it now exists *ipso jure* in international law, remains to be examined. In 1963 Denmark issued a "Royal Decree concerning the Exercise of Danish sovereignty over the Continental Shelf", using terms similar to those used in the 1958 Convention: in the same year Norway issued a "Royal Decree relating to the Sovereign Rights of Norway over the Sea-Bed and Subsoil outside the Norwegian Coast", an "Act No. 12 relating to Exploration and Exploitation of Submarine Natural Resources" and an "Act No. 12 relating to Scientific Research and Exploration for and Exploitation of Resources other than Petroleum Resources".

32. I must add at this juncture, and it cannot be over-emphasized, that in the mid-1960s there did not exist any idea that the area between Greenland and Jan Mayen would constitute a part of the continental shelf of any State.

(c) *Transition to a new situation due to new technological developments*

33. In the mid-1960s, when it became apparent that the rapid development of technology would accelerate the exploitation of mineral resources beyond the 200-metre isobath and that the whole submarine area of the vast ocean might eventually become exploitable, two opposite interpretations were presented for the definition of the "exploitability test". One was that, as the whole area of the ocean would become exploitable (thus becoming a continental shelf within the meaning of the 1958 Convention), it should be divided by a median line throughout the world. The other idea was that, with the gradual advancement of technology throughout the world, the continental shelf of each State would gradually extend further, thus meeting the continental shelf of the opposite side at the deepest point.

34. In response to the median-line theory and the deepest-trench theory, which had in common their understanding that, in theory, the whole area of the world's ocean would, owing to the development of advanced technologies, soon have the status of the continental shelf of any and every State, Ambassador Pardo of Malta, in his epoch-making statement to the General Assembly on 1 November 1967, appealed for a halt to that expansion of the continental shelf, by suggesting that the sea-bed of the vast ocean should be considered as the "common heritage of mankind". The work towards a new régime of the ocean was accordingly launched at the United Nations Sea-Bed Committee between 1968 and 1973, and was followed up by UNCLOS III, which commenced in 1974 in Caracas.

(d) *Transformation of the definition of the continental shelf*

35. In parallel with the appearance of the new concept of the "exclusive economic zone", the definition of the continental shelf also underwent a complete transformation. In order to apply a brake to the unlimited expansion of the continental shelf in terms of the "exploitability test", the outer edge of the continental margin as the natural prolongation of land territory in accordance with topographical and geological concepts (i.e., the original concept) was fixed as the outer limit of the "continental shelf".

36. On the other hand, the distance criterion of the 200-mile limit, which was quite irrelevant to the original concept and had been advocated only for fisheries purposes, was introduced into the field of the continental shelf although it had no relevance to submarine topography and geology — except in so far as that shelf could be further extended. The new definition of the continental shelf, as incorporated into the 1982 Convention, was simply the product of a compromise between the self-serving, and therefore conflicting, interests of each State at UNCLOS III.

37. Thus the concept of the continental shelf as the "natural prolongation of [the] land territory into and under the sea", which the International Court of Justice had properly applied in its 1969 Judgment to define the "continental shelf" (and which had originally featured in the 1958 Convention), had been completely transformed by the new introduction of the 200-mile-distance criterion and the continental shelf had outgrown its original significance within the meaning of that Convention. It is, however, a remarkable fact (and a most unfortunate one) that, while the continental shelf was thus redefined (Art. 76), that transformation of the concept was scarcely discussed at UNCLOS III, so that the essential provisions in the 1958 Convention relevant to the basic concept of that area remained unaffected (Arts. 77-81).

(e) *Ignorance of the transformation of the concept of the continental shelf and the parallel existence of the exclusive economic zone and the continental shelf*

38. The concept of the continental shelf as understood today *is not* the same as the one which was adopted in the 1958 Convention and prevailed prior to UNCLOS III. The sea area in dispute in the present case between Greenland and Jan Mayen (or the area defined as the "relevant area" in the Judgment (para. 20)) is *not* the "continental shelf" within the meaning of the 1958 Convention, but may well be the continental shelf referred to in the 1982 United Nations Convention, or in the customary international law which may now be reflected in that Convention. This is an important point, but one which both the Applicant and the Court, in my view, have failed to appreciate fully.

39. Furthermore, throughout the meetings of the United Nations Sea-Bed Committee and UNCLOS III in the 1970s, the exclusive economic zone as a new concept and the continental shelf as a concept transformed from the 1958 Convention were considered as separate régimes, to be provided for in parallel in the final text of the Convention. In this respect the Danish submissions in its Application were misguided when the Court was asked "to decide . . . where a single line of delimitation shall be drawn", because Denmark presupposed a line which could not *a priori* exist. This is another point which did not receive the due attention of the Applicant and the Court.

4. *Problem 3: Confusion of Title to the Exclusive Economic Zone and the Continental Shelf and the Question of Delimitation of Overlapping Entitlements*

40. Denmark, in submission (1) in the Memorial and the Reply, asks the Court to declare its *entitlement* "to a full 200-mile fishery zone and continental shelf area vis-à-vis the island of Jan Mayen". In my view, when title to an area of maritime jurisdiction exists — be it to a continental shelf or *(arguendo)* to a fishery zone — it exists *erga omnes*, i.e., is opposable to all States under international law and is not limited to any specific geographical component of any one State. That being understood, it appears to me necessary to point to a certain conceptual confusion that emerges from Denmark's presentation of its claim.

(a) *Denmark's entitlement to an exclusive economic zone and a continental shelf in respect of Greenland*

41. Whether "Greenland" is entitled "to a full 200-mile fishery zone and continental shelf area" is a general question concerning Denmark's title to those areas. It is accordingly different from the question of the extent of the area in which its entitlement may be claimed and which needs to be delimited as it overlaps with the opposing entitlement of another State. What Denmark really seeks in submission (1), in its relation "vis-à-vis the island of Jan Mayen", is that the Court should effect a delimitation making no abatement of what would be its maximum theoretical entitlement in the absence of any competing title; submission (1) has no effective meaning if read on its own, i.e., without any reference to submission (2).

(b) *Norway's entitlement to an exclusive economic zone and a continental shelf in respect of Jan Mayen*

42. In the light of the drafting process of the 1958 and 1982 Conventions, the entitlements of Jan Mayen (or rather of Norway on its behalf) to

the 200-mile exclusive economic zone and/or continental shelf need not, I submit, have been taken for granted. In the present case, however, Denmark did not dispute the entitlements of Jan Mayen as a singular island of smaller dimensions to an exclusive economic zone and/or a continental shelf.

43. Denmark only questioned the extent of the area to which Jan Mayen's entitlements extend. It is important to note, however, that Norway claimed theoretical entitlement up to the full 200-mile extent for the exclusive economic zone and continental shelf of Jan Mayen but, taking a rather modest approach, simply refrained from asserting its full entitlement vis-à-vis Greenland.

(c) *Overlapping of entitlements or claims*

44. As can be seen from its submissions, Denmark does not seem to grasp that, where the entitlements of two opposite States overlap in an area less than 400 miles apart, the question of delimitation arises in the area of overlapping entitlements of the two States. Unlike Norway, Denmark was not ready to have the area of overlap delimited but simply claimed the whole potential area of its entitlement. Denmark appears to believe that the possession of a maximum entitlement (in respect of Greenland) implies that the line of delimitation should be drawn without any regard to the maximum entitlement of Norway (in respect of Jan Mayen). In this respect, Denmark tends to ignore the distinction between determining the limits of entitlements to sea areas and the division of overlapping claims.

45. The Court likewise pays insuffficent heed to this distinction. Despite the fact that at one point it suggests the "area of overlapping potential entitlement" as one of the three areas designated as relevant for the purpose of the Judgment (para. 19), it scarcely makes use of this area in its reasoning but relies mainly on the "area of overlapping claims", i.e., the overlapping of the maximum entitlement of Greenland, presented as a claim, and the modest claim made on behalf of Jan Mayen (Judgment, para. 18), in order to justify the line which it has drawn.

46. I am afraid that this Judgment, which barely paid the requisite attention to Jan Mayen's potential entitlement and was too much concerned with the "area of overlapping claims" could well lead a State, at some future time, to claim its maximum entitlement in the initial stage of negotiations with its neighbouring State for the delimitation of maritime boundaries, either of the exclusive economic zone or the continental shelf.

PART II. THE POSSIBLE FUNCTION OF THE COURT IN CASES OF MARITIME DELIMITATION

47. To define what roles it may or may not be open to the Court to assume in matters of maritime delimitation, it is necessary to review the principles on the subject that have evolved in international law.

1. Law of Maritime Delimitation in the 1958 Convention on the Continental Shelf

(a) *Delimitation of fisheries jurisdiction not at issue at UNCLOS I*

48. The offshore areas dealt with in UNCLOS I were primarily either the territorial sea or the contiguous zone. Agreement on the width of the territorial sea was not reached, except in the sense that it should not exceed 12 miles — the distance fixed for the contiguous zone. In such circumstances, the delimitation of the territorial sea and the contiguous zone as between adjacent or opposite States in rather narrow areas was not seen as a new or very significant issue. The focus in UNCLOS I was upon the delimitation of the continental shelf, extending further than those narrower areas but, in principle, as far as the 200-metre isobath. However, I must repeat that for fisheries purposes there did not exist any concept of further jurisdiction of the coastal State beyond 12 miles from the coast.

(b) *UNCLOS I: Adoption of the Convention on the Continental Shelf*

49. It is not necessary to follow the whole of the drafting process leading to Article 6 of the Convention governing the delimitation of the continental shelf. UNCLOS I accepted the need for the insertion into the Convention of a provision on the continental shelf, the text of which had been prepared by the International Law Commission in deliberations over a period of several years in the mid-1950s:

> "Where the same continental shelf is adjacent to the territories of two or more States [*(a)* whose coasts are opposite each other], [*(b)* the territories of two adjacent States], the boundary of the continental shelf . . . shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, [*(a)* the boundary is the median line] [*(b)* the

boundary of the continental shelf shall be determined by application of the principle of equidistance from the nearest points of the baseline] . . ." (Convention on the Continental Shelf, Art. 6.)

50. It is important to note, *firstly*, that when the delimitation of the continental shelf was under consideration prior to or at UNCLOS I, the area beyond the 200-metre isobath was scarcely considered. This preliminary understanding is essential when one is interpreting Article 6 of the Convention.

51. *Secondly*, the provision that "the boundary . . . shall be determined by agreement between [the States concerned]" may well have the status of a legal principle but it does not indicate any criteria for determining the boundaries of the (legal) continental shelf. In addition, the suggestion to employ as the boundary line, "in the absence of agreement [and] unless another boundary line is justified by special circumstances", (i) "a median line [in the case of the opposite States]" and (ii) a line to "be determined by the principle of equidistance [in the case of adjacent States]" gave not the slightest clue as to the "circumstances" which would be so "special" as to "justify" a line other than a median line (or the equidistance line).

52. Certainly, one State might have the view that no other line but the median line (or the equidistance line) would be justified in the absence of any "special circumstances" and the other State might point to the existence of some special circumstances which, in its view, did justify a departure from the median line (or the equidistance line). The question remained as to whether any *legal* criteria would have to be met by such justifying special circumstances.

(c) *The North Sea as a practical case-study*

53. The question of the delimitation of the continental shelf became of imminent importance in the mid-1960s, particularly in the areas of the North Sea. The discovery of reserves of oil or natural gas in this region necessitated the division, early in the 1960s, of the sea-bed of these shallow waters among the surrounding nations. The whole area of the North Sea is shallower than 200 metres (with the exception of the Norwegian Trough) and there was no doubt about the area being a continental shelf within the meaning of the 1958 Convention, irrespective of any interpretation of the definition of its "exploitability" as provided for in the Convention.

54. A number of bilateral agreements were successively concluded in the period 1964-1966 among States of the region, including Denmark and Norway, on the basis of a general application of the equidistance or the median line (Netherlands-United Kingdom, 1965; Norway-United Kingdom, 1965; Denmark-Germany, 1965; Germany-Netherlands, 1965;

Denmark-United Kingdom, 1966; Denmark-Netherlands, 1966). It is important to bear in mind that the 1965 Agreement between Denmark and Norway, which has been much discussed in the present case, was simply one of a number[1]. As has already been stated (para. 32 above), in those days the area between Greenland and Jan Mayen was never deemed to be one covered by the concept of the continental shelf, so it is obvious that the 1965 Agreement did not apply to that area.

55. In 1967 the delimitation between Germany on the one hand and Denmark and the Netherlands on the other, which except for some areas extending over a short distance from their coasts had not been agreed upon through diplomatic negotiations, was brought jointly to the International Court of Justice. The *North Sea Continental Shelf* cases should be understood in the context of a chain of bilateral negotiations in the North Sea region in the 1960s.

56. Germany viewed the *mechanical* application of the equidistance-line rule as being unfavourable to its own interests in respect of the adjacent coasts of Denmark and the Netherlands. In that case before the Court, Germany presented various arguments contesting Denmark's/the Netherlands' positions based on the application of the equidistance-line rule. It was argued by Germany that, while the equidistance line was applicable, the base for measuring the distance should be determined in the case of adjacent States in such a way as to take account of macro-geographical factors, by taking a rectified coastline, that is, the coastal front or "coastal façade" (see *I.C.J. Pleadings, North Sea Continental Shelf*, Vol. II, p. 193).

57. The International Court of Justice stated, in its 1969 Judgment, that:

> "delimitation is to be effected by agreement in accordance with equitable principles, and taking account of all the relevant circumstances, in such a way as to leave as much as possible to each Party all those parts of the continental shelf that constitute a natural prolongation of its land territory into and under the sea, without encroachment on the natural prolongation of the land territory of the other" (*I.C.J. Reports 1969*, p. 53, para. 101 (C) (1)).

Thanks to that Judgment of the Court, the delimitation in the south-east-

[1] As has been pointed out, Norway is separated from the main part of the North Sea continental shelf by a deep trench, known as the Norwegian Trough. It was really remarkable that Norway, in spite of the existence of that trench, could participate in the division of the continental shelf of the North Sea by applying in general the rule of the median line or the equidistance line. The reason behind this solution can only be a matter of pure conjecture but it seems to me that there existed some general feeling among the countries of the North Sea region that Norway ought not to be isolated in this respect.

ern part of the North Sea was subsequently agreed in 1971 between Denmark and Germany, as well as between the Netherlands and Germany.

(d) *Implications of the Judgment in the* North Sea Continental Shelf *cases*

58. There are a few points which must be given due consideration when the Judgment in the *North Sea Continental Shelf* cases is interpreted. *Firstly*, the Judgment referred to a sea not exceeding 200 metres in depth, hence one underlain by a continental shelf of the most unambiguous kind, and was delivered in 1969, at a time when jurists continued to conceive of the shelf primarily in a geological and topographical sense — hence in terms (to quote the Judgment) of the "natural prolongation of [the] land territory into and under the sea".

59. *Secondly*, the suggestion of *dividing* the shelf in:

> "such a way as to leave as much as possible to each Party all those parts of the continental shelf that constitute a natural prolongation of its land territory . . . without encroachment on the natural prolongation of the land territory of the other"

did not contain any concrete indication for the *delimitation* of the area and did not go beyond the simple suggestion of an "equitable solution", the expression later employed in the 1982 United Nations Convention.

60. *Thirdly*, one should try to be precise about the status of the indication given by the Court as to "the factors to be taken into account . . . in the course of the negotiation". Did this indication simply constitute a suggestion put forward by the Court in order to assist negotiations between the Parties, or did it amount to a determination of law on the basis of Article 38, paragraph 1, of the Court's Statute?

(e) *Article 6 of the 1958 Convention not applicable to the present case*

61. As has already been explained (para. 50 above), Article 6 of the 1958 Convention is applicable to the continental shelf in an orthodox sense, i.e., the sea-bed areas inside the 200-metre isobath. The area between Greenland and Jan Mayen is not a continental shelf in that sense, though it certainly is taken to be a continental shelf in accordance with the transformed concept. This is a point of which, in my view, the Applicant and the Court were not sufficiently aware. It seems to me that the Parties to this case and the Court erred in taking the 1958 Convention as the rule with regard to the delimitation of the continental shelf while the rule of the 1982 Convention is valid for the delimitation of the exclusive economic zone. What

applies today to the delimitation of either the exclusive economic zone or the continental shelf is the 1982 United Nations Convention — or customary international law which may be reflected in that Convention.

2. The Rules for Maritime Delimitation Discussed at the Sea-Bed Committee and UNCLOS III, and Their Adoption in the 1982 United Nations Convention

(a) *Drafting of Articles 74 and 83 of the 1982 Convention*

62. As has already been said (para. 16 above), the new concept of the exclusive economic zone has its own background and exists in parallel with the transformed concept of the continental shelf. The delimitations to be effected under each régime could have been separate. Nevertheless, as they had in common at least the 200-mile distance criterion (qualified, in the case of the continental shelf, by the possibility of a further extension as far as the outer edge of the continental slope), the delimitation issues of these two separate régimes were discussed together by the delegates at UNCLOS III. Article 74 (for the delimitation of the exclusive economic zone) and Article 83 (for the delimitation of the continental shelf) were drafted in the same fashion in the 1982 United Nations Convention on the Law of the Sea.

63. A detailed analysis of the background to these provisions may not be necessary, as only minimum information is required in this instance. In 1978, the conflict of the two schools of thought had become apparent with regard to the question of the delimitation of both the exclusive economic zone or the continental shelf at UNCLOS III. The median-line school proposed the following draft:

> "The delimitation of the Exclusive Economic Zone [Continental Shelf] between adjacent or opposite States shall be effected by agreement employing, as a general principle, the median or equidistance line, taking into account any special circumstances where this is justified"

and the equitable-principle school proposed that:

> "The delimitation of the exclusive economic zone [continental shelf] between adjacent or/and opposite States shall be effected by agreement, in accordance with equitable principles taking into

account all relevant circumstances and employing any methods, where appropriate, to lead to an equitable solution."

64. The effort to reach a compromise between these two schools of thought was not successful[1]. In 1981, at the tenth session, Ambas-

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[1] Mr. Manner, Chairman of Negotiating Group 7, reported in the course of the seventh session (28 March-19 May 1978):

> "No compromise on this point did materialize during the discussions held, although one may note, that there appears to be general agreement as regards two of the various elements of delimitation: first, consensus seems to prevail to the effect that any measure of delimitation should be effected by agreement, and second, all the proposals presented refer to relevant or special circumstances as factors to be taken into account in the process of delimitation." (UNCLOS III, *Official Records*, Vol. X, p. 124.)

He also reported at the resumed seventh session (21 August-15 September 1978):

> "During the discussions general understanding seemed to emerge to the effect that the final solution could contain the following four elements: (1) a reference to the effect that any measure of delimitation should be effected by agreement; (2) a reference to the effect that all relevant or special circumstances are to be taken into account in the process of delimitation; (3) in some form, a reference to equity or equitable principles; (4) in some form, a reference to the median or equidistance line." (*Ibid.*, p. 171.)

In his statement on 24 April 1979 to the Second Committee of the Conference at the eighth session, he stated that "[d]espite intensive negotiations, the Group had not succeeded in reaching agreement on any of the texts before it" (*ibid.*, Vol. XI, p. 59) but suggested as a possible basis for compromise the following text:

> "The delimitation of the exclusive economic zone (or of the continental shelf) between States with opposite or adjacent coasts shall be effected by agreement between the parties concerned, taking into account all relevant criteria and special circumstances in order to arrive at a solution in accordance with equitable principles, applying the equidistance rule or such other means as are appropriate in each specific case." *(Ibid.)*

Mr. Manner again in his Report on 22 August 1979, at the resumed eighth session, stated that

> "[a]s before, the discussions on delimitation criteria were characterized by the opposing positions of, on the one hand, delegations advocating the equidistance rule and, on the other hand, those specifically emphasizing delimitation in accordance with equitable principles" (*ibid.*, Vol. XII, p. 107).

On 24 March 1980 at the ninth session he suggested his assessment of alternatives which might, in time, secure a consensus at the conference:

> "Article 74 [83]. 1. The delimitation of the exclusive economic zone [continental shelf] between States with opposite or adjacent coasts shall be effected by agreement in conformity with international law. Such an agreement shall be in accordance with equitable principles, employing the median or equidistance line, where appropriate, and taking account of all circumstances prevailing in the area concerned." (*Ibid.*, Vol. XIII, p. 77.)

This draft was incorporated in the Informal Composite Negotiating Text/Revision 2 (11 April 1980) by a decision of the "collegium" but was not agreeable to both groups at the plenary meetings on 28 July 1980 at the resumed ninth session; Negotiating Group 7 had, by that time, been dissolved.

sador Koh of Singapore, who became President of UNCLOS III on the death of Ambassador Amerasinghe of Sri Lanka, held meetings with the chairmen of each group and then, on 28 August 1981 at the resumed tenth session, formulated a proposal for a solution. In the plenary meetings the chairmen of the two groups gave their respective support and that text constituted the provisions in the final version of the Draft Convention on the Law of the Sea (28 August 1981) which was finally adopted as Articles 74 and 83 of the 1982 United Nations Convention, which read:

> "The delimitation of [the exclusive economic zone] [the continental shelf] between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution."

Whether Articles 74 and 83 of the 1982 Convention (which has not yet entered into force) have any validity as customary international law or not may still be arguable, but this is a different problem.

(b) *Interpretation of the provisions of Articles 74 and 83*

65. It is not easy to give a proper interpretation to a text which, after the failure of negotiations over a lengthy period at the Conference, was drafted by one person (i.e., the President of UNCLOS III) and adopted without any further discussion. However, there can be no doubt that the whole concept of Articles 74 and 83 originated from Article 6 of the 1958 Convention and was a product of a compromise between the two opposite schools of thought, the median-line school and the equitable-principle school. Against this background, I would make the following suggestions.

66. *Firstly*, the words "in order to achieve an equitable solution" cannot be interpreted as indicating anything more than the target of the negotiation to reach an agreement. The text may indicate a frame of mind, but it is not expressive of a rule of law. It must be borne in mind that, while the reference to "special circumstances" in the 1958 Convention or to "all relevant circumstances" in the negotiations at UNCLOS III was finally dropped, those concepts were well reflected in the provision quoted above. In other words, the consideration of some relevant or special circumstances may be required if one is to arrive at an "equitable solution".

67. *Secondly*, what is the meaning of this provision that agreement must be reached "on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice"? Agreement between States is simply a result of diplomatic negotiations and is reached by the

free will of the States concerned (cf. the doctrine of liberty of contract). The deciding factors in such diplomatic negotiations are simply negotiating powers and the skills of each State's negotiator as well as the position, geographical and other, of each State.

68. It may be contended that there can be a legal framework within which — and only within which — the content of an agreement is justifiable under international law and that any agreement contrary to *jus cogens* should be regarded as invalid. For example, an agreement obtained by duress might be open to challenge. Except in that very general sense, there does not in my view exist any *jus cogens* governing the delimitation of overlapping maritime titles. The parties can freely negotiate and can reach an agreement on whatever they wish, employing all possible elements and factors to strengthen their own position. In other words, there is *no* legal constraint, hence no rule, which guides the negotiations on delimitation, even though the negotiations should be directed "to achiev[ing] an equitable solution". Disagreement over the points arising during the effort to reach agreement cannot constitute a "legal dispute", because law is not involved in choosing the line among infinite possibilities.

69. *Thirdly*, in spite of the practical identity between Article 74 and Article 83, there is, of course, no guarantee that the delimitation of the exclusive economic zone and the delimitation of the continental shelf will necessarily be identical. The "equitable solution" to be reached by negotiation in the delimitation of the exclusive economic zones and that of the continental shelf areas can certainly be different, as the "special" or "relevant" circumstances to be taken into account when defining a delimitation line may well be different in each case.

(c) *One or two delimitation lines?*

70. Whether the boundary of the continental shelf areas and the boundary of the exclusive economic zone are or are not identical will depend quite simply on the result of each delimitation, which can well be different with respect to the two different areas. In the absence of an agreement between the States concerned, one cannot presuppose a single delimitation for two separate and independent régimes, the exclusive economic zone and the continental shelf, although the possibility of an eventual coincidence of the two lines may not be excluded.

71. I have however some sympathy with the Danish attitude and with the Court's tendency to prefer a single maritime boundary, since, if the acceptance of wider claims to coastal jurisdiction over offshore fisheries had been seen as inevitable, those two régimes should have been amalgamated in the new law of the sea. What is deplorable about the new order in the oceans (which was being prepared in UNCLOS III) is the fact that an

immature concept of the exclusive economic zone has been introduced to coexist with the previously accepted concept of the continental shelf which has been re-defined and thus transformed, and that the concept of the exclusive economic zone has in fact had the effect of ousting the latter concept. Article 56, paragraph 3, which provides that

> "[t]he rights set out in this article [rights, jurisdiction and duties of the coastal State in the exclusive economic zone] with respect to the sea-bed and subsoil shall be exercised in accordance with Part VI [continental shelf]",

which was incorporated without discussion, seems to be an extremely misguided provision and is difficult to understand.

72. If UNCLOS III was set upon instituting the exclusive economic zone, it ought frankly to have first wound up the original concept of the continental shelf. Thus the régime under the 1982 Convention remains immature in some respects, such as the exclusive economic zone and the continental shelf. At all events, the transformed concept of the continental shelf espoused by the 1982 Convention still remains unclear, particularly in its relation to the parallel régime of the exclusive economic zone, and does not stand up to criticism from a purely legal standpoint. As has already been said (para. 37 above), the continental shelf (which should have been examined more cautiously with the introduction of its new definition) was scarcely discussed at UNCLOS III.

73. However, in spite of all I have said, the two régimes of the exclusive economic zone and the continental shelf exist separately and in parallel in the 1982 United Nations Convention, hence in existing international law, and the delimitation for each is different.

74. Having said all this, I do not rule out the possibility that, from the practical standpoint of the exercise of their respective jurisdictions over the offshore areas for the purpose of the control of maritime resources, States in negotiation may prefer to have a single boundary rather than two separate boundaries, but then they should be in agreement on this point as in the case concerning the *Delimitation of the Maritime Boundary in the Gulf of Maine Area.*

3. *Role of the Third Party in Settling Disputes concerning Maritime Delimitation*

(a) *Infinite variety of potential delimitation lines*

75. While the entitlement to areas is *erga omnes*, the delimitation of areas is solely related to the drawing of a line between two conflicting entitlements, which remains a matter for the States concerned. This is

why the 1958 Convention provides in the case of the continental shelf that "the boundary of the continental shelf appertaining to . . . States shall be determined by agreement between them" (Art. 6) and the 1982 United Nations Convention provides in relation to the exclusive economic zone and the continental shelf that "[t]he delimitation of [the exclusive economic zone] [the continental shelf] between States with opposite or adjacent coasts shall be effected by agreement" (Arts. 74 and 83).

76. In reality the delimitation of a line to be effected by agreement may vary in an infinite number of ways within a certain range, and the choosing of one of these variations after consideration of "special circumstances", "relevant circumstances" or "factors to be taken into account" etc., does not belong to the function of law. No line thus drawn can be illegal or contrary to rules of international law.

(b) *Role of the third party in the delimitation of maritime boundaries*

77. When a question is to be resolved by agreement, if that agreement cannot be achieved because of a divergence of views on various relevant elements governing the negotiation, that failure to reach agreement — assuming good faith — will not have been due to a difference in the interpretation of international law but to a difference in the concepts of equity upheld by each party.

78. The function of the third party in assisting the parties in dispute could be either to suggest concrete guidelines for the evaluation of each of the above-mentioned relevant elements in order to assign them a proper place in the negotiations or to proceed itself to choose a line by weighing up the relevant factors or elements from among an infinite variety of possibilities so that an equitable solution may be reached.

79. The most that can be done by this Court, *as a judicial tribunal applying international law*, is to declare that the lines of delimitation for the exclusive economic zone and the continental shelf, respectively, must be drawn by agreement between the Parties, as provided for in the 1982 United Nations Convention, from among the infinite possibilities lying *somewhere* between the line asked for by Denmark and the other line asked for by Norway. This is, however, not what Denmark asked the Court to do in the present case. Denmark asked the Court to draw "a . . . line of delimitation . . . at a distance of 200 nautical miles" (submission (2)) or to draw simply "the line of delimitation" (submission (3)).

(c) *Arbitration* ex aequo et bono

80. The delimitation of a maritime boundary line which "shall be effected by agreement" is not a matter to be decided by the International

Court of Justice unless it is jointly requested to do so by the States concerned. With the exception of the *Aegean Sea Continental Shelf* case which was also concerned with the title of islands to a continental shelf but which did not proceed to the merits phase, this is the first case in the history of the Court concerning maritime delimitation to have been brought by unilateral application.

81. The Court is competent under Article 36, paragraph 1, to be seised of "all cases which the parties refer to it", but does not have jurisdiction under Article 36, paragraph 2, to deal with a dispute of this kind, which is neither "the interpretation of a treaty" nor "any question of international law". Let me, for the sake of argument, assume (in the light of the different ways in which Norway, as a respondent State, argued its case before the Court) that Norway had consented to join Denmark in asking the Court to draw a boundary line and that the present case therefore fell to be considered as one in which the Court had been requested *jointly* by the Parties to decide on maritime delimitation.

82. Here it is once again important to be clear about the distinction between the invocation of declarations made under Article 36, paragraph 2, of the Statute, which cannot enlarge the Court's powers beyond the strict application of law to the case concerned, and the submission of a case by special agreement — one of the methods of seisin available under Article 36, paragraph 1 — which does enable the parties, by consent, to confer on the Court an arbitral, i.e., quasi-political, role whereby equity may be applied where no law exists.

83. It may be interesting to note that the initial draft of the provision relevant to the delimitation of the continental shelf, that is, the provision adopted by the International Law Commission in 1951, read as follows:

> "Two or more States to whose territories the same continental shelf is contiguous should establish boundaries in the area of the continental shelf by agreement. Failing agreement, the parties are under the obligation to have the boundary fixed by arbitration",

and the commentary attached to this provision read, in part:

> "It is not feasible to lay down any general rule which States should follow; . . . It is proposed . . . that if agreement cannot be reached and a prompt solution is needed, the interested States should be under an obligation to submit to arbitration *ex aequo et bono*. The term 'arbitration' is used in the widest sense, and includes possible recourse to

the International Court of Justice." (*Yearbook of the International Law Commission*, 1951, Vol. II, p. 143 [1].)

84. Another important factor to be remembered is that in the 1982 United Nations Convention, an independent part of which contains the detailed provisions on dispute settlement, disputes concerning the interpretation or application of Articles 74 and 83 relating to sea boundary delimitations may, by the declaration of a State party, be excluded from compulsory procedures entailing binding decisions, provided that the matter is submitted to conciliation as provided in Annex V of that Convention.

(d) *Limited function of the International Court of Justice in a maritime delimitation*

85. Accordingly, and on the premise that there are in fact no rules of law for effecting a maritime delimitation in the presence of overlapping *titles* (not overlapping *claims*), it follows that if the Court is requested by the parties to decide on a maritime delimitation in accordance with Article 36, paragraph 1, of the Statute, it will not be expected to apply rules of international law but will simply "decide a case *ex aequo et bono*".

86. In other words, the presentation of a case of maritime delimitation by agreement between the States in dispute in accordance with Article 36, paragraph 1, means by implication that the parties are requesting the Court "to decide a case *ex aequo et bono*" in accordance with Article 38, paragraph 2, of the Statute. For instance, in my view, the Judgment of the Court in the case concerning the *Continental Shelf (Libyan Arab Jamahiriya/Malta)* must be interpreted as having been given on that basis, even though the Court never expressly stated as much. It certainly is not a convincing exposition of the law.

87. However, there is no escaping the fact that the rendering of a decision *ex aequo et bono* is only admissible with the consent of the parties. This was not a big problem in earlier delimitation cases, because the consent derived or could be inferred from the special agreement concerned. But if the Court intended *in this case* to apply equitable considerations, it

[1] This text did not appear in the later (i.e., post-1953) text drawn up by the International Law Commission. After 1953, the International Law Commission prepared an independent article concerning dispute settlement, to cover not only delimitation but also other aspects of the continental shelf, which finally became the optional protocol for the settlement of disputes attached to the four Geneva Conventions on the law of the sea adopted at UNCLOS I.

should, in my view, first have decided that the submissions or, alternatively, the arguments of the Parties, in particular Norway, permitted the conclusion that a consent had emerged between them amounting to a special agreement to the effect that the Court was not bound to adhere to strict law. In this way the case could conceivably have been, so to speak, transferred from the ambit of Article 36, paragraph 2, to that of Article 36, paragraph 1, as a very special case of *forum prorogatum*.

(e) *Effecting a delimitation* ex aequo et bono

88. Only in a case in which the parties in dispute have asked the Court by agreement to effect a maritime delimitation *ex aequo et bono* is it qualified to examine what factors or elements should be taken into account as relevant, and to what degree such factors or elements should be evaluated when it is determining the line to be drawn or indicating a concrete line based on its own evaluation of the relevant factors and elements.

89. I must add furthermore that, if a single maritime delimitation for the continental shelf and the exclusive economic zone is to be effected by the Court in response to a joint request by the parties in dispute, then the parties have to agree which factors or elements relevant to either the exclusive economic zone or the continental shelf (or, in other words, relevant to either fishery resources or mineral resources), are to be given priority. The Court is not competent even as an arbitrator to decide the priority of either the exclusive economic zone or the continental shelf unless expressly requested to do so by the parties.

PART III. LACK OF VALID GROUNDS FOR THE LINE DRAWN IN THE JUDGMENT

90. The Court has drawn "the delimitation line that divides the continental shelf and fishery zones of the Kingdom of Denmark and the Kingdom of Norway". Holding as I do the view that the Court is not competent to determine the delimitation line at all unless requested jointly by the Parties to decide the case *ex aequo et bono,* I am in no position to comment on the actual course of the delimitation effected by the Court.

91. I am concerned, however, that, even supposing that the Court had been requested by agreement to draw a single maritime boundary on the basis of Article 38, paragraph 2, of the Statute, it did not present any convincing statement of its reasons for having drawn the particular single maritime boundary line shown on sketch-map No. 2 attached to the Judgment. The line drawn by the Court may well be one of an infinite number of possibilities which could have been indicated if the Court had thought

any one of them would lead to an equitable solution. However, in choosing this line rather than any other, the Court seems to have taken a purely arbitrary decision.

(a) *Unsatisfactory "justification" by special (relevant) circumstances*

92. *Firstly*, the Court seems to take the view that the disparity in the lengths of the coastlines of the opposite States must necessarily be reflected in an adjustment or shifting of the median line taken as a line of departure. However, the Court appears to overlook one geometrical fact, namely that, in the case of opposite coasts of disparate lengths, even an unadjusted median line leaves a greater portion to the State with the longer coastline. What is more, the Court does not indicate the reasoning that has led it to conclude that the longer coastline should automatically lead to an even larger portion of the maritime area.

93. Even supposing that the State with the longer coastline is to be entitled to a much larger portion than the median line would confer, the drawing of the line connecting points A, O, N and M, as proposed in sketch-map No. 2 in the Judgment, is not, in my view, supported by any reasons that can be described as objective or convincing.

94. *Secondly*, I can accept that, just as in the *North Sea Continental Shelf* cases where the "natural resources of the continental shelf areas involved" were suggested as a factor to be taken into account, the "fishing resources" may well be a relevant factor in the delimitation of the exclusive economic zone. However, no reason is given in the Judgment as to why "equitable access" to the fishing resources is a relevant factor and the Court does not explain what the words "equitable" access can be taken to mean. Does the Court intend that Greenland's inhabitants or Danish fishermen, together with Norwegian fishermen (there are no inhabitants on Jan Mayen), should be entitled to "equitable access" to the fishing resources in one specific area, the area east of the median line, a long way from Greenland but close to Jan Mayen? Why is only that specific area taken up for the consideration of "equitable access to the fishing resources"? In fact capelin fishing has been controlled under an international arrangement without any reference to the division of the sea areas concerned.

95. In spite of repeated references to the concept of "equitable access to the fishing resources", the Court does not give the slightest hint in its reasoning as to why the median line as a line of departure should be adjusted or shifted so as to allot one-half of the southern part of the "area of overlapping claims" to Greenland (or Denmark) while leaving the other half to Jan Mayen (or Norway).

(b) *Unjustified choice of the line*

96. In taking not only "the disparity of coastal lengths" but also "equitable access to the fishing resources" as factors for the purpose of adjusting or shifting the median line as a line of departure, the Court was too much concerned with "the area of overlapping claims" when it divided the area between Greenland and Jan Mayen. The Court was incorrect in unduly concerning itself with the "area of overlapping claims" while neglecting the rest of the "relevant area", when allocating the areas to each State.

97. The task confronting the Court was *not* to delimit the boundary of the "area of overlapping claims" but to do so *of* the maritime area between Greenland and Jan Mayen, in other words the "relevant area" as defined in the Judgment (para. 20), although the line had of course to be located *in* the "area of overlapping claims". Its manipulation of the delimitation line, choosing points M, N and O on a ratio of 1 : 1 or 1 : 2 between the two lines, i.e., the maximum 200-mile line of the Danish entitlement and the median line, the line of Norway's modest assertion, can only be described as misguided.

98. I accept that the median line may be taken as a line of departure and then adjusted or shifted, with special (relevant) circumstances or relevant factors (elements) being given due consideration. In my concept of equity, it is not merely the simple disparity of opposite coastlines which must be taken into account but also disparity of geographical (natural or socio-economic) situations, for example, population, socio-economic activity, existence of communities behind the coastline and the distance of an uninhabited island from the nearest community of the mainland or main territory. The existence, quality and quantity of marine resources (either fishery or mineral) are relevant, but equity surely requires that any decision as to how these resources should be allotted to each party should take account not only of such relatively objective ecological facts but also of their relative significance, perhaps amounting to dependence, to the communities appertaining to either party. Certainly, it is impossible to calculate and balance up these elements mathematically in order to draw a line with total objectivity. Thus the drawing of a line must depend upon the conscientious but infinitely variable assessment of those drawing it.

(c) *Mistaken definition of a single maritime boundary*

99. I must also add that the Court failed to discern the possible differences in the special (relevant) circumstances which need to be taken into

consideration in order to achieve an equitable solution, depending on whether one is effecting the delimitation of the exclusive economic zone or that of the continental shelf. If the marine resources constitute a factor to be taken into account, it is unthinkable to draw a single maritime boundary without having a clear idea as to which particular circumstances ought to predominate (i.e., those relating either to the exclusive economic zone or to the continental shelf). The Court does not give any good reason why equitable access to the "fishing resources" should have also been taken into account when it drew the line constituting the boundary not only of the exclusive economic zone but also of the continental shelf. The Court has apparently erred in this respect after taking it for granted that there ought to be such a single boundary.

(d) *Conclusion*

100. As I have already pointed out, the line connecting points M, N, O and A, which is drawn eastwards of the median line as a result of adjustment and shifting, *cannot* be categorized as *mistaken* because it represents one choice from an infinite number of potential lines of delimitation in this area, but I venture to suggest that it was drawn in an arbitrary manner, unsupported by any sufficiently profound analysis. That the effort of the Court was conscientiously directed towards the finding of an equitable solution is something which, however, I readily acknowledge.

(Signed) Shigeru ODA.