SEPARATE OPINION OF JUDGE SCHWEBEL

I am in substantial but not full agreement with the Court's Judgment. There is no need to specify the several holdings of the Court with which I agree. The questions whose treatment by the Court is in my view questionable are the following.

I. Should the Law of Maritime Delimitation Be Revised to Introduce and Apply Distributive Justice?

The Judgment quite rightly observes that the real interests immediately at stake in this case are fishing rights, restricted to a southerly, relatively ice-free zone of the disputed area. It decides that equal access to the capelin resources of the southern part of the area of overlapping claims has to be assured by a substantial adjustment or shifting eastwards of the median line. The Court concludes that the two Parties "should enjoy equitable access to the fishing resources of this zone, which should accordingly be divided into two equal parts".

While the Court may be commended for the simplicity of its conclusion, a principled consistency with its earlier case-law is less conspicuous. In this Judgment, the Court recalls "the need, referred to in the *Libya/Malta* case, for 'consistency and a degree of predictability' ". But in this, the most critical holding of the Judgment on the real assets at stake, the Court jettisons what its case-law, and the accepted customary law of the question, have provided.

In its seminal Judgment in the *North Sea Continental Shelf* cases, the Court held that delimitation of the continental shelf is "not the same thing as awarding a just and equitable share of a previously undelimited area". It held that:

> "the doctrine of the just and equitable share appears to be wholly at variance with what the Court entertains no doubt is the most fundamental of all the rules of law relating to the continental shelf, enshrined in . . . the 1958 Geneva Convention, . . . namely that the rights of the coastal State in respect of the area of continental shelf . . . exist *ipso facto* and *ab initio*, by virtue of its sovereignty over the land . . .
>
> It follows that . . ., the notion of apportioning an as yet undelimited area, considered as a whole (which underlies the doctrine of the just and equitable share), is quite foreign to, and inconsistent with, the basic concept of continental shelf entitlement, . . . The delimitation

itself must indeed be equitably effected, but it cannot have as its object the awarding of an equitable share, or indeed of a share, as such, at all, — for the fundamental concept involved does not admit of there being anything undivided to share out." (*I.C.J. Reports 1969*, p. 22, paras. 19 and 20.)

The Court consequently rejected the claim of the Federal Republic of Germany to a "'just and equitable' share of the shelf areas involved" (*ibid.*, p. 29).

In the *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* case, the Court concluded that:

"these economic considerations cannot be taken into account for the delimitation of the continental shelf areas appertaining to each Party. They are virtually extraneous factors since they are variables which unpredictable national fortune or calamity, as the case may be, might at any time cause to tilt the scale one way or the other. A country might be poor today and become rich tomorrow as a result of an event such as the discovery of a valuable economic resource." (*I.C.J. Reports 1982*, p. 77, para. 107.)

In the case concerning *Delimitation of the Maritime Boundary in the Gulf of Maine Area*, the Chamber of the Court observed that fishing, oil exploration and other such considerations advanced by the Parties diverged from the crux of the matter. The Chamber was bound "not to take a decision *ex aequo et bono*, but to achieve a result on the basis of law" (*I.C.J. Reports 1984*, p. 278, para. 59). When it approached what it characterized as "the real subject of the dispute between the United States and Canada in the present case, the principal stake in the proceedings", Georges Bank (*ibid.*, p. 340, para. 232), the Court confronted the question of whether the line which it had drawn on geographical grounds should be affected by considerations of human and economic geography. The Chamber held that such considerations were "ineligible for consideration as criteria to be applied in the delimitation process itself" *(ibid.)*. It concluded:

"It is, therefore, in the Chamber's view, evident that the respective scale of activities connected with fishing — or navigation, defence or, for that matter, petroleum exploration and exploitation — cannot be taken into account as a relevant circumstance or, if the term is preferred, as an equitable criterion to be applied in determining the delimitation line. What the Chamber would regard as a legitimate scruple lies rather in concern lest the overall result, even though achieved through the application of equitable criteria and the use of appropriate methods for giving them concrete effect, should unexpectedly be revealed as radically inequitable, that is to say, as likely to entail catastrophic repercussions for the livelihood and economic well-being of the population of the countries concerned." (*Ibid.*, p. 342, para. 237.)

In the *Continental Shelf (Libyan Arab Jamahiriya/Malta)* case, the Court reaffirmed "the principle that there can be no question of distributive justice" (*I.C.J. Reports 1985*, p. 40, para. 46). A court applying equitable considerations may take into account "only those that are pertinent to the institution of the continental shelf as it has developed within the law" (*ibid.*, p. 40, para. 48). Thus the Court rejected the economic considerations advanced by Malta as "totally unrelated to the underlying intention of the applicable rules of international law" (*ibid.*, p. 41, para. 50).

In the light of this jurisprudence, why should Denmark be accorded equal access with Norway to the section of the area of overlapping claims in which, in season, the presence of capelin and the absence of drift ice provide a valuable fishing ground? Why must what the Court describes as "equitable access to the fishing resources" of this zone be shared? It was not claimed or shown that, if Greenland were not to be accorded fuller access to the ice-free area in which capelin may be fished in season, Greenland would be confronted by catastrophic economic repercussions, so even that "legitimate scruple" did not come into play.

It follows that the Court by this holding of distributive justice has departed from the accepted law of the matter, as fashioned pre-eminently by it. It is not suggested that this departure from principle and precedent is legally fatal. If what is lawful in maritime delimitation by the Court is what is equitable, and if what is equitable is as variable as the weather of The Hague, then this innovation may be seen as, and it may be, as defensible and desirable as another. It may be more defensible and desirable than that concerning the length of coastlines.

II. Should the Differing Extent of the Lengths of Opposite Coastlines Determine the Position of the Line of Delimitation?

The Court observes that it has never before had occasion to apply the 1958 Geneva Convention on the Continental Shelf. In the *North Sea Continental Shelf* cases, Germany was not a party to the Convention; similarly, in the continental shelf cases between Tunisia and Libya and between Libya and Malta, Libya was not a party. In the *Gulf of Maine* case, Canada and the United States were parties to the 1958 Convention, but they requested the Chamber to define "the course of the single maritime boundary that divides the continental shelf and fisheries zones", so that, as the Court notes, the Chamber considered that the 1958 Convention, being applicable only to the continental shelf, did not govern the delimitation at issue. The Court consequently and rightly now holds that:

> "In the present case, both States are parties to the 1958 Convention and, there being no joint request for a single maritime boundary

> as in the *Gulf of Maine* case, the 1958 Convention is applicable to the delimitation of the continental shelf between Greenland and Jan Mayen." (Judgment, p. 58, para. 45.)

It follows that, since the Convention is applicable, and since by the terms of Article 38 of the Statute,

> "The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
>
> *(a)* international conventions, whether general or particular, establishing rules expressly recognized by the contesting States"

the Court in this case is bound to give effect to the pertinent provisions of the 1958 Convention.

Article 6 of the 1958 Convention is prescriptive. Its first paragraph provides:

> "Where the same continental shelf is adjacent to the territories of two or more States whose coasts are opposite each other, the boundary of the continental shelf appertaining to such States shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary is the median line, every point of which is equidistant from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured."

Since there is no agreement between the Parties, "the boundary is the median line" — "unless another boundary line is justified by special circumstances". That brings us to the ever-recurring question: are there special circumstances which justify another boundary?

It is plain that the term "special" circumstances may not be judicially interpreted to mean "any" circumstances. The meaning of the term "special" is antithetical to "any" or "all" or what is the generality of circumstances. Nor in interpreting the 1958 Convention may "special" circumstances be equated with the broader range of "relevant" circumstances which may be applicable in customary international law. The factors that are pertinent to a circumstance clearly are wider than those which are special to it. What then are "special circumstances" — i.e., particular, peculiar or singular circumstances — as that term is illuminated by the *travaux préparatoires* of the 1958 Geneva Convention and by Court precedents?

The *travaux préparatoires* indicate that, by special circumstances, the drafters of the 1958 Convention decidedly did not mean any circumstance which the arbitrator or judge might see as relevant. Judgment was to be made on the basis of law, not *ex aequo et bono.* Graphic illustration was

given of what are "special circumstances": initially, an exceptional configuration of the coast, or the presence of islands or of navigable channels. The pertinent passage of the report of the International Law Commission, which ultimately was the basis of the draft of the Convention submitted to the Geneva Conference, provides:

> "Having regard to the conclusions of the committee of experts referred to above [the committee which proposed equidistance], the Commission now felt in the position to formulate a general rule, based on the principle of equidistance, applicable to the boundaries of the continental shelf both of adjacent States and of States whose coasts are opposite to each other. The rule thus proposed is subject to such modifications as may be agreed upon by the parties. Moreover, while in the case of both kinds of boundaries the rule of equidistance is the general rule, it is subject to modification in cases in which another boundary line is justified by special circumstances. As in the case of the boundaries of coastal waters, *provision must be made for departures necessitated by any exceptional configuration of the coast, as well as the presence of islands or of navigable channels. To that extent the rule adopted partakes of some elasticity. . . . arbitration, while expected to take into account the special circumstances calling for modification of the major principle of equidistance, is not contemplated as arbitration* ex aequo et bono. *That major principle must constitute the basis of the arbitration, conceived as settlement on the basis of law, subject to reasonable modifications necessitated by the special circumstances of the case.*" (*Yearbook of the International Law Commission,* 1953, Vol. II, p. 216, para. 82; emphasis supplied.)

So in the view of the International Law Commission, "reasonable modifications" of "the general rule, based on the principle of equidistance" might be made where departures were "necessitated by the special circumstances of the case".

At the Geneva Conference at which the 1958 Convention was adopted, the Commission's carefully crafted proposal was sustained in a formulation of the British and Netherlands delegations. The only elucidation of what might be a special circumstance was the statement of the British delegation's Admiralty expert, Commander Kennedy, offered in explanation of "The fairest method of establishing a sea boundary . . . that of the median line":

> "Among the special circumstances which might exist there was, for example, the presence of a small or large island in the area to be apportioned; he [Commander Kennedy] suggested that, for the purposes of drawing a boundary, islands should be treated on their

> merits, very small islands or sand cays . . . being neglected as base points . . . Other types of special circumstances were the possession by one of the two States concerned of special mineral exploitation rights or fishery rights, or the presence of a navigable channel; in all such cases, a deviation from the median line would be justified, but the median line would still provide the best starting point for negotiations." (UNCLOS I, Fourth Committee, Continental Shelf, *Official Records*, Vol. VI, p. 93.)

No delegation questioned the sense and scope of special circumstances given by Commander Kennedy. At the same time, the United States delegation observed that "the rule adopted would have to be fairly elastic", and supported maintenance of "the reference to special circumstances, since account would have to be taken of the great variety of complex geographical situations that existed" (*ibid.*, p. 95). While the diversity of views about the merits of equidistance which since has become ritualized was introduced at the Geneva Conference, the text of what became Article 6 was overwhelmingly adopted.

At the Geneva Conference as in the International Law Commission, there was no suggestion that differing lengths of opposite coastlines — which would represent the typical and not the special case — would constitute a special circumstance. Of course islands, as well as mainlands, have coasts, which may be situated opposite other coasts. But the acceptance of islands as a special circumstance in the *travaux préparatoires* plainly refers to islands whose situation or size or other characteristics may constitute a special circumstance in a delimitation between two other coasts; an island was not conceived to be of itself a special circumstance which affects its own coastal projections. That concept is so bizarre that naturally it finds no expression in the intentions of those who drafted the 1958 Convention.

Of prior cases in this Court of delimitation of the continental shelf or of fishing zones, three are particularly pertinent. In the *North Sea Continental Shelf* cases, the Court drew a distinction between the situation of adjacent and opposite coasts. It took account of the lengths and configurations of the coasts of adjacent States. As to opposite States, it had this to say of the product of the International Law Commission which found expression in Article 6 of the 1958 Geneva Convention:

> "Most of the difficulties felt in the International Law Commission related, as here, to the case of the lateral boundary between adjacent

States. Less difficulty was felt over that of the median line boundary between opposite States, although it too is an equidistance line. For this there seems to the Court to be good reason. The continental shelf area off, and dividing, opposite States, can be claimed by each of them to be a natural prolongation of its territory. These prolongations meet and overlap, and can therefore only be delimited by means of a median line; and, ignoring the presence of islets, rocks and minor coastal projections, the disproportionally distorting effect of which can be eliminated by other means, such a line must effect an equal division of the particular area involved. If there is a third State on one of the coasts concerned, the area of mutual natural prolongation with that of the same or another opposite State will be a separate and distinct one, to be treated in the same way. This type of case is therefore different from that of laterally adjacent States on the same coast with no immediately opposite coast in front of it, and does not give rise to the same kind of problem — a conclusion which also finds some confirmation in the difference of language to be observed in the two paragraphs of Article 6 of the Geneva Convention . . . as respects recourse in the one case to median lines and in the other to lateral equidistance lines, in the event of absence of agreement.

If on the other hand, contrary to the view expressed in the preceding paragraph, it were correct to say that there is no essential difference in the process of delimiting the continental shelf areas between opposite States and that of delimitations between adjacent States, then the results ought in principle to be the same or at least comparable. But in fact, whereas a median line divides equally between the two opposite countries areas that can be regarded as being the natural prolongation of the territory of each of them, a lateral equidistance line often leaves to one of the States concerned areas that are a natural prolongation of the territory of the other." (*I.C.J. Reports 1969*, pp. 36-37, paras. 57 and 58.)

In the *Gulf of Maine* case, the Chamber adjusted a median line to take account of the "actual situation" respecting the length of coastlines, which in some measure were opposite. Its selection of the relevant coastlines, the larger part of which were adjacent rather than opposite, was controversial, but a calculation was made of the lengths of the coastlines so selected and the resultant relationship between them was mathematically applied to adjust the position of the median line in that precise measure. The *Gulf of Maine* case is distinguishable from the instant case on the grounds that, first, the 1958 Convention was not applicable to its determination of a single maritime boundary; second, the adjustment in the median line was made in a situation in which the coasts were not only opposite but adjacent and in which a salient issue was abatement of claimed cut-off effects which an unadjusted median line would entail; and third, the adjustment

in the position of the median line was made in proportion to the actual difference in the length of the coasts which the Chamber calculated.

While for these reasons, the *Gulf of Maine* case provides no more than qualified support for the Court's reasoning and conclusions in the instant case, direct support is provided by the Court's Judgment in the *Continental Shelf (Libyan Arab Jamahariya/Malta)* case. Not on a doctrinal level, for, on the contrary, the Court in that case had this to say about Libya's contention that the length of coastlines afforded the basis of delimitation:

> "However, to use the ratio of coastal lengths as of itself determinative of the seaward reach and area of continental shelf proper to each Party, is to go far beyond the use of proportionality as a test of equity, and as a corrective of the unjustifiable difference of treatment resulting from some method of drawing the boundary line. If such a use of proportionality were right, it is difficult indeed to see what room would be left for any other consideration; for it would be at once the principle of entitlement to continental shelf rights and also the method of putting that principle into operation. Its weakness as a basis of argument, however, is that the use of proportionality as a method in its own right is wanting of support in the practice of States, in the public expression of their views at (in particular) the Third United Nations Conference on the Law of the Sea, or in the jurisprudence. It is not possible for the Court to endorse a proposal at once so far-reaching and so novel." (*I.C.J. Reports 1985*, p. 45, para. 58.)

Nevertheless, the Court proceeded, in a situation of purely opposite coasts, in which the far greater length of Libya's coast in relation to that of Malta was similar to the very great extent of Greenland's coast relative to that of Jan Mayen, to shift the median line markedly northwards in Libya's favour to take account of a difference in coastal lengths. It cannot be said, to take mathematical or proportionate account of a difference in coastal lengths, for, unlike the *Gulf of Maine* Judgment, the application of proportionality in the *Libya/Malta* case evidences no discernible, specific relationship between the different coastal lengths of Libya and Malta. Indeed, in that case as in this, if the vast differences in coastal lengths were to have been given proportionate effect, the relatively minuscule islands would have no continental shelves or fishing zones at all. The obscure measure of adjustment of the median line between Libya and Malta appears to have had the benefit of inspiration, if divine, then from Roman gods, for the line selected just happened essentially to coincide with the limit of the claims of a third State, Italy, whose claims the Court paradoxically earlier had declined to pass upon. In the current case, the measure of adjustment seems to have followed, if not from the inspiration of Norse gods, then from considerations of symmetry, once the decision

was made to furnish "equitable access" to the southern sector in which capelin may be fished. In Selden's seventeenth-century days, equity was described as the Chancellor's conscience, variable indeed; it was as if the standard of measurement called a foot were to be the length of the Chancellor's foot, "an uncertain measure". (Pollock, ed., *Table Talk of John Selden*, 1927, p. 43.) Nowadays, equity is to be impressionistically measured by the length of opposite coastlines.

III. Should Maximalist Claims Be Rewarded?

If the case between Denmark and Norway is to be considered in a fashion which places the legal entitlements of each Party on an equal plane, then both Greenland and Jan Mayen should be viewed as entitled prima facie to a 200-mile zone. These entitlements, however, being less than 400 miles apart, overlap. Thus it is within this large maritime area of overlapping potential entitlements that the line of delimitation had to be drawn. But not in Denmark's view. For its part, Denmark claimed its full 200-mile entitlement, proposing to leave Norway none of its, whereas Norway, for its part, took a more modest approach, claiming not the full extent of its 200-mile entitlement but only those areas which lie to the east of a median line drawn between the opposite coasts of Jan Mayen and Greenland. That is to say, Denmark's claim is precisely the same claim as could be made if Jan Mayen Island did not exist or, if existing, were to be treated not as an island but as a rock "which cannot sustain human habitation or economic life" of its own and which accordingly shall have "no exclusive economic zone or continental shelf" (Art. 121 of the 1982 United Nations Convention on the Law of the Sea). The singular characteristics of Jan Mayen Island may leave room for argument about whether it meets the standards of Article 121, but Denmark did not make that argument; it accepted that Jan Mayen Island is not a rock but an island.

The line of delimitation indicated by the Court gives the impression of rewarding Denmark's maximalist claim and penalizing Norway's moderation. Equitable or equal access is given to the Parties in the southerly area that matters, and the remainder of the line is indicated to conjoin with the line so to be drawn, apparently all of this to fall within the area of Norway's claim. Norway proposed a median line, which fell roughly midway between the coasts of Greenland and Jan Mayen, but which nevertheless would have accorded Greenland significantly more continental shelf and fishing zone than Jan Mayen, for the reason that Greenland's far longer

coast generates more area seawards than does Jan Mayen's short coast. But that was not seen as sufficient for Denmark's maximalist claim or the Court's apportionment, which is markedly more generous to Denmark than is the median line. To arrive at this expanded apportionment, the Court has found it right to award Greenland a bonus for the length of its coast or to penalize Jan Mayen for the shortness of its. The result is to attribute almost three-quarters of the total area of overlapping potential entitlements to Denmark and a bit more than one-quarter to Norway. Why this should be seen as equitable is not clear but what is clear is that the Court's Judgment may tend to encourage immoderate and discourage moderate claims in future. Yet it may be said in defence of the approach of Denmark, if not of the Court, that, however extreme Denmark's claim appears in legal terms, in political terms it is perfectly understandable. Once Norway had extended to Iceland a 200-mile zone in relation to Jan Mayen, naturally Denmark sought no less on behalf of Greenland.

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As noted, in this case Article 6 of the 1958 Convention has mandatory force, for the Parties and for the Court. But the 1958 Convention concerns the continental shelf; it does not govern the fishing zone. It is agreed by the Parties and the Court alike that customary international law governs delimitation of the fishing zone. It is also agreed that, in this case of opposite coasts, it would make no practical sense for the delimitation of the fishing zone to produce a line which differs from that to be drawn for delimitation of the continental shelf.

The saving grace for the Court's Judgment in these circumstances is that the customary law governing delimitation of the fishing zone is elastic indeed, having been shaped by the Court's judicial and by arbitral decisions and the porous terms of the United Nations Convention on the Law of the Sea. Under that Convention, which is not in force, an equitable solution is to be achieved, for the continental shelf and the exclusive economic zone, on the basis of international law as referred to in Article 38 of the Statute of the Court. Nothing is said in these Convention provisions of equidistance, or special circumstances, or relevant circumstances. Permeable as the Convention's provisions are, they exclude an equitable solution based not on international law but considerations *ex aequo et bono.* The terms of Article 38 of the Statute distinguish between the function of judicial decision in accordance with international law

which applies the sources of that law, and the power of the Court to decide a case *ex aequo et bono* if the parties so agree.

Nevertheless, the authority to seek an equitable solution by the application of a law whose principles remain largely undefined affords the Court an exceptional measure of judicial discretion. In this Judgment, the Court's attempted definition of that law ultimately does little more than require the investigation of "relevant circumstances" which have to be taken into account if an equitable result is to be achieved. Invoking "relevant circumstances" is in accord with earlier Judgments of the Court, beginning with the *North Sea Continental Shelf* cases, and is consistent with the tenor of the debate at the Third United Nations Conference on the Law of the Sea. If the Court draws from the cornucopia of judicial discretion afforded by its appreciation of what circumstances are relevant the decision that the fishing zone shall be equally apportioned in this case, it is difficult to maintain that that exercise of discretion is more objectionable than indication of an alternative line.

If that is so, the question then arises, should the continental shelf line imported by the 1958 Convention — the median line — govern, or should the fishing zone line indicated by the Court's sense of equity govern?

There is no ready answer to this conundrum. It might on the one hand be maintained that the 1958 Convention affords anterior and harder law, unmodified by a subsequent treaty in force. It should accordingly govern, the more so because there are a number of continental shelf agreements and awards which are in force which are not treated as having been reworked by the subsequent advent of the concept of the exclusive economic zone or variants thereof or by the lenient terms of the United Nations Convention on the Law of the Sea. On the other hand, it might be maintained that, even if that be generally so, the real interests at stake in this case involve the apportionment of fishing rights and that, therefore, the Court's appreciation of fishing zone equities should govern any apportionment of the continental shelf.

The Court avoids a choice between these approaches by maintaining that it applies "a general norm based on equitable principles" amalgamating the two in a formula it describes as "the equidistance-special circumstances rule". Whether, in view of the reasoning employed in this case by the Court, it has effectively employed that rule is debatable. But what is clear is that the Court leavens its Judgment with a large infusion of equitable ferment, importing as it does a search for "relevant circumstances", and so concocts a conclusion which does not lend itself to dissection or, for that matter, dissent. Based on large and loose approaches such as its gross impression of the effects of differing lengths of coasts, its desire to afford equitable access to fishing resources, and the attractions of the

symmetrical conjoinder of indicated lines of delimitation, the Court comes up with a line which, given the criteria employed, may be as reasonable as another. Where this leaves the law of maritime delimitation, to the extent that such a law subsists, is perplexing.

(Signed) Stephen M. SCHWEBEL.