DISSENTING OPINION OF JUDGE FISCHER

To my regret I am unable to concur in the decision of the Court for the reasons which I shall briefly set forth below. My remarks will concentrate on the principal divergence of views.

On the other hand, I am in agreement with some of the reasoning of the Court.

1. I agree, for example, with the description of what can be called the relevant area and the area of overlapping claims (synonymous with the "disputed area"). However, I do not share the Court's view that the so-called "area of overlapping potential entitlement" is relevant. It is a fact that Norway has claimed median lines constituting the delimitation of the continental shelf and the fisheries zones as it is a fact that Denmark has claimed a delimitation line 200 nautical miles from East Greenland. The claims of the Parties are decisive, not the entitlement.

The distinction in this case between "entitlement" and "delimitation" is important and must always be kept in mind. I will revert to this matter in another context.

The case is characterized by a rather simple geography: the extensive, well-defined coast of East Greenland confronting the equally well-defined but much smaller coast of West Jan Mayen.

2. I also agree with the Court in rejecting the principal contentions of Norway that median lines delimitation in respect of the continental shelf areas and the fisheries zones between Greenland and Jan Mayen are "in place". These contentions were mainly based on the 1965 Agreement, the 1958 Convention on the Continental Shelf and the conduct of the Parties, especially of Denmark. The Court did rightly not accept any of these arguments.

3. On the whole I agree with the Court as to the question of whether there should be one line of delimitation as claimed by Denmark or two — coinciding — lines as claimed by Norway. The Court is — even without an agreement between the parties — competent to declare that a delimitation of the shelf and of the fisheries zones should be based on a single line. The fact that the present case has been brought before the Court by the unilateral application of Denmark has therefore not been relevant.

The legal paths leading to the final outcome of either a single line or two

(coinciding) lines are or may be different. However, when the result is attained, is there then any difference between a single line on a given geographical position or two coinciding lines on this same position? In my view, there is not. It is the location of the delimitation which matters, not whether the delimitation is effected by one line or two coinciding lines.

4. I agree with the Court that the legal sources governing the case are the 1958 Convention (Art. 6) as regards the continental shelf and customary law as regards the fisheries zone. I do not, however, consider the 1958 Convention to be the sole legal source concerning the continental shelf delimitation, as Article 6 of that Convention has to be interpreted according to and to be supplemented by customary law.

The Court itself has mentioned the tendency towards assimilation of the "special circumstances" of Article 6 and the relevant circumstances of customary law, because both aim to promote the achievement of an equitable result.

5. I disagree with the Court when it deduces from Article 6 that it is appropriate provisionally to draw a median line as a first stage in the delimitation process.

By means of this legal method the Court has been able to reach its decision of establishing a delimitation line located between the lines claimed by the two Parties.

The approach whereby the Court first used a provisionally drawn median line and then enquired whether special circumstances required another boundary is set forth in the Judgment after the Court's rejection of the Norwegian contentions that median lines are in place, but before it considers whether the Danish claims are equitable or justified. The Court apparently arrived *a priori* at the conclusion that those claims would lead to an inequitable result.

I do not consider this manner of proceeding to be the proper one. In my view, the Court should, after having examined the Norwegian claims, have examined the Danish claims and only then, if the Danish claims were found to lead to an inequitable result, should it have considered whether a provisional line — the median line or another line — could appropriately be used.

6. The Court has in my view not produced any substantial arguments in favour of the use of the median line as a starting point for the delimitation process.

I do not see how one can defend the contention that Article 6 of the 1958 Convention justifies this method. The Article does not contain any provisions about using the median line as a provisionally drawn line.

The Court has assumed that the striking difference in the length of the two relevant coasts constitutes "special circumstances" within the meaning of Article 6, which means that a delimitation line other than the median line has to be established. It is difficult to understand how it can then conclude that a median line should be used as a provisional line.

7. The Court has referred to the *Continental Shelf (Libyan Arab Jamahiriya/Malta)* case where the tracing of a median line by way of a provisional step in a process to be continued by other operations was considered to be the most judicious manner of proceeding with a view to the eventual achievement of an equitable result.

Reference has also been made to the Anglo-French Court of Arbitration which, in 1977, applied the equidistance line as a provisional line. These cases are however so different from the present one in respect of geographical and other factors, that there seems to be no justification from drawing any conclusions from them as to the appropriateness of using a provisional median line in the present case.

It is, moreover, possible to adduce other cases with different standpoints, as for instance the case concerning the *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*:

> "Nor does the Court consider that it is in the present case required, as a first step, to examine the effects of a delimitation by application of the equidistance method, and to reject that method in favour of some other only if it considers the result of an equidistance line to be inequitable." (*I.C.J. Reports 1982*, p. 79, para. 110.)

8. It seems to me that the Court, when deciding to use a median line as a provisional line, has accorded a preferential and unwarranted status to the median line.

This attitude corresponds to the general attitude of the Court in this case to the effect that prima facie a median line between opposite coasts results in an equitable solution. This does not, in my opinion, correspond to the developments in international law since 1958 especially as codified by the 1982 Convention on the Law of the Sea, which has diminished the significance attached to the median line principle, seen as no more than one means among others of reaching an equitable result.

I do not think that, in the absence of an agreement, the median line according to Article 6 of the 1958 Convention can be considered as the main rule while "special circumstances" constitute the exception. The two alternatives are, in my opinion, placed on the same footing. The primary task is therefore, to examine whether in the present case there are special circumstances which justify a boundary other than the median line and, if so, where such a line is to be drawn.

Article 6 contains no indication of the precise nature of "special circumstances" but it is generally accepted that those circumstances are such as to lead to an equitable solution.

9. The claims of Denmark to a delimitation line running 200 nautical miles from the coast of Eastern Greenland have, as mentioned, been examined by the Court only in the context of the adjustment of the provisional median line and were rejected on the grounds that the allocation of the whole of the disputed area and its resources to one of the Parties would not have been considered equitable. The Court has also asserted that the coast of Jan Mayen, no less than that of Eastern Greenland, accords full title to the maritime areas recognized by customary law, i.e., in principle up to a limit of 200 miles from the baseline, and that the attribution to Norway of no more than the residual area left after giving full effect to the eastern coast of Greenland would run counter to the superior requirements of equity. According to the standpoint of the Court, neither of the States with opposite coasts can require the other State to renounce its claim to the full maritime area. This leads me to think that the Court has not drawn a clear distinction between "entitlement" and "delimitation".

10. The distinction between the two concepts is important, because the law applicable to the basis of entitlement to areas of continental shelf or fishery zones, is different from — albeit complementary to — the law applicable to the delimitation of such areas (see the case concerning the *Continental Shelf (Libyan Arab Jamahiriya/Malta), I.C.J. Reports 1985*, pp. 29-30, para. 27).

Denmark has not questioned Jan Mayen's status as an island and, consequently, has neither questioned its entitlement to a fishery zone and a continental shelf, nor objected to its 200-mile zone towards the open sea.

Delimitation does not by definition and necessarily have to lead to a partition of the disputed area. No legal norms exist which would prevent a judicial solution of a delimitation dispute from being one in which one of the Parties is left with its full zone vis-à-vis the other Party, if such a solution is found to be equitable.

11. Customary law concerning the delimitation of the continental shelf and/or of economic zones has been applied in a number of cases by the International Court of Justice (*North Sea Continental Shelf* cases, 1969; *Tunisia/Libya*, 1982; *Gulf of Maine*, 1984; *Libya/Malta*, 1985) and by other international tribunals (*United Kingdom/France*, 1977); *Guinea/Guinea-Bissau*, 1985; *Canada/France*, 1992). Some cases were concerned solely with the continental shelf (*North Sea Continental Shelf* cases; *Tunisia/Libya*; *Libya/Malta*; *United Kingdom/France*), while other cases were also concerned with the delimitation of economic zones and the territorial sea (*Guinea/Guinea-Bissau* and *Canada/France*).

In all cases concerning maritime delimitation, customary law prescribes that a delimitation is to be effected by the application of equitable principles (criteria) capable of ensuring an equitable result (*Continental Shelf (Tunisia/Libyan Arab Jamahiriya), I.C.J. Reports 1982*, p. 59, para. 70; *Delimitation of the Maritime Boundary in the Gulf of Maine Area, I.C.J. Reports 1984*, p. 299, para. 112; *Continental Shelf (Libyan Arab Jamahiriya/Malta), I.C.J. Reports 1985*, p. 38, para. 45).

Customary law does not define the term "equitable", which is used to characterize both the result to be achieved and the means to be employed in order to attain it. It is, however, the result which is predominant, so that the equitableness of a principle (criterion) is assessed in the light of its usefulness for the purpose of arriving at an equitable result. The equitableness of the result is to be determined by a balancing up of all the relevant factors of the particular case (*North Sea Continental Shelf* cases, *I.C.J. Reports 1969*, p. 50, para. 93). International tribunals have found a variety of factors or methods to be relevant, and no factors or methods are considered to have a privileged status in relation to others. This was clearly stated in the *North Sea Continental Shelf* cases (*ibid.*, pp. 53-56, para. 101) and in the *Guinea/Guinea-Bissau* case, 1985 (*International Legal Materials*, Vol. XXV, No. 2, 1986, p. 294, para. 102).

12. The factors which, in accordance with international judicial practice, have primarily to be taken into consideration are those related to the geographical features of the case, especially the relevant area and the relevant fronting coasts. The length of the relevant eastern coast (baseline) of Greenland is approximately 524 kilometres, the length of the fronting western coast of Jan Mayen is approximately 57.8 kilometres. Thus, the ratio of coastal lengths is more than 9 to 1 in favour of Greenland, so that this case is characterized by a very marked difference between the lengths of the two relevant opposite coasts. This is why the proportionality factor is crucial. In the context of a delimitation of the continental shelf, a reference to that factor is generally taken to imply that there should be a reasonable degree of proportionality between the area of the continental shelf of the States concerned and the length of their relative coastlines.

13. Proportionality has played an important role as a relevant factor in many judicial cases concerning delimitation of the continental shelf and other maritime areas (*North Sea Continental Shelf* cases, 1969; *United Kingdom/France*, 1977; *Tunisia/Libya*, 1982; *Gulf of Maine*, 1984; *Libya/Malta*, 1985; *Guinea/Guinea-Bissau*, 1985; *Canada/France*, 1992). The exact role in the delimitation process has differed in judicial practice and has been widely discussed by publicists of international law. Proportionality in the lengths of the relevant coasts has either been a factor which, together with other factors, has been taken into consideration in order to decide an equitable delimitation or it has — as in the present Judgment —

been used *a posteriori* as a test of equity and appropriateness of a line which, as a starting point in the delimitation process, has been drawn on the basis of equidistance or in accordance with another method of delimitation.

When there are opposite coasts of comparable lengths, a median line delimitation would, in general, pass the tests of proportionality and equity. In the present case, however, where the two coastlines are of a proportion of more than 9 to 1, a median line cannot in my opinion be considered equitable, not even as a starting point in the delimitation process.

A median line delimitation would have allocated in total 96,000 square kilometres of the relevant area to Norway/Jan Mayen and 141,000 square kilometres to Denmark/Greenland, which corresponds to a ratio of some 1.5 to 1 in favour of Denmark/Greenland. Such a ratio differs greatly from the ratio of the difference of the lengths of the relevant coasts and would clearly have been inequitable.

This is also the case — although to a smaller degree — with the ratio, which follows from the Judgment.

The Court has in its decision, in my opinion, not — sufficiently — taken the difference between the lengths of the relevant coasts into consideration as it attributes, according to my estimate, some 43 per cent of the area of overlapping claims (zones 1, 2 and 3) to Denmark/Greenland (approximately 28,000 square kilometres) and some 57 per cent to Norway/Jan Mayen (approximately 37,000 square kilometres). This amounts to a total allocation of some 178,000 square kilometres of the relevant area to Denmark/Greenland and some 59,000 square kilometres to Norway/Jan Mayen, which is a ratio of some 3 to 1 in favour of Denmark. I do not see how this partition can be equitable considering the ratio of the coastal lengths (9 to 1). A delimitation of 200 miles drawn from Eastern Greenland would have allocated an area of about 206,000 square kilometres to Denmark/Greenland and some 31,000 square kilometres to Norway/Jan Mayen, which is a ratio of some 6.1 to 1 in favour of Denmark/Greenland. I therefore consider that considerations of general proportionality — together with certain other considerations — lead to the conclusion that a delimitation of 200 miles drawn from Eastern Greenland would have been equitable.

14. The Court has taken no account at all of the considerable differences between Greenland and Jan Mayen as regards population and socio-economic factors, on the grounds that such factors undergo modifications over time and thus cannot serve as a basis for a maritime delimitation which is destined to be permanent. I disagree with the Court as all these factors have existed for a long period of time and any change in the foreseeable future is very unlikely. Due to geographical, climatic and

other local conditions the major differences between Greenland and Jan Mayen will in all probability continue to exist and are, in my opinion, stable enough to be taken into consideration.

Besides, the position of the Court that socio-economic factors should not play a role in the delimitation process because they change has not prevented it from taking account of access to the fishery resources in the south of the disputed area.

As has been said, there are no general criteria of customary law that can serve to determine the weight to be attached to the factors considered relevant in a concrete case, as each case is "monotypic" *(Gulf of Maine).*

Contrary to the standpoint of the Court, I consider that not only geographical but also population and socio-economic factors play a part when one is assessing the equitableness of a maritime delimitation (*Delimitation of the Maritime Boundary in the Gulf of Maine Area, I.C.J. Reports 1982*, p. 278, para. 59, and p. 340, para. 232). There is no question of assessing single factors individually as relevant, but of assessing and weighing them up collectively.

The present case is characterized not only by a very marked difference between the lengths of the two relevant coasts (and the size of the two landmasses), but also by a fundamental difference between Greenland and Jan Mayen with respect to their demographic, socio-economic and political structures. Greenland is a viable human society with a population of 55,000 and with political autonomy, whereas Jan Mayen has no population in the proper sense of the word, as only about 25 persons temporarily stay on the island manning meteorological, radio and LORAN stations.

15. The economic and other interests described by the Parties in this case are fundamentally different. The interests described by Denmark are interests directly connected with Greenland whereas the interests described by Norway are interests connected with the Norwegian mainland and its population, not with Jan Mayen. As the case concerns delimitation of the maritime area between Greenland and Jan Mayen it seems to me that only the population and socio-economic structures of these territories are in fact relevant and that, in this connection especially, the total dependence of Greenland on fisheries needs to be stressed.

It is generally recognized that a heavy dependence on fisheries may be a relevant factor in international law, as far as territories like Greenland are concerned. This appears from a resolution which was adopted in connection with the Convention of 29 April 1958 on Fishing and Conservation of the Living Resources of the High Seas. In connection with the adoption of the resolution, particular mention was made of Iceland, the Faroe Islands and Greenland, as countries whose people are over-

whelmingly dependent upon coastal fisheries for their livelihood or economic development. That the needs of the coastal population of Greenland justify special protective measures was also recognized in the Judgment of 30 November 1982 of the Court of Justice of the European Communities.

The Court has, as mentioned, taken account of the factor of access to what it considered to be the capelin zone as it has found that a division of the southern part of the area of overlapping claims into two equal parts would give both Parties equitable access to the fishing resources of the area. In other words, a new type of median line has been introduced. I disagree with the grounds of the Court as they disregard the above-mentioned socio-economic factors.

16. The Court did not consider the maritime delimitation between Iceland and Jan Mayen, as effected by the treaties of 1980 and 1981, to be a precedent and the conduct of the Parties to constitute an element which could influence the operation of delimitation in the present case.

I agree that these treaties do not constitute a binding precedent in the strict sense of the term but they are in my opinion nevertheless relevant as an expression of the conduct of Norway and as such of great importance to the present case.

I consider the Iceland/Jan Mayen delimitation which involves the very same island which is the subject of the present case to be highly relevant as a strong indication of what would be an equitable delimitation of the maritime area between Greenland and Jan Mayen.

17. It is noteworthy that the operative part of the Agreement of 1980 does not contain any provisions concerning the delimitation of the economic zones but that one of the preambular clauses is the following:

> "Considering that Iceland has established an economic zone of 200 nautical miles and that Norway will in the near future establish a fishery zone around Jan Mayen".

Thus the Icelandic 200-mile zone, vis-à-vis Jan Mayen, was not agreed upon by the Parties but existed by virtue of the Icelandic Law of 1 June 1979. The line, unilaterally drawn by Iceland, was then mentioned in the Preamble of the 1980 Agreement "recognizing Iceland's strong economic dependence on the fisheries, cf. Article 71 in the text of the Conference on the Law of the Sea". The same point of view was expressed in the Recommendation of 30 May 1980, advanced by the Norwegian Parliamentary Committee with respect to the 1980 Agreement:

> "In that no reservation is made on Norway's part against the full 200-nautical-mile extent of Iceland's economic zone also in the area between Iceland and Jan Mayen, it also implies approval of that extent of the zone in the area mentioned."

That view also found expression in the Committee's Report of 27 April 1982:

> "The Committee would also recall that, by virtue of the Agreement of 28 May 1980 between Norway and Iceland concerning fisheries and continental shelf questions, Norway indirectly approved an Icelandic economic zone of 200 nautical miles, comprising both fishing territory and the continental shelf, between Iceland and Jan Mayen. This approval at the same time marked acceptance on Norway's part of an Icelandic continental shelf of at least 200 miles towards Jan Mayen."

The Agreement of 1981 between Norway and Iceland, following the recommendations of the Conciliation Commission set up by the 1980 Agreement, provided that the delimitation between the Parties' respective parts of the continental shelf in the area between Iceland and Jan Mayen was to coincide with the delimitation line between their respective economic zones. The Conciliation Commission had, according to the 1980 Agreement, to "take into account Iceland's strong economic interests in these sea areas, the existing geographical and geological factors and other special circumstances".

18. The two Agreements by which Norway accepted that the maritime boundary between Iceland and Jan Mayen should be established to take account of the existing Icelandic 200-mile zone must, in the context of developments in the law of the sea, be considered as being in conformity with equitable principles and expressing a solution which Norway (and Iceland) considered to be equitable. A median line delimitation would not have been considered equitable.

19. The factual and legal situation in relation to the maritime delimitation in the area between Greenland and Jan Mayen is very similar to the context of the delimitation between Iceland and Jan Mayen. Greenland is, like Iceland, much larger than Jan Mayen and they both have, unlike Jan Mayen, permanent populations and their own economic and political structure. Iceland and Greenland have, with regard to their economies, been put on the same footing as, together with the Faroe Islands, they have, as has been said, been singled out in connection with the Convention of 29 April 1958 on Fishing and Conservation of the Living Resources of the High Seas, as countries or territories whose people are overwhelmingly dependent upon coastal fisheries for their livelihood or economic development.

The delimitation between Iceland and Jan Mayen must, as already stated, be considered to be equitable. As the factors which were relevant in that case are very similar to the relevant factors in the Greenland/Jan Mayen case, it would have been just and equitable to draw the delimitation line in the present case in a manner similar to the way in which the lines were drawn in the Iceland/Jan Mayen case, that is to say, at a distance of 200 nautical miles from East Greenland.

20. As for the delimitation in the maritime area between Bear Island and mainland Norway, the Court has found that Norway is no more bound by that solution than is Denmark to apply, in the present dispute, the method of equidistance used to effect the delimitation between Norway and Denmark in the Skagerrak and the North Sea or off the Faroe Islands. I do not see any analogy between the delimitation situations concerning Bear Island and the delimitations in the North Sea mentioned by the Court as the situation concerning Bear Island is very special. I consider that the Bear Island delimitation, although it concerns delimitation between two Norwegian territories, has international aspects and that it is of a certain relevance as expressing the conduct of Norway concerning a maritime delimitation of an area located between an uninhabited small island and a mainland.

21. I do not agree with the method of delimitation of the area of overlapping claims (zones 1, 2 and 3) which is very ingeniously invented expressly for this case.

The two lines dividing the area into three zones are drawn between the points where the Greenland 200-mile line and the median line are changing direction.

The southernmost zone (zone 1) corresponds — by accident — essentially to the area which, according to the Court, is the principal area for capelin fishing. It follows from what I have already stated that I do not consider the division of this zone into two equal parts to be equitable as it disregards relevant socio-economic factors. Furthermore I do not think that the Court is in a position to define the main fishing area of capelin with accuracy as that area might vary greatly.

The division of zones 2 and 3 is based on the sole consideration — which I strongly contest — that an equal division of all three zones would give too great a weight to the circumstance of the marked disparity in coastal length. The division of zones 2 and 3 is thus effected in a way that leads to the desired delimitation of all three zones. I consider that this whole method is artificial and that no rules of international law have been adduced to provide grounds for the method apart from a general reference to "the requirements of equity".

22. The judge may — and should — exercise judicial discretion within certain limits and has to make difficult choices according to his convictions.

In the present case, where the decision is based mainly upon equitable considerations, the range of choices is wider than in cases involving treaty law only, and the decision of what should be the equitable solution correspondingly difficult. In many cases as in the present one it seems almost impossible with 100 per cent certainty to point to one single solution which could be characterized as equitable. The judge has to make a choice between several potentially equitable solutions.

For the reasons stated above and after having carefully weighed up all the relevant factors, I have reached the conclusion that the Judgment is

not the most equitable solution but that a delimitation of the continental shelf and of the fisheries zone between Greenland and Jan Mayen at a distance of 200 nautical miles from Eastern Greenland would have been the most equitable solution and consequently should have been the outcome of the case.

(Signed) Paul FISCHER.