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PLEADINGS, ORAL ARGUMENTS, DOCUMENTS

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(FEDERAL REPUBLIC OF GERMANY/DENMARK;
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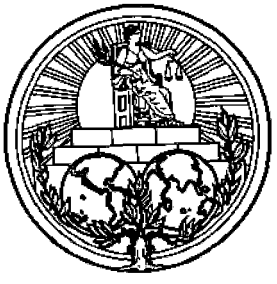


COMMON REJOINDER SUBMITTED BY THE GOVERNMENTS OF THE KINGDOM OF DENMARK AND THE KINGDOM OF THE NETHERLANDS

INTRODUCTION

I

1. This Common Rejoinder of the Kingdom of Denmark and of the Kingdom of the Netherlands to the Reply of the Federal Republic of Germany is submitted to the Court in pursuance of the Order of the Court dated 26 April 1968.

2. The Governments of the Kingdoms of Denmark and of the Netherlands note the considerations set out in the above-mentioned Order which have led the Court to conclude that the two Governments are in a common interest in the proceedings and to decide that they should file a Common Rejoinder. The two Governments appreciate the convenience which this procedure may have for the Court in the present cases and, in accordance with the terms of the Order, have drawn up their comments upon the two Replies of the Federal Republic of Germany as a Common Rejoinder.

3. The Governments of the Kingdoms of Denmark and of the Netherlands at the same time emphasize that their respective cases against the Federal Republic of Germany were instituted by separate Special Agreements and concern the delimitation of different boundaries of the continental shelf to seawards from different parts of the North Sea coast of the continent of Europe. The two Governments are thus in a common interest in the proceedings only in the sense that the issue before the Court in both these cases is "what principles and rules of international law are applicable to the delimitation as between the Parties of the areas of the continental shelf in the North Sea which appertain to each of them" beyond certain partial boundaries already determined and that the principles and rules of international law which each Government considers to be applicable in its case correspond. In all other respects their interests in the proceedings are entirely different and, in their substance, even divergent; for each of the two Governments is concerned to maintain its rights to the area of the North Sea continental shelf which appertains to it *erga omnes*, that is, vis-à-vis each and every other North Sea Power, including *both* the other two Parties to the present proceedings.

In this connection, it may be recalled that in its Counter-Memorial the Danish Government (paras. 152-156 and fig. 3) has taken the position that the delimitation of its continental shelf boundary vis-à-vis the Federal Republic is dependent *on the configurations only of the coasts of Denmark and of the Federal Republic in their relation to each other*; and that in its Counter-Memorial (paras. 147-151 and fig. 4) the Netherlands Government has taken the position that the delimitation of its continental shelf boundary vis-à-vis the Federal Republic is dependent *on the configurations only of the coasts of the Netherlands and of the Federal Republic in their relation to each other*. In other words, the two Governments have each insisted upon the entirely separate character of the issues between them and the Federal Republic so far as concerns the *substance*

of the matters in dispute, that is, the areas of continental shelf which appertain to the respective coasts of the three countries.

It may also be recalled in this connection that the partial continental shelf boundaries, which already exist between, on the one hand, Denmark and the Federal Republic and, on the other hand, the Netherlands and the Federal Republic and which are referred to in the respective Special Agreements submitting the two cases to the Court, were agreed upon in wholly separate negotiations and were delimited wholly independently of each other by reference exclusively, in the one case, to the coasts of Denmark and the Federal Republic and, in the other, to the coasts of the Netherlands and the Federal Republic.

4. Accordingly, having separate points of view in regard to the substance of the matters in dispute, the Governments of the Kingdoms of Denmark and of the Netherlands have included in this Common Rejoinder certain observations for which the Danish Government is solely responsible (para. 142) and certain other observations for which the Netherlands Government is solely responsible (para. 143).

II

5. In its Reply the Federal Republic, as it was entitled to do, has both added to and amended its submissions. These revised submissions will be commented upon later in so far as may appear necessary. But the two Governments cannot refrain in this Introduction from at once drawing attention to the extraordinary character of the new Submission 4 contained in the version of the Federal Republic's submissions which now confronts the Court [1].

The first submission asks the Court to say that the delimitation of the continental shelf between the Parties in the North Sea is governed by the principle that each coastal State is entitled to a just and equitable "share". This submission is followed by a series of negative submissions, developed in two paragraphs, which are designed to induce the Court to discard the equidistance principle as a relevant principle or rule of international law. The final submission then reads:

> "Consequently, the delimitation of the continental shelf in the North Sea between the Parties is a matter which has to be settled by agreement. This agreement should apportion a just and equitable share to each of the Parties in the light of all factors relevant in this respect."

The extraordinary character of this submission lies in the fact that it seems to question the very basis of the Special Agreements by which the two cases were referred to the Court.

6. The Governments of the Kingdoms of Denmark and of the Netherlands, in the submissions contained in their Counter-Memorials, have pointed out that the present cases have been brought before the Court precisely because in each of them the Parties had established that in regard to the further course of the boundary a disagreement existed between them which could not be settled by detailed negotiations. They have also pointed out that this state of disagreement is expressly recorded in each Compromis and that the task—the only task—entrusted to the Court in each case is to decide what principles and rules of international law are applicable to the delimitation as between the Parties to the case in question, of the areas of the continental shelf which appertain to

[1] Reply, p. 435, *supra*.

each of them. The final submission in the Federal Republic's Reply seems to invite the Court, disregarding the clear terms and express object of the Compromis, to lay down as a principle or rule of international law that "the delimitation is a matter which has to be settled by agreement" subject only to a rider that "this agreement should apportion a just and equitable share to each of the Parties in the light of all factors relevant in this respect".

Under Article 1, paragraph 2 of the Compromis, Denmark and the Federal Republic in the one case and the Netherlands and the Federal Republic in the other case, have, it is true, undertaken that *after the Court has given its decision regarding the applicable principles and rules of international law* they will respectively delimit the continental shelf in the North Sea as between their countries by agreement in pursuance of the Court's decision. But this is quite a different thing from what the Federal Republic seeks to obtain from the Court in its final submission. There the Federal Republic asks the Court to decide *under paragraph 1 of Article 1 of the Compromis* that in each case *the principle or rule of law* applicable to the delimitation of the continental shelf as between the Parties is that the delimitation is a matter which has to be settled by agreement. This deprives the Compromis of all meaning. In the Compromis, as pointed out above, the Parties expressly recorded their disagreement and their inability to settle this disagreement by detailed negotiations and went on to ask the Court to decide the applicable principles and rules of international law *in order that they might afterwards be in a position to reach agreement in pursuance of the Court's decision.*

7. Nor is the incompatibility of this submission with the Compromis in any way diminished by the rider attached to it, which exhorts the Parties that their agreement should "apportion a just and equitable share to each of the Parties in the light of all factors relevant in this respect". In effect, this exhortation merely reproduces the so-called principle of the "just and equitable share", which forms the subject of the first submission, adding to it the words "in the light of all factors relevant in this respect".

The so-called principle of the "just and equitable share" has already been subjected to stringent criticisms by the two Governments in their respective Counter-Memorials (Part II, Chapter 1) and will be further discussed in Chapter 1 of this Common Rejoinder. Here it suffices to recall its complete lack of any objective legal frame of reference by which to determine what is to be considered a "just and equitable share" in any given situation. In the context of legal rights, what is "just" and what is "equitable" can be appreciated only by reference to objective and legally recognized criteria. In the two cases now before the Court the good faith of the respective Parties is not in question. They are in dispute precisely because they differ in their appreciations as to what is "just" and "equitable" as between them under international law. It therefore serves no purpose whatever, and knocks the bottom out of the Compromis, for the Federal Republic to ask the Court merely to direct the Parties to settle their dispute by agreement in a manner which will give a "just and equitable share" to each of them.

Furthermore, the addition of the words "in the light of all factors relevant in this respect" merely serves to underline the complete absence of any objective legal criteria in the Federal Republic's first and fourth submissions. In Section 5 of Chapter III, entitled "Conclusions", the Federal Republic does indeed speak of "the breadth of the coastal front of each State facing the North Sea" as an "appropriate objective standard of evaluation with respect to the equitableness of a proposed boundary". Indeed in paragraph 97 the Federal Republic goes to the length of saying that "the breadth of the coastal front of each State is the only appropriate standard by which to determine the equitableness of the

apportionment effected by the proposed boundary". But it has not dared to include this suggested objective standard of evaluation in its legal submissions to the Court *for the very good reason that it knows this so-called standard of evaluation to have no legal foundation whatever.*

Admittedly, the Federal Republic has sought in its Reply to give the so-called principle of the "just and equitable share" the aura of a principle or rule of international law by christening it a "general principle of law recognized by civilized nations" within the meaning of Article 38, paragraph 1*(c)*, of the Statute of the Court. The inadmissible character of this attempt to legitimate the so-called principle will be demonstrated in Chapter 1 of this Common Rejoinder. But even if the so-called principle could be regarded as a principle of *international law applicable in the context of the delimitation* of the continental shelf, it would still furnish no objective criterion by which to determine what would be a "just and equitable" delimitation as between the Parties.

8. The Federal Republic, in short, seems in its final submission to be virtually asking the Court to pronounce a *non liquet* and to send the case back to the Parties to negotiate afresh the delimitation of their respective continental shelves without any sufficient legal criteria by which to determine that delimitation. The two Governments, before they are asked in negotiations to yield a single metre of the continental shelf which naturally appertains to them under the principles contained in the Continental Shelf Convention, are entitled to know upon precisely what *legal* basis that metre ought to be regarded as appertaining to the Federal Republic rather than to Denmark or, as the case may be, the Netherlands. They are the more entitled to be so informed when the Federal Republic explicitly recognizes the justice and equity of the delimitation of all other continental shelf boundaries in the North Sea on the basis of the very legal principles contained in the Convention and invoked by the two Governments. Under pressure of the arguments in the Counter-Memorials the Federal Republic has amended its submissions so as to claim that, if the principles contained in Article 6 of the Convention are applicable, special circumstances within the meaning of the rule exist in the present case. But precisely what constitutes those special circumstances the Federal Republic has not asked the Court to decide. Moreover, the closer the Federal Republic's contentions regarding special circumstances are examined, the more clearly it appears that the "special circumstances" claimed by the Federal Republic in the present case are nothing more than its discontent with the area of continental shelf which falls to the Federal Republic *under a delimitation made on the basis of the applicable principles and rules of law.*

III

9. This Common Rejoinder is divided into the following Parts:

Part I, which contains the following Chapters:

Chapter 1 elaborating the views of the two Governments regarding the essence of the issue before the Court and showing that the question is one of delimitation of boundaries, not one of sharing out a common area and still less one of sharing out according to a "coastal frontage" concept hitherto unknown in international law.

Chapter 2 dealing with the applicability of the principles and rules of delimitation expressed in Article 6 of the Convention on the Continental Shelf, thereby showing that these principles and rules are not only in conformity

with existing practice of delimiting maritime areas but are also the concrete expression of the principle of adjacency underlying Articles 1 to 3 in the Continental Shelf Convention.

Chapter 3 dealing with the interpretation of the special circumstances clause in Article 6, showing that this clause cannot be applied in the present dispute because a boundary other than the equidistance line is not justified by any special circumstance within the meaning of the clause. This Chapter further contains the individual observations of the Kingdom of Denmark and the Kingdom of the Netherlands mentioned in paragraph 4 above.

Part II, which contains the submissions of each Government to the Court regarding the principles and rules of international law applicable to the delimitation as between the Parties of the areas of the continental shelf in the North Sea which appertain to each of them.

Part III, which contains the Annexes which, *inter alia*, set out certain additional information on recent State practice regarding the continental shelf.

PART I. THE LAW

CHAPTER 1

THE ESSENCE OF THE ISSUE BEFORE THE COURT

10. As explained in the Introduction the present proceedings have a two-fold object:

(a) the determination of the boundary line, delimiting, as between Denmark and the Federal Republic of Germany, the areas of the continental shelf in the North Sea which appertain to each of them beyond the partial boundary determined by the Treaty concluded between Denmark and the Federal Republic of Germany on 9 June 1965;

(b) the determination of the boundary line, delimiting, as between the Netherlands and the Federal Republic of Germany, the areas of the continental shelf in the North Sea which appertain to each of them beyond the partial boundary determined by the Treaty concluded between the Netherlands and the Federal Republic of Germany on 1 December 1964.

11. There is complete disagreement between Denmark and the Netherlands on the one hand, and the Federal Republic on the other hand, as to what the rules and principles of international law, relevant for each of the two situations —the Danish/German boundary and the Netherlands/German boundary—are.

12. According to the Federal Republic the relevant rules and principles of international law are:

(a) "The delimitation of the continental shelf between the Parties in the North Sea is governed by the principle that each coastal State is entitled to a just and equitable share" (Submission 1, p. 435, *supra*, of the Reply) and

(b) ". . . the delimitation of the continental shelf in the North Sea between the Parties is a matter which has to be settled by agreement. This agreement should apportion a just and equitable share to each of the Parties in the light of all factors relevant in this respect" (Submission 4, p. 435, *supra*, of the Reply).

13. On the other hand, according to Denmark and the Netherlands, the relevant rules and principles of international law declare:

(a) that the boundary line as between Denmark and the Federal Republic (or as between the Netherlands and the Federal Republic, as the case may be) is to be determined by application of the principle of equidistance from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured, unless another boundary is justified by special circumstances (Submissions 2, p. 221, *supra*, of the Danish Counter-Memorial and p. 375, *supra*, of the Netherlands Counter-Memorial) and

(b) that, as between Denmark and the Federal Republic (or as between the Netherlands and the Federal Republic, as the case may be), there are no special circumstances which would justify another boundary line (Submissions 3 of the Counter-Memorials).

14. The Danish and Netherlands Governments respectfully submit that there is no support whatever to be found in any source of rules and principles of international law for a set of rules of the kind put forward by the Federal Republic of Germany, whereas, on the other hand, the relevant rules and

principles of international law, as formulated in the submissions of Denmark and the Netherlands, are in full conformity with generally recognized and accepted international norms relating to the drawing of boundary lines in general and to the delimitation of fresh water and sea areas in particular.

Section I. Rules and Principles of International Law relating to the Determination of Boundary Lines in General

15. Before going into a detailed analysis of the allegations of the Federal Republic relating to the contents of the relevant rules and principles of international law, it may be useful to recall the general spirit of the rules and principles of international law relating to the determination of boundary lines.

The rules and principles of present-day international law relating to the delimitation in space of sovereignty or sovereign rights are indeed "marginal" in the sense, that they pre-suppose the co-existence in fact of various States—or centres of power—each having already a "territory", i.e., a more or less defined space, within which such power is in fact exercised exclusively by each State. Taking their starting-point in this factual situation the rules of international law do *not* pretend to "distribute" the total space, available for human activities, between the various States, but rather accept in principle the factual situation, according to which each State determines its own exclusive sphere of activities in space, and do no more than limit the discretion of States in this respect, particularly in view of its relations with neighbouring States. In other words, it is not the territory of a State *as a whole*, but the *boundary line* between the territories of neighbouring States—i.e., the exact points where the extension in space of the sovereign rights of one State meets the extension in space of the sovereign rights of another State—which is the object of rules and principles of international law.

Accordingly, where, between neighbouring States, the exact delimitation of their respective territories is uncertain or disputed, international law has developed criteria for the more precise determination of the boundary line and settlement of such disputes. These criteria are of various kinds, but whatever their nature and character, the effect of the determination of the boundary line on the *total surface* of the territory of the one State in comparison with the total surface of the territory of the other State, is never a legally relevant element.

Indeed the rules and principles of international law relating to delimitation of territory between two States do not proceed in the way alleged by the Federal Republic of Germany. They do not start from the assumption that the total territories of both parties put together (thereby including the area lying between the boundary line as claimed by the one party and the boundary line as claimed by the other party, i.e., the disputed area) are a single unit to be shared out—"equitably" or otherwise—between the two States in dispute. Nor do they consider *the disputed area* as an area to be shared out between the States in dispute. On the contrary, the normal process is that the claim of each party as to the boundary line is put to the test of the rules and principles of international law; in short, that the better claim prevails. And even if a boundary line is determined which does not correspond fully to either claim this is because the rules and principles of international law indicate such boundary line. The fact that such boundary line *might* be found to "divide" the "disputed area" because it lies between the two boundary lines as claimed by the parties, is no more than an optical illusion formed *a posteriori*, neither of the claimed lines—nor, consequently, the "disputed area"—having any *legal* meaning under the rules and principles of international law.

16. This process of determination of boundary lines by the rules and prin-

ciples of international law on the basis of the fact of the extension in space of the sovereign powers of each State rather than on the basis of division of any particular area between States, is obvious both in the decisions of international courts and arbitral tribunals and in the practice of States in determining the boundaries of their respective territories by agreement between them.

The idea of "equitable distribution" of a specific area is absent from the factors which are relevant in the determination of a boundary line by agreement or by decision of an international court or arbitral tribunal. Thus, a certain preference for "natural" boundaries and for other boundary lines which can easily be identified by the persons concerned, as well as the taking into account in the determination of a particular boundary line of socio-economic factors such as the traditional or historic use of resources in a particular area by the nationals of one State rather than by the nationals of another State, have no relation whatsoever with the alleged "principle" of equitable distribution *according to a criterion of the comparative total surface* of the area accruing to one State and the other.

The wishes of the population of the area, lying between the boundary lines claimed by the respective States, sometimes play an important role in the final determination of the boundary line, but again this obviously has nothing to do with "equitable" distribution of *space* between the States concerned on the basis of shares of the total surface of any area.

17. That the starting-point of the rules and principles of international law relating to the determination of boundary lines is the extension of sovereign rights in space, rather than the division—"equitable" or otherwise—of the total surface of a specific area, is particularly apparent where fresh water and sea areas are concerned. Here indeed the concept of the natural continuation of the land territory of a State into the water area, and, consequently, the concept of propinquity, are at the basis of judicial settlement and State practice relating to the delimitation of such areas. No doubt the boundary lines finally laid down in such areas are not always mathematically exact equidistance lines; but the deviations from such mathematically exact equidistance lines are in principle limited to specific points and founded on considerations specifically related to such points. Again, considerations of sharing-out the total surface according to some numerical proportion are wholly absent.

That the concept of the natural continuation of the land territory of a State into the water area adjacent to the land territory lies at the basis of the practice of States relating to the determination, vis-à-vis other States, of boundary lines in rivers, lakes, straits, territorial waters, contiguous zones, fishing zones and other sea areas, is amply demonstrated by the boundary treaties quoted in Annex 13 of the Danish Counter-Memorial and in Annex 15 of the Netherlands Counter-Memorial, as well as by the three Geneva Conventions relating to the law of the sea (Annexes 1, 4 and 5 of the Counter-Memorials) and the European Fisheries Convention (Annex 6 of the Counter-Memorials).

That concept naturally leads to an application of the equidistance principle as the *starting-point* for determining where the continuation of the land territory of one State meets the continuation of the land territory of another State. Indeed it is clear that, in some form or another, and subject to simplifications and corrections for reasons relating to specific points, the equidistance principle is followed in the practice of States, as illustrated by the treaties just referred to.

In its Reply (paras. 34-39; 56-61 and Annex) the Federal Republic attempts to minimize the importance of this evidence of consistent State practice, *inter alia*, by pointing out that (Reply, para. 37) "some of them" (i.e., boundary lines established by the Treaties cited in Annex 13 of the Danish Counter-

Memorial and in Annex 15 of the Netherlands Counter-Memorial) "are not true equidistance lines in the full sense because only a limited number of points on the boundary have been defined as being equidistant from certain coastal points". (Similar remarks are made at various places in the Annex to the Reply.) Now obviously in *practice* every boundary line drawn in accordance with the equidistance *principle* is no more than *approximately* a "true" equidistance *line* in the mathematical sense of the word; there is always some amount of simplification in order to arrive at a practicable solution.

Furthermore—as developed elsewhere in the present Rejoinder—*at specific points* deviations from the "true"—or even from the "rough"—equidistance line may be accepted for reasons of "historic rights" in a specific area through which part of the equidistance line would run or in view of "special circumstances" relating to specific base-points from which the equidistance line would be construed.

But the relevant fact here is that in all those cases the concept of the natural continuation of the land territory into the fresh-water and sea areas, as reflected in the equidistance principle, remains the basis of the determination of the boundary line. And equally relevant is that, whatever deviations from the equidistance line are admitted, the reasons therefor are *not* to be found in considerations relating to the equality or proportionality of the total surface of the fresh-water or sea areas lying on either side of the boundary line.

18. In paragraph 14 of its Reply the Federal Republic of Germany attempts to nullify the difference between the approach of the alleged principle of "just and equitable share" and the approach of the existing rules and principles of international law relating to the determination of boundary lines, by qualifying the distinction made in the Danish and the Netherlands Counter-Memorials between delimitation and sharing-out of areas of the continental shelf as a "rather artificial verbal distinction". The only reason given for this qualification is that "it is evident that any delimitation between two States necessarily allots each of them a certain share of the shelf so divided". Now obviously, as already remarked above, if one State claims a particular boundary line and the other State claims another particular boundary line, it is possible to regard the area lying between those two lines as a "disputed area". If then, by agreement or judicial settlement, a third boundary line, lying between the two claimed lines is determined as *the* boundary line, it is possible to compare *a posteriori* the total surface of the part of the "disputed area" lying on one side of that boundary line with the total surface of the part of the "disputed area" lying on the other side of that boundary. But the question is *not* whether such an operation is technically possible, but whether it is legally relevant for the application of the rules and principles of international law relating to the determination of the boundary line. As explained above, the answer to the latter question is definitely a negative one, for the simple but essential reason that the rules and principles of international law in this field deal with the *position* of the boundary line and are not concerned with the *result* in terms of proportional shares of the total surface of *any* area, let alone the "disputed area". Indeed, what the Federal Republic of Germany qualifies as "the rather artificial verbal distinction" is in reality an expression of a *fundamental difference in legal approach*.

One *could imagine* an international legal order which distributed the total space available for human activities between the various existing States, thereby allotting to each State a particular territory on the basis of its needs in comparison with those of other States. But it is obvious that this is *not* the legal approach of the rules and principles of international law as they exist today. On the contrary, those rules and principles take their starting-point in the

factual situation of each State, and, in particular in so far as the delimitation of sea areas appertaining to such State is concerned, proceed according to the concept of contiguity or propinquity.

Indeed the Federal Republic of Germany seems to accept—see, *inter alia*, paragraph 88 of the Reply—"the generally recognized conception that the rights of a State over the continental shelf before its coast have their legal basis in the continuation of the State's territory into the sea". Now it is *inherent* in the principle of continuation of the land territory into the sea, that the sea areas are no more "equitably distributed" between States than the land masses are "equitably distributed" between States.

Section II. The Alleged Principle of Just and Equitable Shares

19. The Federal Republic of Germany attempts to find support for its submission that—

> "the delimitation of the continental shelf between the Parties in the North Sea is governed by the principle that each coastal State is entitled to a just and equitable share" (Submission 1, p. 435, *supra*, of the Reply)

in an alleged general principle of law recognized by all nations formulated by the Federal Republic in the following terms:

> "each State may claim a just and equitable share in resources to which two or more States have an equally valid title" (Reply, para. 11).

It is significant that the Federal Republic does not even try to adduce examples of the application of this alleged "principle" in international conventions, judicial or arbitral decisions or the practice of States. Indeed the Federal Republic states only that the alleged "principle" has "an inherent, self-evident and necessary validity" *(ibid.)*. The Federal Republic of Germany even goes so far as to state that this "inherent, self-evident and necessary validity" is "evidenced . . . by the fact that the Counter-Memorial, while trying to brush it aside on procedural grounds, does not dare to attack its legal substance".

Now actually, a large part of the Counter-Memorials is devoted to a denial of the "legal substance" of the alleged principle. Nevertheless it may be helpful to go somewhat further into the matter in the present Rejoinder.

20. First of all it should be remarked that, whereas the alleged principle is formulated in terms of "a just and equitable share in *resources*" (italics added), the submission, based solely on this alleged principle, deals with a "just and equitable share" of the continental shelf as an *area*, the total surface of which should be divided between the coastal States in proportion to the breadth of their coastal front. Now it is obvious that there is no necessary connection between the surface of an area and the amount of exploitable resources therein. In particular, there is no connection whatsoever between the resources and the breadth of the coastal front, which, in the opinion of the Federal Republic of Germany, is the only appropriate standard by which to determine the equitableness of the apportionment (Reply, para. 88). Indeed the total amount of the natural resources of the area, indicated as the continental shelf beneath the North Sea, is unknown and the same goes for the location of those resources. Therefore, even if the alleged principle were indeed part of positive international law—*quod non*—it would be impossible to apply it to the present case. It may be remarked in passing, that even if the total amount and exact location of all the natural resources were known with regard to a particular area of continental shelf, it would be difficult or even impossible to distribute these resources between a number of States through the drawing of boundary lines in space, without giving up the conception of a *continuation* of the land

territory into the sea. Indeed the alleged principle, as formulated by the Federal Republic of Germany, is in flat contradiction to Articles 1, 2 and 3 of the Geneva Convention on the Continental Shelf, which, in accordance with previous and later State practice, determines the sovereign rights of the coastal States by reference to a delimited *space* (see also Art. 6, para. 3, of the Convention).

21. Perhaps the mixing-up of resources and space, which already appeared in paragraphs 30 and 35 of the Memorial, is intentional. Indeed in paragraph 35 of the Memorial a comparison is made between what is there called "the problem of the division of a common continental shelf" and the "apportionment" of the "limited amount of water resources" of a river basin which extends over the territories of several States "between the basin States".

As already remarked in paragraph 49 of the Danish Counter-Memorial and in paragraph 43 of the Netherlands Counter-Memorial this reference to the use of the waters of international rivers is entirely beside the point. Since in its Reply the Federal Republic does not elaborate on this matter, it might be superfluous to devote further attention to it. However, since the so-called "Helsinki rules on the uses of waters of international rivers" are the only example mentioned anywhere by the Federal Republic of Germany of application of a concept of a "just and equitable share", a few additional remarks might be appropriate.

At the outset it should be noted that it is doubtful, to say the least, whether the so-called Helsinki rules, drafted and adopted by a private organization, really express existing international law at all. But even apart from that, it is obvious that it is impossible to compare a continental shelf with a drainage basin. The concept of "drainage basin" and "basin State" in the Helsinki rules apply only to the non-navigational uses of waters. The problems of non-navigational uses of waters arise from the fact of nature that water *flows* from one point to another. Accordingly conduct within the boundaries of one basin State in relation to the water of a drainage basin which extends over the territories of two or more States necessarily affects the use of the water of the same drainage basin within the boundaries of another State. This simple fact of nature underlies the concept of treating a drainage basin as an integrated unit. There is no such natural foundation for treating a *continental shelf* as an integrated unit. Surely it is possible that a *single geological structure* extends across a boundary line on the continental shelf, as it is possible that a single geological structure extends across the delimitation lines between concession areas on the part of the continental shelf appertaining to one State. Both municipal legislations and the international practice of States show that the problems arising from such a situation are *not* solved by a modification of the boundaries of the concession area or of the continental shelf as the case may be, but by different methods which do not affect those boundaries. In this connection reference is made to paragraph 18 of the Netherlands Counter-Memorial. Indeed if the Helsinki rules prove anything relevant to the present dispute, it is that there is no connection at all between the "equitable" distribution of resources and the determination of boundary lines in space. The Helsinki rules themselves, while providing that "each basin State is entitled, *within its territory*, to a reasonable and equitable share in the beneficial uses of the waters of an international drainage basin" (italics added) and that "what is a reasonable and equitable share . . . is to be determined in the light of all relevant factors in each particular case", do *not* at all attach to the treatment of an international drainage basin as an integrated unit any consequences with respect to the *boundaries* of the basin States respective *territories*.

22. It should also be noted in passing that this—in itself inadmissible—analogy, as invoked in paragraph 35 of the Memorial, is manipulated by the Federal Republic in a highly selective fashion. In paragraph 35 the Federal Republic cites with apparent approval Article V (1) of the Helsinki rules and indeed in submission 4 of its Reply uses an almost identical formula: "a just and equitable share ... in the light of all factors relevant in this respect". But if one looks at what the Helsinki rules consider as "relevant factors" one finds, *inter alia*, the following factors: (Article V (2), under *(e)*, *(f)*, *(g)* and *(h)* of the Helsinki rules—

"*(e)* the economic and social needs of each basin State;

(f) the population dependent on the waters of the basin in each basin State;

(g) the comparative costs of alternative means of satisfying the economic and social needs of each basin State;

(h) the availability of other resources;".

One would expect the same or similar "factors" being mentioned by the Federal Republic of Germany as relevant "factors determining the share of each adjacent State". But there is no reference to such factors in paragraphs 76 to 81 inclusive of the Memorial dealing with alleged "Criteria for a Just and Equitable Apportionment of the Continental Shelf in the North Sea"!

Admittedly, paragraph 79 of the Memorial mentions in passing the "economic needs" of the Federal Republic and the "particular economic capacity" of the Federal Republic, but in the same paragraph the Federal Republic declares "that it does not wish to base its claim on these considerations". On the contrary, in paragraph 97 of its Reply it is stated that "the Federal Republic maintains that ... the breadth of the coastal front of each State is the *only* appropriate standard by which to determine the equitableness of the apportionment effected by the proposed boundary" (italics added).

No trace whatsoever is left of the idea of "distribution according to needs" which underlies the Helsinki rules!

23. Leaving aside the confusion between resources and space, and supposing that the alleged general principle of law as stated in paragraph 11 of the Reply is meant to refer to the continental shelf as space rather than to resources, it is still difficult to understand what relevance the alleged principle could have for the present case or indeed for any other case relating to boundary lines on a continental shelf. The application of the alleged principle by a sharing-out operation presupposes that "two or more States have an equally valid title" to a continental shelf. Applied to the North Sea the supposition would be that all the States bordering the North Sea would have an equally valid title to the *whole* of the continental shelf under that sea. Now such a supposition is in flat contradiction to the attitude of *all* those States, with the single exception of the Federal Republic of Germany! All other North Sea States have from the outset limited their claims to an area the boundaries of which are determined by the equidistance principle. It is true that one of those other States, France, claims an adjustment of the equidistance line *in specifically mentioned geographic areas*. But this claim does not affect the validity of the equidistance principle and is *not* based, as the Federal Republic of Germany's claim is, on the argument that the *total surface* of the part of the continental shelf, allocated to France under the equidistance principle, represents an "inequitable share".

Apparently the Federal Republic accepts the equidistance lines, in their median line form, as the limit of the continental shelves appertaining to Belgium, the Netherlands, the Federal Republic of Germany and Denmark as regards

the United Kingdom and Norway. The Federal Republic has also raised no objection to the application of the equidistance principle in the lateral determination of the boundary line of the continental shelves of the Netherlands and Belgium.

Should it then be understood to be the legal point of view of the Federal Republic that Denmark, the Federal Republic and the Netherlands each have "an equally valid title" to the *whole* continental shelf area adjacent to the coasts of those three States, the outer limits of which are determined by strict equidistance lines vis-à-vis the other North Sea States? It is hard to believe and, in any case, neither Denmark nor the Netherlands claim such a title!

Indeed, in the opinion of Denmark and of the Netherlands, an opinion clearly shared by the other North Sea States except the Federal Republic, a valid title only exists in respect of the continental shelf area truly adjacent to the coastal State, i.e., an area limited in principle by boundary lines drawn in accordance with the equidistance method. But, if it is not true that the three States involved in the present dispute have each an equally valid title to the *whole* of the continental shelf area adjacent to the three States, the alleged general principle would seem to be irrelevant to the present case.

Indeed the alleged principle, as formulated by the Federal Republic, could not, even if it existed, help to solve the present dispute, which actually turns on the question to what area of the continental shelf each of the three States *has* a "valid title".

The formulation of the alleged principle as presented by the Federal Republic once again shows the fundamental misconception on which the Federal Republic's case is based. The rules and principles of positive international law do *not* proceed from the assumption of the continental shelf being "common property" of the coastal States adjacent to it. The coastal States do *not*, each, have an "equally valid title" to the continental shelf as a whole. On the contrary, to each coastal State separately appertains *ipso jure* the continental shelf area adjacent to *its* coast and that area is *a priori* "inherently, necessarily and self-evidently" limited by the geographical facts.

24. If one accepts, as the Federal Republic does, *inter alia*, in paragraph 88 of the Reply—"the generally recognized conception that the rights of a State over the continental shelf before its coast have their legal basis in the continuation of the State's territory into the sea", it is clear that such continuation must be based on the actual coastline since it is from the actual coastline that the land territory "continues" in and under the sea. Indeed the figures 1-3 (pp. 427 and 428, *supra*) of the Reply clearly show that, in terms of continuation, only the actual coastline, and not the "general direction of the coast" can be the *starting point* for judging what part of the sea or sea-bed is a continuation of the land. It is equally clear that from this point of view there is no difference between opposite and adjacent States, as there is no difference between "enclosed" or "not-enclosed" seas. In all those cases the continuation of one land territory meets the continuation of another land territory, with the result that questions arise of the determination of the boundary line between those areas.

It is the merit of the equidistance principle that it fully takes into account the actual coastlines in determining in a mathematically correct way where the continuation of one coast ends in meeting the continuation of another coast.

In other words the equidistance principle in sea areas is a translation of the continuation-conception and excludes considerations of comparative surface shares.

The mathematical method of drawing the invisible boundary lines, which are all that is possible over the open sea, and of which the equidistance line

is an example, is particularly suited to conditions such as those which prevail, *inter alia*, in regard to the continental shelf. Moreover, unless the line is to be more or less arbitrary, the precise limits to which sovereign rights of a State extend in space could—in relation to the sea-bed and subsoil—hardly be determined in any other way than by the equidistance method if similar rights of other States are involved.

The effective exercise of sovereign rights by a State in a particular area cannot be a criterion, it being generally recognized that, as stated in Article 2, paragraph 3, of the Geneva Convention on the Continental Shelf, the rights of the coastal State do *not* depend on occupation, effective or notional, or on any express proclamation.

Nor—the question of sedentary fisheries apart—could the regular use of a particular area by nationals of one State rather than by nationals of another State—"traditional" or "historic rights"—provide a criterion. Such "traditional" use for the purposes of exploration and exploitation of the natural resources of sea-bed and subsoil does not exist, and, even if it existed, is excluded as a title to the continental shelf by paragraph 2 of Article 2 of the Geneva Convention on the Continental Shelf. Other traditional uses, such as fishing in particular areas, cannot affect the boundary line, those activities being safeguarded by other provisions of the same Convention.

The Memorial and the Reply suggest considerations of "equity" as criteria for the delimitation.

Now, obviously, such considerations, if at all valid, could only lead to a *correction* of lines, drawn according to *other* criteria. These considerations, in other words, could apply to the *result* of the drawing of boundaries according to other criteria.

Indeed the whole argument of the Federal Republic is that the application of the equidistance method in the particular case now before the Court *results* in a comparatively small surface of the area belonging to the Federal Republic. But the Memorial and the Reply fail completely to indicate for what reason and on the basis of what considerations this result would be "inequitable". In plain words: *why* should the Federal Republic's continental shelf have a larger total surface? And where should this additional surface be located? And why should such additional surface be provided by Denmark and/or the Netherlands rather than by other countries adjacent to the North Sea? And why should only the Federal Republic receive additional surface and not other countries adjacent to the North Sea?

The truth of the matter is that there *is* simply *no* basis, either in law or in "equity", for the Federal Republic's claim for additional surface.

25. In this respect it is significant that the Federal Republic requests the Court to recognize and declare that:

> "4. . . . the delimitation of the continental shelf in the North Sea between the Parties is a matter which has to be settled by agreement. This agreement should apportion a just and equitable share to each of the Parties in the light of all factors relevant in this respect." (Reply, p. 435, *supra*).

Now, first of all, it is an established fact that neither the Federal Republic and Denmark, nor the Federal Republic and the Netherlands, have been able to reach agreement on the delimitation, since both pairs of States are in disagreement on the basis for such agreement.

Consequently the dispute could only be settled by the Court indicating on what basis the boundary lines must be drawn.

Apparently the Federal Republic requests the Court to declare that this basis is: "apportioning a just and equitable share to the Federal Republic of Germany, Denmark and the Netherlands in the light of all factors relevant in this respect."

Clearly, as already pointed out in the Introduction, such a declaration of the Court would be absolutely useless for the settlement of the boundary disputes between the Federal Republic and Denmark on the one hand, and the Federal Republic and the Netherlands on the other hand. It would be a thinly disguised *non liquet* unless it were accompanied by a statement why, where and to what precise extent the equidistance lines should be deviated from in the determination of the boundary lines.

Section III. The Alleged Standard of "the Coastal Front"

26. In its submissions in Part II of the Reply the Federal Republic does not indicate why, where and to what precise extent the equidistance lines should be deviated from or displaced in the determination of the boundary lines of the continental shelves appertaining to Denmark, the Federal Republic and the Netherlands respectively.

By failing to do so, and by introducing instead the notion of "proportionality" of the surface of the continental shelf appertaining to a State, to the length of what is called "the coastal front" of that State, the Federal Republic once again moves out of the realm of existing rules and principles of international law into the field of arbitrary constructions.

As demonstrated earlier in the present Rejoinder there is no rule or principle of international law requiring the application of *any* standard of "equitableness" to the result, in terms of total surface, of the drawing of boundary lines.

Indeed the Federal Republic *in its submissions* carefully refrains from indicating what, in its opinion, would be the content of such a "standard of equitableness". In *the Reply itself*, however, the Federal Republic maintains that "the breadth of the coastal front of each State is the *only* appropriate standard by which to determine the equitableness of the apportionment effected by the proposed boundary" (para. 97 of the Reply) (italics added).

Now—leaving aside the fact, that the notion of "proportional shares" is wholly alien to the rules and principles of international law relating to boundaries—the concept of "coastal front" is a completely novel invention in the field of maritime law. As pointed out in paragraph 17 of the present Rejoinder, the existing rules and principles of international law relating to the delimitation of sea areas are based on the concept of continuation of the land territory of a State into the sea. Obviously, this continuation starts from the actual coastline. Accordingly, as confirmed in Article 3 of the Geneva Convention on the Territorial Sea and the Contiguous Zone, the normal baseline for determining the extent of sea areas is the low-water line along the coast. In particular localities and under certain conditions straight baselines may be drawn with the effect of moving seawards the outer limits of the sea areas involved. But this "straightening-out" of the baseline shall not result in a line which bears no relation at all to the actual low-water line and the land-domain behind it (cf. Art. 4 of the Geneva Convention on the Territorial Sea).

Neither in the Geneva Conventions and the *travaux préparatoires* nor in the practice of States can any trace be found of the concept of a "coastal front", the length or breadth of which would determine the extent in space of the rights of a coastal State. Apart from the description in the Reply, paragraph 94, of the Borkum-Sylt line the Federal Republic of Germany has not in so many words described the so-called "coastal fronts" of the States involved in this

dispute. And although the Federal Republic has in the Memorial and the Reply—not counting what is contained in the Annexes—presented no less than 26 charts and diagrams, no graphic description of the "coastal fronts"—a concept to which the Federal Republic attaches the utmost importance—has been given. In these circumstances the two Governments feel justified in trying to show in figure A (on p. 470, *infra*) what the "coastal fronts" of the three States appear to be as far as this concept can be deduced from the text of the Memorial and the Reply and from some abstract diagrams presented in the Reply. A simple glance at this figure is sufficient to show that the concept of "coastal front" has no basis whatever either in geography or in law.

In paragraph 97 of the Reply, it is stated that "the Federal Republic maintains that not the distance from some single point on the coast but rather the breadth of the coastal front of each State is the *only* appropriate standard by which to determine the equitableness of the apportionment effected by the proposed boundary" (italics added).

In itself the statement just cited is remarkable in the sense that it compares criteria of an essentially different kind. Whereas the equidistance principle or method is meant to determine the boundaries of an area *every single point within which* is nearer to the coastline (i.e., obviously *a* point on the coastline) of one State than to the coastline (i.e., obviously, *any* point on the coastline) of another State, in other words, the *location* of the limits of the area, the alleged criterion or standard of "the breadth of the coastal front" (at other places in the Memorial and in the Reply also called "coastal frontage") is a criterion for the distribution of the *total surface* of the area expressed in a number of square miles or kilometres, the shares to be proportionate to the length or breadth of an artificial line representing "the general direction of the coast".

Now, one simply cannot compare a criterion for the location of the limits of an area with a criterion for the size of the shares of the total surface of an area.

As already remarked before, the only criterion compatible with the concept of the continuation of the land territory is a criterion based on the location of the actual coastline.

Criteria of total surface are irrelevant within the context of the continuation of land territory. Equally irrelevant for the concept of continuation is the length or breadth of an *artificial* line representing "the general direction of the coast", quite apart from the fact that in many cases the total coastline of a particular State simply does not *have* one "general direction". It should also be noted that even if, in the abstract, it may for some purpose make sense to reduce and simplify a particular actual line to one or a series of straight lines, called "the general *direction*" of the actual line, the *length* of such an artificial line has no relationship whatever with the length of the actual line or with any other reality.

It is therefore confusing to compare "the distance from some single point on the coast" to "the breadth of the coastal front". This way of presentation *seems* to suggest that points on the coastline which deviate considerably from the "general direction" of the coastline should be left out of account *in determining the equidistance line*. However, this suggestion is not borne out by the remainder of the sentence just quoted. In the remainder of the statement it is *not* the *direction*, but the *length* of the artificial line called "coastal frontage" which is considered the *only* appropriate standard by which to determine the total surface—not the location of the limits—of the continental shelf to be allotted to a given State.

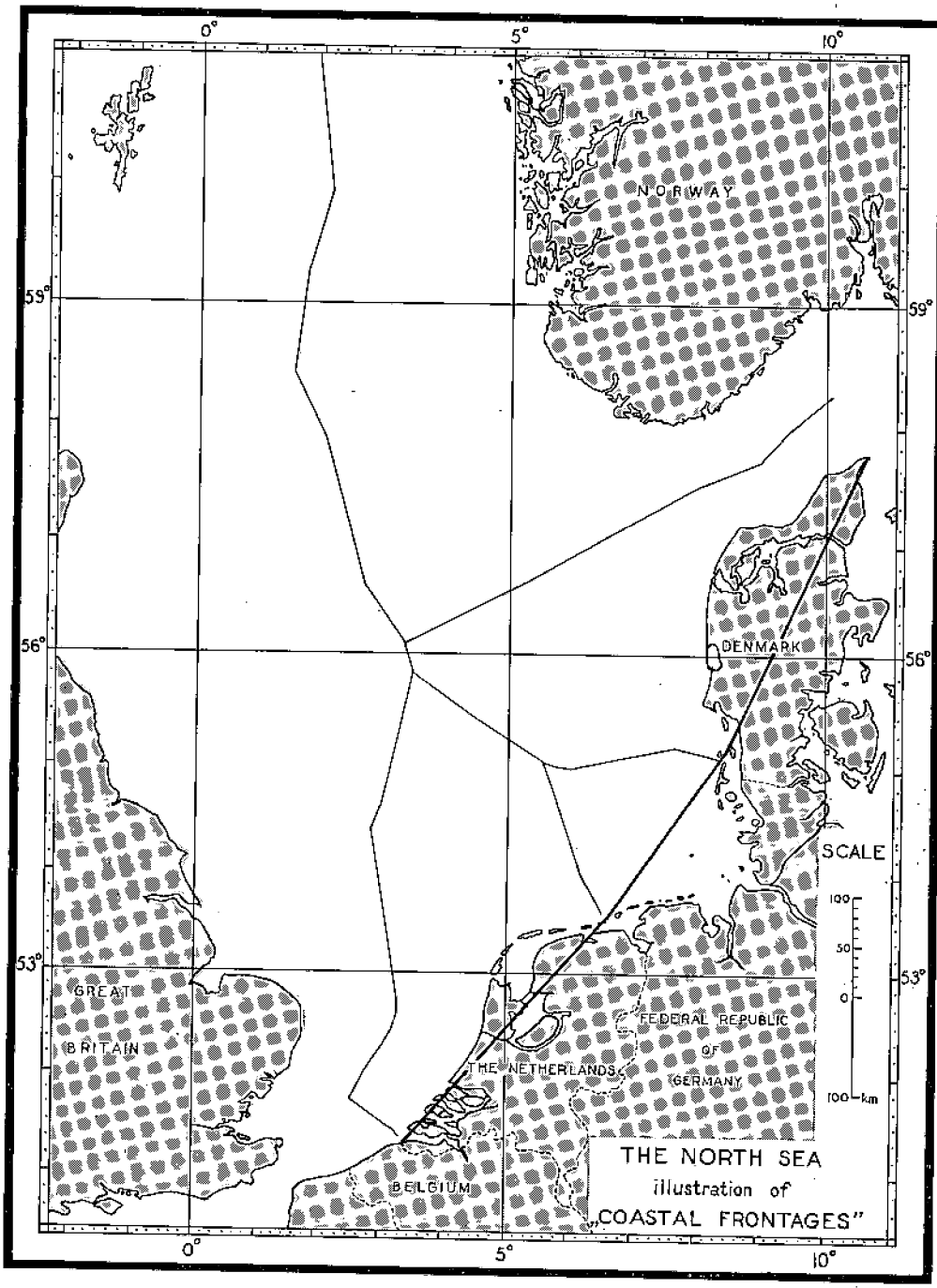

0°
5°
10°
59°
56°
53°
NORWAY
DENMARK
GREAT BRITAIN
THE NETHERLANDS
FEDERAL REPUBLIC OF GERMANY
BELGIUM
SCALE
100
50
0
100 km
THE NORTH SEA
illustration of
„COASTAL FRONTAGES"

Figure A

Section IV. The So-Called "Sector-Theory"

27. The attempt of the Federal Republic to get away from the necessity of indicating precisely why, where and to what extent the equidistance lines should be deviated from in the determination of the boundary lines on the continental shelf culminates in the construction of the North Sea area as a "roughly circular" area, to be divided in "sectors". In this construction any and every connection with the realities of the situation—the actual location of the coastlines and the form of the North Sea—is completely thrown overboard.

It is significant that *only* through such a construction can a link be established between the location of the limits in the area, the total surface of that area and the length of the imaginary coastline.

Indeed if an internal sea area is perfectly circular, that is if there is no land within that circle and no sea outside that circle, lines could be drawn from the centre of that sea area to the frontier points on the coastline, which lines could then be taken as the dividing lines on the—equally circular—sea-bed. If the whole sea-bed is continental shelf or if the configuration of the continental shelf is such that its natural outer limit (the 200 metres isobath) runs exactly parallel to the coastline, the result would then be that for each coastal State the total surface of the continental shelf appertaining to it would be exactly proportionate to the length of its coastline as it would be exactly proportionate to the length of the straight line connecting its frontier points. At the same time the boundary lines thus drawn would be exact equidistance lines!

In other words, in such an *imaginary* situation the result is the same whether the boundary lines are drawn taking as a starting-point the *land* territory and its continuation into the sea from the actual coastline, or whether one shares out the *sea* area, taking as a starting-point the "middle" of that sea area.

In any *actual* situation, however, and in particular in the case of the North Sea, the choice of a point "in the middle of the sea", as well as the drawing of boundary lines from such point to the frontier points on the actual coastlines, would be purely arbitrary *even in the sharing out approach* adopted by the Federal Republic. There is simply no escape from the fact that any test of "equitableness" in terms of total surface of an area cannot determine the location of the lines delimiting that area.

28. In its Reply the Federal Republic states (para. 92):

> "The Federal Republic has *not* attempted to regard the North Sea as a case where the delimitation of the continental shelf between the adjacent States could be effected by application of the sectoral division pure and simple; it has considered the construction of sectors as a '*standard of evaluation*' by which to judge whether a certain boundary delimitation, in particular by the principle of equidistance, could be regarded as equitable under the circumstances of the case." (Italics added.)

But how could the *mathematical* fact that in a perfectly circular internal sea the drawing of boundary lines according to the equidistance principle results in sectors, the surface of which is proportional to the length of the coastline, provide any standard of evaluation in *law* for the drawing of boundary lines in sea areas of a completely different shape, which are not fully surrounded by land, where the configuration of the coastlines is far from circular, and where the length of each coastline has no relationship whatsoever with the length of an arc of circle or straight line joining its frontier points?

Indeed, if the Federal Republic "has considered the construction of sectors" only as a "standard of evaluation" of the "equitableness" of the total surface of the continental shelf which appertains to the Federal Republic under the principle of equidistance, the whole so-called "sector theory" has no independent meaning and boils down to a somewhat elaborate way of asking for more.

29. On the other hand it appears from the statement in the Reply, just quoted, that the Federal Republic has *given up* the—indeed untenable—claim, put forward in paragraph 81 of its Memorial, to the effect that—

> "in an apportionment of maritime areas which are surrounded by a number of States, it would be an equitable principle of division for every coastal State to receive a portion *which extended to the middle of the sea*" (italics added).

Actually the Federal Republic—in paragraph 93 of the Reply—recognizes that "the circle line in figure 21" (of the Memorial) "may indeed have been a little misleading . . ." and "might have been drawn with a different radius *or omitted altogether*" (italics added). This admission rather underlines the purely arbitrary character of both the so-called "sector theory" and the concept of "coastal front" as applied to the North Sea.

It is obviously always possible to choose a point in the sea as represented on a map, and draw a circle having that point as its centre. But if the map faithfully represents the North Sea no such circle line can be construed that bears any relationship to the actual coastlines of the North Sea countries!

The Federal Republic's claim to "the middle of the sea" indicated at least one—be it fictitious—point of the boundary line as it should run in the view of the Federal Republic. Now that this claim is abandoned the thesis of the Federal Republic is reduced to one relating to the total surface only of the continental shelf appertaining to it. As such it does not, and could not, specify at which point or points a deviation from the equidistance lines is considered justified by the Federal Republic nor, *a fortiori*, what are the considerations relating to those points, which could possibly militate in favour of such deviation.

Section V. The Federal Republic's Concept of "Special Circumstances"

30. Contrariwise, Denmark and the Netherlands, while admitting that the rules and principles of international law provide for the possible justification of a boundary line other than the equidistance line, maintain that there are no special circumstances, which, in the relationship between the Federal Republic and Denmark, or in the relationship between the Federal Republic and the Netherlands, would justify a deviation from the equidistance line.

As amply demonstrated in the Counter-Memorials and in the present Rejoinder, such "special circumstances", in order to qualify for the possible justification of another boundary line, should relate to specific geographic points and the corresponding specific area.

Thus, in particular with respect to the application of the equidistance principle in the delimitation of rivers, lakes and territorial waters, deviation from the exact equidistance lines is sometimes based on the consideration that at specific points those equidistance lines would insufficiently take into account the traditional use of a specific area crossed by such equidistance line (cf. "historic title" in Art. 12 of the Geneva Convention on the Territorial Sea).

Again, in the application of the equidistance principle, there *might* be reasons to a certain extent to disregard particular points of the baselines of one State, which—taking into account their position with respect to the baselines of the

other State—deviate extremely from otherwise relevant points in their neighbourhood on the baselines of the former State. But these types of circumstances are *fundamentally different* from the type of circumstances which the Federal Republic of Germany attempts to invoke in the present dispute.

The Federal Republic—in paragraph 82 of the Reply and at various other places in the Memorial and in the Reply—alleges:

> "if geographical circumstances bring about that an equidistance boundary will have the effect to cause an unequitable apportionment of the continental shelf between the States adjacent to that continental shelf, such circumstances are 'special' enough to justify another boundary line".

Now it is obvious that the boundaries, established on land, arrive at a certain point at the coastline and that, from thereon, the equidistance boundary in the sea area is *ex hypothesi* the result of "geographical circumstances", i.e., of the configuration of the coastline. If such configuration of the coastline were to be qualified as a "special circumstance" in any and every case where the determination of boundary lines in the sea area by application of the equidistance principle were said to result in an "unequitable share" in the *total surface* of sea area, the connection between the location of the boundary line in the sea area and the configuration of the coastline would be completely severed.

In other words, and as already remarked before, it is logically impossible to combine the idea of "equitable distribution" of the total surface of a sea area with the rule of determination of boundary lines with reference to the configuration of the coast. The latter rule necessarily requires, for the possible justification of a deviation from the equidistance line, that there is something "special" in the location of specific points of the coastline.

As amply demonstrated in the Counter-Memorials the Federal Republic did not—and, indeed, cannot—indicate any "special" point or points in the configuration of the coastline of the three States involved in the present dispute which could possibly justify a deviation from the equidistance lines.

CHAPTER 2

THE APPLICABILITY OF THE PRINCIPLES OF DELIMITATION EMBODIED IN ARTICLE 6 OF THE CONVENTION ON THE CONTINENTAL SHELF

Section I. The Principles and Rules of Law Invoked by Denmark and the Netherlands

31. The Governments of Denmark and of the Netherlands, in presenting their submissions in their respective Counter-Memorials, asked the Court when fulfilling its task under Article 1 of the Compromis to adjudge and declare (Submission 1):

> "The delimitation as between the Parties of the said areas of the continental shelf in the North Sea is governed by the principles and rules of international law which are expressed in Article 6, paragraph 2, of the Geneva Convention of 1958 on the Continental Shelf."

The principles and rules of international law expressed in that paragraph, as the Court is aware, are:

> "Where the same continental shelf is adjacent to 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, the boundary shall be determined by application of the principle of equidistance from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured."

On the basis of these principles the two Governments asked the Court further to adjudge and declare (Submission 2):

> "*The Parties being in disagreement*, unless another boundary is justified by special circumstances, the boundary between them is to be determined by application of the principle of equidistance from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured." (Italics added.)

Finally, they asked the Court to adjudge and declare (Submission 3):

> "*Special circumstances which justify another boundary line not having been established*, the boundary between the Parties is to be determined by application of the principle of equidistance indicated in the preceding submission." (Italics added.)

32. In Chapter II of the Reply (para. 20) the Federal Republic professes to find that the Counter-Memorials are "not very clear on the *substance of the legal rule*" (italics in the original) which the two Governments consider should oblige the Federal Republic to accept the principle of equidistance with regard to the boundaries of its continental shelf. It claims that "the necessary distinction between the *method* of drawing the boundary line according to the principle of equidistance from the nearest points of each coast, and the *alleged rule* of law which prescribes the application of this method under certain or, as the Counter-

Memorial interprets it, under nearly all circumstances, is missing" (italics in the original).

33. The submissions in the Counter-Memorials, however, are crystal clear as to the substance of the legal rule which the two Governments consider should oblige the Federal Republic to accept the principle of equidistance with regard to the boundaries of its continental shelf. It is the legal rule expressed in Article 6, paragraph 2, of the Continental Shelf Convention which, when applied to the circumstances of the present cases, leads logically to the result that the Federal Republic is obliged to accept the determination of its boundaries "*by application of the principle of equidistance* from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured" (italics added). Furthermore, the precise substance of the legal rule invoked by the two Governments against the Federal Republic was repeatedly indicated and underlined in their respective Counter-Memorials.

34. Nor is there any "necessary distinction" between the method of drawing the boundary line according to the principle of equidistance and the rule of law invoked by the two Governments against the Federal Republic. The supposed "necessary distinction" is nothing but a dogma introduced by the Federal Republic in Part II, Chapter II, of the Memorial. Asserting in the opening paragraph of that Chapter that the principle of equidistance was adopted in Article 6 of the Continental Shelf Convention and in Article 12 of the Territorial Sea and Contiguous Zone Convention as a *method* for drawing maritime boundaries, the Federal Republic thereafter tenaciously referred to the principle of equidistance as the "equidistance *method*" or as a mere "*technique* for the drawing of maritime boundaries" (para. 46). But that is not how the matter appears either in its substance or in the work of the International Law Commission or in the Continental Shelf Convention itself.

The delimitation of maritime boundaries between either "opposite" or "adjacent" States raises both a problem of the *principle* by which to determine the course of the boundary and a problem of the *method* by which, the principle being settled, the course of the boundary is actually to be delimited. It is one of the virtues of the equidistance principle that it provides the basis for the solution of both problems at one and the same time. It supplies first a *principle* for the delimitation of the maritime areas in question, namely the principle that areas nearer to one State than to any other State are to be presumed to fall within its boundaries rather than within those of a more distant State; and at the same time a practical geometrical *method* for defining the boundary in accordance with the principle, namely the construction of a line the points of which are at equal distance from the nearest points of the respective coastlines of the two States.

This double character of the equidistance criterion as both a *principle* and a *method* is shown in the recommendation of the Committee of Experts in their Report of 18 May 1953 (Danish Counter-Memorial, Annex 12 A and Netherlands Counter-Memorial, Annex 7):

> "After thoroughly discussing different *methods* the Committee decided that the (lateral) boundary through the territorial sea—if not already fixed otherwise—should be drawn according to the *principle* of equidistance from the respective coastlines." (Italics added.)

If the Committee, as a body of technicians, may have approached the problem primarily from the point of view of "methods", it is clear that they at the same time recognized its character as a "principle". Not only did they speak of it as

such but they occupied themselves with the question whether or not it would in all cases give an equitable result.

In the Commission itself the Special Rapporteur (M. François) at once translated the recommendation of the Experts into provisions which manifestly expressed the equidistance criterion as a *principle* and as a *legal rule*:

> "2. Where the same continental shelf is contiguous to the territories of two adjacent States, the boundary of the continental shelf appertaining to each State should be drawn according to the *principle of equidistance* from the respective coastlines of the adjacent States.
>
> 3. If the parties cannot agree on *how* the lines are to be drawn *in accordance with the principles* set forth in the preceding paragraphs, the dispute shall be submitted to arbitration [1]." (Italics added.)

In the subsequent proceedings in the Commission it was in the character of a principle and legal rule that the equidistance criterion was discussed, not of a mere "method" or "technique". Nor can it be seriously questioned that it was in the character of a *principle* and *rule* of law as well as of a *method* of delimitation that the equidistance criterion was embodied in the Continental Shelf Convention at Geneva in 1958.

35. Curiously enough, the Federal Republic seems itself in paragraph 36 of the Reply to have admitted the dual character of the equidistance criterion as both a "principle" and a "method". Riding its hobby horse of an alleged fundamental difference between median lines between "opposite" States and equidistance lines between "adjacent" States, it there said:

> "However persistently the Counter-Memorial may refuse to admit it, there can be no doubt that *the function of maritime boundaries is not a mere 'delimitation' of the maritime area each State controls, but also, if not primarily, an equitable partition of the maritime area between the States concerned.*" (Italics added.)

Even if this proposition could be assumed to be true, it seems pertinent to ask the Federal Republic whether the 63 States, *including the Federal Republic itself*, which voted in favour of the text of Article 6 of the Continental Shelf Convention at Geneva are not to be presumed to have adopted the equidistance criterion in paragraph 2 not as a mere *method* of delimitation but "*also if not primarily*", as "*an equitable partition of the maritime area between the States concerned*" (italics added).

In any event it is clear that any partition of maritime areas cannot be completely detached from all the accepted principles governing delimitation of maritime areas, as the Federal Government maintains.

36. In short, the Federal Republic's attempt to separate the equidistance criterion as a *principle* of delimitation from the equidistance criterion as a *method* of delimitation is completely unjustified in the context of the Continental Shelf Convention. The alleged "necessary distinction" is clearly non-existent and cannot serve the Federal Republic's purpose of trying to undermine the status of the equidistance principle as a generally recognized rule of law for the delimitation of continental shelf boundaries as between adjacent States.

37. Chapter II of the Reply further contains a general attack on the submissions of the Danish and Netherlands Governments concerning the principles and rules of international law applicable to the delimitation of the boundaries now

[1] *Yearbook of the I.L.C.*, 1953, Vol. I, para. 37, p. 106.

in question. This attack takes the form of a series of related, if disjointed, arguments which the two Governments propose to examine under two main heads: (1) the status of the equidistance-special circumstances rule as a generally recognized rule of international law; and (2) the position of the Federal Republic of Germany in relation to that rule.

Section II. The Status of the Equidistance-Special Circumstances Rule as a generally Recognized Rule of International Law

A. The Arguments of the Danish and Netherlands Governments

38. In Chapter II of the Reply, as in the Memorial, the arguments of the Federal Republic are in some measure misdirected because it persists in representing that the legal rule invoked by the two Governments is the "equidistance *line*" pure and simple whereas it is, of course, the application of the "equidistance *principle unless another boundary is justified by special circumstances*". In paragraph 21 it further distorts the legal position taken up by the two Governments in their Counter-Memorials by asserting:

> "The Counter-Memorial regards the equidistance line as the 'general rule' for all sorts of maritime boundaries (Dan. C.-M., paras. 61, 84-90, 115; Neth. C.-M., paras. 55, 78-84, 109) as if it had the same legal validity for all situations, irrespective of whether the boundary line had to be drawn between adjacent or opposite coasts, whether they were boundaries in straits, in waters near the coast or in the wider regions of the open sea, or whether the delimitation was made for the purposes of custom and fishery control or for the division of submarine resources. By treating the existing maritime boundaries alike the specific factors relevant to the applicability of the equidistance line for delimiting continental shelf boundaries might be disregarded."

The paragraphs in the Counter-Memorials mentioned by the Federal Republic in no way bear out the assertion, by which the Federal Republic seems to suggest to the Court that in their Counter-Memorials the two Governments have invoked the equidistance principle as a general rule of customary law governing the delimitation of *all* maritime boundaries binding as such upon the Federal Republic.

If that is the meaning of the assertion, it is an inadmissible presentation of the arguments of the two Governments in their Counter-Memorials, where they expressly stated: It is not here a question of establishing the "equidistance principle" as a principle universally binding in boundary delimitation.

39. The arguments, meticulously developed step by step in Chapter 3 of Part II of the Counter-Memorials, may be summarized as follows.

In the State practice prior to the definitive establishment of the coastal State's rights in the continental shelf at the Geneva Conference of 1958 the tendency was to refer in general terms to the delimitation of continental shelf boundaries on "equitable principles". But the concept of a delimitation on equitable principles was afterwards converted, through the work of the International Law Commission and through the Geneva Conference into the rules set out in Article 6 of the Continental Shelf Convention which accept the equidistance-special circumstances principle for the delimitation of continental shelf boundaries as a rule of law (Danish Counter-Memorial, para. 61; Netherlands Counter-Memorial, para. 55). This development took place between 1951 and 1958 through the work of the Committee of Experts and the International Law Commission and through the endorsement of their views at the Geneva

Conference (Danish Counter-Memorial, paras. 63-71 and 75-79; Netherlands Counter-Memorial, paras. 57-65 and 69-73).

Throughout the period during which the codification and progressive development of the law of the sea was under consideration by the International Law Commission the whole doctrine of the coastal State's rights over the continental shelf was still in course of formation. The unilateral claims which had been made by individual States varied in their nature and extent; and many coastal States, including all the Parties to the present disputes, had not yet promulgated any claims, although Denmark had made her position clear (Danish Counter-Memorial, paras. 12 and 73). The work of the Commission and of Governments in their replies to the Commission both helped to consolidate the doctrine in international law and to clarify its content. This it did no less in regard to the delimitation of boundaries between States on the continental shelf than it did in regard to the nature and extent of the legal rights of coastal States over the continental shelf. Thus, just as the work of the Commission and the contribution to the work made by governments were important factors in developing a consensus as to the acceptability of the doctrine, so also were they important factors in developing a consensus as to the acceptance of the equidistance-special circumstances principle as the general rule for the delimitation of continental shelf boundaries (Danish Counter-Memorial, para. 72; Netherlands Counter-Memorial, para. 66).

The equidistance-special circumstances rule was embodied in the Continental Shelf Convention at Geneva by an almost unanimous vote. Furthermore, the equidistance principle which is its basis, so far from being a novelty in 1958, was a principle which already had wide roots in the State practice concerning sea and fresh-water boundaries. State practice, as demonstrated in an Annex to the Counter-Memorials (Danish Annex 13; Netherlands Annex 15), showed that in 1958 there already existed a very considerable number of examples of recourse to the equidistance principle or some variant of it for the delimitation of different kinds of sea and fresh-water boundaries. In short, the rules for the delimitation of continental shelf boundaries embodied in Article 6 of the Convention were *an expression of a principle already known and accepted in State practice in relation to maritime boundaries and were thus in full harmony with the existing practice and concepts of maritime international law* (Danish Counter-Memorial, paras. 84-90; Netherlands Counter-Memorial, paras. 78-84).

State practice since the Geneva Conference, by the numerous ratifications of the Geneva Convention and by the numerous delimitations of continental shelf boundaries on the basis of the principles expressed in Article 6, amply confirms that today those principles possess the status of the generally recognized rules of international law applicable to the delimitation of continental shelf boundaries. Those principles have been applied not only by the States parties to the Continental Shelf Convention but also by States, including the Federal Republic which have not yet become parties. It is with regard to the present boundaries alone, and this only with reference to "their further course" beyond partial boundaries already determined on the basis of the equidistance principle, that an example of a State's resisting the normal application of the principle of Article 6 is to be found.

Finally, the principles expressed in Article 6 are fully consonant with, and even demanded by, the *ratio legis* of the Continental Shelf Convention. Under Articles 1 and 2 each coastal State is recognized to possess *ipso jure* sovereign rights of exploration and exploitation over the sea-bed and subsoil of the submarine areas adjacent to its coasts. Inherent in this concept is the principle that areas nearer to one State than to any other State are to be presumed to fall

within its boundaries rather than within those of a more distant State; and the application of this principle is realized by a delimitation in accordance with the equidistance principle (Danish Counter-Memorial, para. 115; Netherlands Counter-Memorial, para. 109).

40. Such, in outline, is the case presented by the two Governments in their respective Counter-Memorials regarding the status of the principles contained in Article 6 of the Convention as the generally recognized rule today for the delimitation of continental shelf boundaries. They have not asked the Court to decide that the equidistance principle or even the equidistance-special circumstances principle is a general rule of customary law governing the delimitation of *all* forms of maritime boundaries. Impressive though the evidence may be in favour of the equidistance principle as a norm for the delimitation of maritime boundaries, the Court is here concerned with a narrower question—the question of the principles and rules of international law applicable to the delimitation of the boundaries of the areas of continental shelf appertaining to coastal States. What the two Governments have asked the Court to decide is that the rapid development and general recognition of the coastal State's rights in the exploration and exploitation of the continental shelf adjacent to its coasts has been attended by a parallel development and general recognition of the equidistance-special circumstances principle as the general rule, in the absence of agreement, for the delimitation of boundaries between the areas of continental shelf appertaining to different coastal States; and that this principle, being an integral part of the law now generally recognized as the law governing the continental shelf, is binding upon any coastal State which claims areas of continental shelf as appertaining to it under that law, whether under the Continental Shelf Convention itself or under a customary right recognized and defined in that Convention.

B. The General Recognition of the Equidistance Principle Extends to Lateral Boundaries no Less Than to Median Lines

41. In attempting to undermine the above arguments the Federal Republic, as already indicated, makes considerable play with its supposed "necessary distinction" between equidistance as a *method* for a boundary and as a *principle* prescribing the application of this method. The spurious character of this so-called "necessary distinction" has been pointed out above (para. 36): the equidistance criterion is at once a *method* of limitation and a *principle* of division, namely equality of distance from the nearest points of the respective coasts of the States concerned. In the Reply, however, as in the Memorial, the Federal Republic places its main emphasis on a further distinction: a supposed difference in the validity of the equidistance criterion as a principle for the delimitation of a boundary between "opposite" States and between "adjacent" States. Here its objectives appear to be four-fold: (1) to diminish the significance of the State practice adduced by the two Governments as showing the wide recourse to the equidistance principle in delimiting sea and fresh-water boundaries; (2) to provide a plausible reason for questioning the general applicability of the equidistance principle as between "adjacent" States, i.e., of the provisions in paragraph 2 of Article 6 of the Convention; (3) to provide a plausible reason for its acceptance of the use of the equidistance principle in the delimitation of all other continental shelf boundaries in the North Sea but not its own; and (4) to provide a plausible reason for its acceptance of the equidistance principle in the delimitation of its own continental shelf boundary in the Baltic Sea.

42. The preoccupations of the Federal Republic concerning these matters are easily understood. The Federal Republic has taken the position before the Court that there is only one—very broad—principle which is binding as law upon all North Sea States, including itself, in the delimitation of their continental shelf boundaries: the principle that "each coastal State is entitled to a just and equitable share[1]". This so-called principle of law, as has already been pointed out and is indeed evident from its mere formulation, lacks any objective criteria or standards for its application. Accordingly, the Federal Republic is apprehensive that, even if the Court were to admit that entirely vague formula as an applicable principle of law for the purposes of the present case, *it might very well think it logical, on the basis of the principles stated in Article 6 of the Convention, of the delimitation of numerous continental shelf boundaries in conformity with those principles and of the wide use of the equidistance principle in the delimitation of other sea and fresh-water boundaries, still to lay down that in the context of maritime areas a just and equitable share is that which results from the application of the equidistance principle unless it is affirmatively established that another boundary is justified by special circumstances.* In other words, the Court might very well find in the numerous precedents of the use of the equidistance principle in State practice the objective criteria and standards of a "just and equitable" delimitation which the Federal Republic's very broad formula so evidently lacks.

43. The Federal Republic, it would seem, had made up its mind that, having regard to the extensive acceptance of *median lines* in State practice, including its own acceptance of *median line* delimitations of the continental shelf in the North Sea and the Baltic, the Court is almost certain to conclude that median line delimitation—equidistance delimitation between "opposite" States—is today generally recognized as the legally appropriate expression and application of the concept of a "just and equitable share" for maritime areas in the absence of special circumstances. For this reason it has sought in its Memorial and Reply to make a sharp distinction between the use of the equidistance principle —in its median line form—for delimitation of boundaries between "opposite" States and its use—in its lateral line form—for delimitation of boundaries between "adjacent" States. But for this distinction no basis is to be found in State practice.

44. In seeking, as it does in paragraph 21 of the Reply, to drive a wedge between "median line" boundaries for "opposite" States and "equidistance line" boundaries for adjacent States the Federal Republic has the narrowest limits within which to manœuvre. It finds itself gravely embarrassed by the fact that neither the Territorial Sea and Contiguous Zone Convention nor the Continental Shelf Convention itself makes the slightest difference between the two types of case. The argument by which it attempts to escape from this embarrassing fact appears to the two Governments to be wholly artificial and unconvincing.

After accusing—quite gratuitously—the two Governments of treating all maritime boundaries alike, the Federal Republic proceeds in paragraph 21 to argue as follows:

> "By treating the existing maritime boundaries alike the specific factors relevant to the applicability of the equidistance line for delimiting continental shelf boundaries might be disregarded. This is in contradiction not only to the practice of States but also to the wording of the Geneva

[1] Reply, Submission 1.

Conventions on the Law of the Sea. It does not seem necessary to repeat all what has been said in this respect in the Memorial of the Federal Republic of Germany; it may suffice to ask why Article 6 of the Continental Shelf Convention put the rules on boundaries between adjacent and opposite coasts in different paragraphs and why the impact of 'special circumstances' is treated differently in Article 6 of the Continental Shelf Convention from Article 12 of the Convention on the Territorial Sea (see Memorial, para. 64, p. 62, *supra*) were it not from the conviction that special factors had to be taken into account in each of these distinct situations. If we examine the report of the Committee of Experts, which played such a great role in introducing the equidistance line into the Geneva Conventions (see the text reproduced in Annex 12 of the Danish Counter-Memorial, pp. 249-258, *supra* and in Annex 7 of the Netherlands Counter-Memorial, pp. 377, *supra*), we see how differently the Committee treats these situations. While for the delimitation of territorial waters between opposite coasts the median line was adopted as a matter of course, for the delimitation between territorial waters of two adjacent States there was a thorough discussion on various methods proposed, until the equidistance line was adopted in the end with the reservation that 'in a number of cases this may not lead to an equitable solution, which should be then arrived at by negotiation' (*ibid.*, p. 258 and p. 377, *supra*, respectively). It was thought by the experts that these proposals might also be used for the delimitation of the continental shelf, which question, however, remained outside the terms of reference of the Committee. Therefore, the material submitted by the Counter-Memorial in support of the equidistance line does not always carry the same weight, depending on the situation where the median or equidistance line had been used."

These arguments, on which the Federal Republic seems primarily to rest its attempt to undermine the legal significance of the provisions of the two Geneva Conventions and the other State practice applying the equidistance principle, will now be examined in turn.

45. That the Federal Republic should pose the question why Article 6 of the Continental Shelf Convention puts the rules for "opposite" and "adjacent" States in different paragraphs is surprising. By doing so it at once invites attention to another and more pertinent question why the rules stated for "opposite" and "adjacent" States in those two paragraphs should be precisely the same.

The answer to the Federal Republic's question seems to be clear enough and hardly to justify the conclusions which the Federal Republic desires to squeeze out of the question. The explanation lies in the drafting history of what is now Article 6 of the Convention and was largely given by the Special Rapporteur of the International Law Commission himself when, at its 201st Meeting, he introduced the first draft of the text which has become Article 6 (then Article 7). That draft, like the present article, dealt with the cases of "opposite" and "adjacent" States in different paragraphs, providing for the application of the equidistance principle in both cases but specifically designating it as the "median" line in the first case. Explaining his new draft, the Special Rapporteur (M. François) said (*Yearbook of the Commission*, 1953, Vol. I, p. 106):

"The Commission would remember that article 7, as adopted at the third session, contained no directives about the delimitation of the continental shelf, on which there was no rule of law that could be applied by a tribunal. The comment, by referring to median lines, did give some

guidance in the matter to States whose coasts were opposite to each other, but gave none to adjacent States, *because the Commission had not yet reached any decision on the delimitation of the territorial sea of such States.* In the absence of any rules of law, the Commission had decided that disputes on the delimitation of the continental shelf should be submitted to arbitration *ex aequo et bono*. In view of the objections raised by numerous governments to that proposal, however, he had suggested in his fourth report that disputes should be submitted to conciliation procedure. But since the completion of the fourth report, the conclusions of the Committee of Experts had become available and had prompted him to prepare a new text for article 7." (Italics added.)

These observations of the Special Rapporteur make it plain that the Commission had come to separate cases of "adjacent" States from cases of "opposite" States largely because *in the former cases the boundary must be linked to the lateral boundary dividing the territorial seas of adjacent States* and it had not yet reached any conclusion in regard to the territorial sea boundary. This purely technical factor made it perfectly natural that the Special Rapporteur also should frame his draft in two paragraphs stating the rule separately for "opposite" and "adjacent" States. There is no trace whatever either in the Special Rapporteur's draft article or in his explanations to the Commission of any inherent difference between the cases of "opposite" and "adjacent" States which might render the equidistance principle either less suitable or less generally applicable for the delimitation of boundaries between "adjacent" States than between "opposite" States.

In the Commission itself the main focus of the discussion was the question whether the equidistance principle should be qualified by making provision for "special circumstances" which might justify another boundary line. This question was discussed by the Commission *indifferently with reference to both "opposite" and "adjacent" States*; and the outcome of the discussion was that the Commission did add this qualifying provision *in the same terms to both cases.* Similarly, the Geneva Conference itself adopted the two paragraphs of Article 6 of the Convention *providing in almost identical terms for the application of the equidistance principle in both types of cases.*

In short—the *travaux préparatoires* of Article 6 afford no warrant whatever for the fundamental differences of substance and principle which the Federal Republic seeks to establish between "median" equidistance lines between "opposite" States and "lateral" equidistance lines between "adjacent" States. On the contrary, both the Commission and States at the Conference treated the equidistance principle as equally suitable for both cases and applicable to both cases under precisely the same conditions.

46. This being so, the Federal Republic, before trying to drive a wedge between "median" and "lateral" equidistance lines for the purposes of its arguments should have asked itself the far more pertinent question: why did the Commission and the Conference treat "opposite" and "adjacent" cases on precisely the same basis? This question, it is obvious, has the most serious implications for the whole of the Federal Republic's case. The Federal Republic has maintained in its pleadings that the only generally recognized principle which is binding upon all States, including itself, is the principle that each coastal State is entitled to a "just and equitable share". The Federal Republic has likewise maintained in its Reply that "there can be no doubt that the function of maritime boundaries is not a mere 'delimitation' of the maritime area each State controls, but also, if not primarily, an equitable partition of

the maritime area between the States concerned[1]". It has further conceded expressly in its pleadings that, in nearly all cases, at least, a "median" equidistance line constitutes a just and equitable delimitation between "opposite" States. What then is the Court to think in regard to the action of the Commission and of the Conference in prescribing the equidistance-special circumstances rule for both "opposite" and "adjacent" States? Did these two responsible bodies have in mind what is "just and equitable" and what would constitute "an equitable partition" when they were endorsing the equidistance-special circumstances rule as the rule of delimitation for "opposite" States? Presumably, the Federal Republic must think so; for the whole of its argument favours that view. But if that be the case, is it really conceivable that those responsible bodies were irresponsibly oblivious of what *in law* would be "just and equitable" and constitute "an equitable partition" when they turned their attention to the case of "adjacent" States? Or is the Court asked to think that those two responsible bodies were irresponsibly oblivious of these considerations in both cases *and only by good luck failed to lay down an inequitable rule for "opposite" States in the first paragraph of Article* 6?

However the matter is put, it is obvious that the position of the Federal Republic is highly delicate even on the basis of its own thesis of the "just and equitable share". The concept of the codifying organ of the United Nations and the concept of the international community of States at the Geneva Conference as to the law to be applied in order to achieve a "just and equitable share" and "equitable partition" is the equidistance-special circumstances rule which is found in Article 6 of the Convention. The Federal Republic's position under its own view of the law becomes all the more delicate if it is asked what was in the mind of the Federal Republic's own delegation at the Conference when it voted in favour of the whole of Article 6 without any semblance of a differentiation between paragraph 1 and paragraph 2. Is the Court to understand that the Federal Republic's delegation voted for the article despite a belief that the application of paragraph 2 would not achieve a "just and equitable share" or an "equitable partition"? If so, there is no indication of any such belief in the records of the Conference.

And if the truth be—as it obviously is—that the International Law Commission and the community of States at the Conference endorsed the equidistance-special circumstances rule because they conceived that in the cases both of "opposite" and "adjacent" States this rule would achieve what *in law* would be a "just and equitable share" and "an equitable partition", then the two Governments are, indeed, entitled to pose another question to the Federal Republic: why should Denmark and why should the Netherlands not be entitled to delimit their continental shelf boundaries on the basis of the principles which the International Law Commission and the delegates at the Geneva Conference, including those of the Federal Republic, appear to have accepted as the embodiment of what is "just and equitable" in this regard?

47. Whatever may be the Federal Republic's answer to that pertinent question, it is clear that the legislative history of Article 6 of the Convention, in the Commission and in the Geneva Conference, is wholly incompatible with the sharp cleavage which the Federal Republic seeks to establish between "median" equidistance lines and "lateral" equidistance lines.

[1] Reply, para. 36.

C. THE ROLE OF THE EQUIDISTANCE-SPECIAL CIRCUMSTANCES RULE IN THE DELIMITATION OF TERRITORIAL SEA AND CONTINENTAL SHELF BOUNDARIES IS IN ESSENCE THE SAME

48. The Federal Republic in the passage of its argument quoted above poses another question: "why the impact of 'special circumstances' is treated differently in Article 6 of the Continental Shelf Convention from Article 12 of the Convention on the Territorial Sea (see Memorial, para. 64, p. 62, *supra*), were it not from the conviction that special factors had to be taken into account in each of these distinct situations [1]". The object of this question seems also to be to drive a wedge between "median" and "lateral" equidistance lines but this time in regard to the role given to "special circumstances"; for the Federal Republic does not in that passage pursue the question of the supposed difference in the treatment of "special circumstances" in the two Conventions but rather claims to find in the Territorial Sea Convention a marked difference between the treatment of "special factors" in delimitations of the boundary as between "opposite" and as between "adjacent" States.

49. Nevertheless, it is necessary to dwell briefly on the difference in the formulation of Article 12 of the Territorial Sea Convention and Article 6 of the Continental Shelf Convention. In paragraph 64 of the Memorial the Federal Republic asked the Court to conclude that the Geneva Conference intended the equidistance line to "have a far wider scope of application in the delimitation of the territorial sea than of the continental shelf" because in the Territorial Sea Convention the "special circumstances" clause is in the form—

> "where it is *necessary* by reason of historic title or other special circumstances to delimit the territorial seas of the two States in a way which is at variance with this provision" (i.e., the equidistance principle) (italics added)

whereas in the Continental Shelf Convention it is in the form—

> "unless another boundary line is *justified by special circumstances*" (italics added).

In fact there are two other clear differences in the *formulation* of Article 12 of the Territorial Sea and Article 6 of the Continental Shelf Conventions: The first is that in the former the cases of "opposite" and "adjacent" States are covered by the same provision *in the same paragraph*, whereas in the latter they are covered by virtually identical provisions *in separate paragraphs*. The second is that in the former Convention the equidistance rule is expressed *negatively* as a prohibition against extending the territorial sea beyond the median (equidistance) line, whereas in the latter it is expressed as a *positive* direction that the boundary shall be the median or equidistance line.

The two Governments dealt with this matter of the different formulation of the two articles in their Counter-Memorials, where they explained that this was primarily due to the accidents of the drafting processes at the Geneva Conference (Danish Counter-Memorial, paras. 122-124; Netherlands Counter-Memorial, paras. 116-118). The two articles were dealt with in different Committees (the First and Fourth Committees) and, owing to the political difficulties surrounding the whole problem of the breadth of the territorial sea, the question of the delimitation of the territorial sea was dealt with towards the end of the Conference when Article 6 of the Continental Shelf Convention had already been approved in the Plenary. The International Law Commission's draft for the delimitation of the territorial sea boundaries between "opposite" and "adjacent" States had been very similar to its draft for the delimitation of

[1] Reply, para. 21.

the continental shelf boundaries. When, however, the draft for the territorial sea was eventually taken up by the First Committee, Norway pointed out that the Commission's draft did not take account of the complication that the States concerned in a delimitation might be claiming different breadths for their territorial seas. Norway further pointed out, as indeed did also the Federal Republic, that some coastal States had "historic"claims to a particular breadth of the territorial sea which might in certain cases entitle them to extend their boundary beyond the equidistance line (*Official Records*, Vol. III, pp. 187-188). At the same time, saying that the problems regarding "opposite" and "adjacent" States were "so closely interrelated as in some cases to be indistinguishable", Norway proposed that the provisions dealing with these two types of cases should be combined *(ibid.)*. The Norwegian proposals found favour with the First Committee and led to a recasting of the Commission's draft in a negative form and as a single provision covering both types of cases; and they also led to the inclusion of an explicit reference in Article 12 of the Territorial Sea Convention to a "historic title" as a form of "special circumstance" which might "necessitate" a departure from the equidistance rule.

50. The Federal Republic has not attempted in the Reply to challenge the statements of the two Governments in the Counter-Memorials that—

> "There is no indication in the records of the Conference that the difference in the formulation of the territorial sea and continental shelf provisions was due to anything else than the difficulty brought up by Norway and the vicissitudes of drafting in different Committees [1]."

It has merely reasserted its contention that the different formulations of the relevant provisions in the two Conventions shows that the "impact of special circumstances" is treated differently in the two Conventions and has attributed this to "special factors" found "in each of those distinct situations".

Undoubtedly, as has just been explained, the Conference did have some special factors in mind when it formulated Article 12 of the Territorial Sea Convention in different language from that in which it had formulated Article 6 of the Continental Shelf Convention. They were the possibility of territorial seas' having different breadth and the possibility of a State's having a historic title to a particular breadth. But, apart from these points, there is no indication in the records that the Conference considered that there would be any essential differences in the impact of "special circumstances" in the delimitation of territorial sea boundaries from their impact on the delimitation of continental shelf boundaries. Indeed, the Conference seems, if anything, to have envisaged that "special circumstances" might have a *larger* impact in the case of the territorial sea than in that of the continental shelf. Nor is it in the least surprising that the Conference should have viewed the matter in that light. The Federal Republic's statement in the Memorial (para. 64) that "the equidistance line has a far wider scope of application in the delimitation of territorial waters than in the delimitation of continental shelf areas" is a pure assumption which lacks any foundation not only in the records of the Conference but also in State practice. Special factors are just as likely to come into play in areas near the shore than in more distant areas. This can be seen, e.g., in the U.S.S.R.-Finland Treaty of 1965 where the near-shore boundary reflects provisions of earlier peace treaties between the two countries (Danish Counter-Memorial, para. 102; Netherlands Counter-Memorial, para. 96) and also in the recently

[1] Danish Counter-Memorial, para. 123; Netherlands Counter-Memorial, para. 117.

signed Norway-Sweden Agreement of 24 July 1968 for the delimitation of the continental shelf boundary of these countries in the northern part of the Skagerrak (see para. 64 below). In both these treaties it is in the near-shore areas that special factors operate *and in the open seas that the equidistance line plays its full role.*

Here again the question posed by the Federal Republic invites another and more pertinent question: why did the International Law Commission and the Geneva Conference, despite any differences which they may have perceived between the situation of the territorial sea and that of the continental shelf, lay down essentially the same general rule for both situations and why did they in each situation lay down the same general rule both for "opposite" and for "adjacent" States? Was it because they considered that this general rule, the equidistance-special circumstances rule, would result in what in law would be a "just and equitable" distribution? Or were they careless of the justice and equity of the result? And, when the Federal Republic's own delegation voted at the Conference in favour of this general rule for both situations and for both types of cases, did it have regard to the "just and equitable" character of the rule? In short, if it becomes a matter of posing questions, the questions may once again prove very delicate for the Federal Republic under its own thesis of the "just and equitable" share as the one and only general rule.

51. Finally, in the above-quoted passage from the Reply the Federal Republic calls in aid the report of the Committee of Experts in support of its contention that special factors distinguish territorial sea from continental shelf delimitations and "opposite States" from "adjacent States" delimitations and that, in consequence, "the material submitted by the Counter-Memorials in support of the equidistance line does not always carry the same weight, depending on the situation where the median or equidistance line had been used [1]". But the deductions which the Federal Republic seeks to make from that report are not justified.

No doubt, the Federal Republic is correct up to a point in saying that "while for the delimitation of territorial waters between opposite coasts the median line was adopted *as a matter of course*, for the delimitation between territorial waters of two adjacent States *there was a thorough discussion on various methods proposed*, until the equidistance line was adopted in the end with the reservation that "*in a number of cases this may not lead to an equitable solution, which should be then arrived at by negotiation* [1]" (italics added). Median line boundaries between "opposite" States were, in one connection or another, already familiar in State practice and had, in fact, already been tentatively recommended by the Commission for the continental shelf. On the other hand, as pointed out in the Counter-Memorials, in most cases States had not found it necessary to conclude treaties or legislate about their lateral sea-boundaries with adjacent States before the question of exploiting the mineral resources of the sea-bed and subsoil arose and the practice was therefore sparse (Danish Counter-Memorial, para. 88; Netherlands Counter-Memorial, para. 82). Accordingly, it is not surprising that in the case of adjacent States the Committee of Experts had a "thorough discussion on various methods proposed" before deciding to recommend the equidistance principle as the general rule. Indeed, the very fact that the Committee did thoroughly discuss other methods can only give added significance to its adoption of the equidistance principle in its report *without mentioning any other rule or method as an acceptable alternative.* But

[1] Reply, para. 21.

in any case the Federal Republic's statement is misleading *in relation to the "impact of special circumstances"*.

52. The Federal Republic refers only to the Committee's observation, under Point VII of its report dealing with *lateral* boundaries, that in a number of cases the equidistance line may not lead to an equitable solution. But under Point VI dealing with "opposite" States the Committee also mentioned certain "special reasons" which "may divert the boundary from the median line". Furthermore, the Special Rapporteur of the Commission, *who was also Chairman of the Committee of Experts*, when it came to translating the Committee's recommendations into draft articles, proposed precisely the same rule for "opposite" and "adjacent" States not only for the continental shelf but also for the territorial sea. And when the Commission introduced "special circumstances" as a *specific* exception to the rule, it did so in the same terms for "opposite" and "adjacent" States and in connection both with the continental shelf and the territorial sea. Accordingly, the Federal Republic's attempt to attribute particular significance to the above-mentioned observation of the Committee of Experts seems altogether unjustified.

As to the Federal Republic's further comment: "It was thought by the Experts that those proposals (concerning the territorial sea) might also be used for the delimitation of the continental shelf, which question, however, remained outside the terms of reference of the Committee", it is not clear what this is meant to convey to the Court. The terms of reference of the Committee took the form of a questionnaire drawn up by the Special Rapporteur of the International Law Commission under whose chairmanship, as just stated, the Committee worked and drew up its report. True, the Committee's statement that it "considered it important to find a formula for drawing the international boundaries in the territorial waters of States, which could also be used for the delimitation of the respective continental shelves of two States bordering the same continental shelf [1]" was made as a "remark" and not as an answer to a specific question. But to speak of this remark as being "outside the terms of reference of the Committee" is in the circumstances quite unreal. The solid fact is that the Committee of Experts did express this view and that the Commission itself, in paragraph 83 of its report for 1953, also put on record its opinion that in the case of adjacent States the delimitation of the continental shelf should be carried out "in accordance with the same principles as govern the delimitation of the territorial waters between the two States in question" (see Danish Counter-Memorial, para. 68; Netherlands Counter-Memorial, para. 62).

53. Accordingly, the two Governments submit that the several arguments discussed above, by which the Federal Republic has sought in its Reply to minimize the significance of the position given to the equidistance principle in the International Law Commission, in the Geneva Conference and in the practice of States are without any substance whatever. They serve only to underline the embarrassment which the Federal Republic feels when it finds itself confronted by so clear and general an acceptance of the equidistance-special circumstances rule within the international community.

[1] *Yearbook of the I.L.C.*, 1953, Vol. II, p. 79, see also Danish Counter-Memorial, Annex 12 A and Netherlands Counter-Memorial, Annex 7.

D. The Equidistance-Special Circumstances Rule in State Practice

54. The Danish and Netherlands Governments set out certain State practice in their Counter-Memorials, invoking this practice from two points of view (Danish Counter-Memorial, paras. 84-112 and Annexes 13, 14 and 14 A; Netherlands Counter-Memorial, paras. 78-106 and Annexes 13 A, 14, 14 A and 15). First, they referred to a considerable number of precedents as showing that the provisions of Article 6 of the Continental Shelf Convention adopted at Geneva in 1958 were in harmony with the principles underlying the delimitation of other types of maritime and fresh-water boundaries. From this State practice they drew the conclusion that the equidistance-special circumstances rule found in Article 6 was not a new concept and that, on the contrary, it was an expression of a principle already known and accepted in State practice in relation to maritime boundaries. Secondly, the two Governments invoked a substantial body of precedents in the period after the Geneva Conference which relate specifically to the delimitation of continental shelf boundaries and which confirm the general acceptance today of the rules set out in Article 6 as representing the modern law governing continental shelf boundaries. In regard to these precedents the two Governments pointed out that all the continental shelf boundaries, including those of the Federal Republic, so far established in the North Sea as well as in the Baltic—the two seas which concern the Federal Republic—reflect the principle of Article 6 of the Geneva Convention.

1. State Practice in regard to the Delimitation of Fresh-Water Boundaries and Maritime Boundaries apart from Boundaries of the Continental Shelf

55. The Federal Republic, in seeking in the Reply to dispose of the State practice relating to boundaries other than continental shelf boundaries, advances certain arguments of a general character (paras. 34-39) and also makes certain specific criticisms of some of the individual precedents (Annex, Section B). These specific criticisms are confined to practice concerning territorial sea boundaries and it will be convenient to consider them first.

It was pointed out in the Counter-Memorials that in 1947, when it was necessary to define the territorial sea boundaries of the Free Territory of Trieste in Articles 4 and 22 of a major collective treaty, the Italian Peace Treaty, the States concerned significantly fixed the boundaries of the Free Territory both with Italy and with Yugoslavia by application of the equidistance principle. The Federal Republic seeks to dispose of these precedents merely by saying that, the Free Territory having ceased to exist, the provisions in question are no longer in force. But the relevant point is not whether these provisions are still in force; it is the evidence which they furnish of the understanding of States concerning the principles to be applied under the international law of today for delimiting territorial sea boundaries between adjacent States. The fact that, owing to the disappearance of the Free Territory, the provisions are no longer in force in no way diminishes their value as evidence of the convictions of States on this matter. Moreover, it seems clear, from the information available, that the existing territorial sea-boundary between Italy and Yugoslavia, which replaces the Peace Treaty boundaries, is also based on the equidistance principle.

The same observation applies to the Treaty between Norway and Finland of 28 April 1924 defining the boundary between their two States in the Varangerfjord. The fact that it is no longer in force does not alter its character as evi-

dence. The new boundary between Norway and the Soviet Union may not follow the equidistance line in the same way; but it also reflects the equidistance principle.

Three examples of reliance on the equidistance principle the Federal Republic seeks to dispose of by the observation that they are *unilateral and cannot constitute a precedent for inter-State practice*: the Mexico-Belice, Mexico-United States and Tanzania-Kenya territorial sea boundaries. This observation seems quite out of place since there is not the slightest suggestion that the applicability of the equidistance principle was in any way in dispute in any of the three cases. Indeed, in the two first-named examples all the States concerned—Mexico, the United Kingdom and the United States—were parties to the Territorial Sea and Contiguous Zone Convention, Article 12 of which provides for the application of the equidistance-special circumstances rule. The third example—a Proclamation of the President of Tanzania—is significant; for Tanzania is not a party to the Convention and yet appears to have considered it natural to apply the principles of delimitation which the Convention prescribes.

As to another precedent, the Italo-Turkish Treaty of 1932 delimiting the territorial sea boundary between Anatolia and the Island of Castellorizo, the Federal Republic comments that "this line contains only a few points of equidistance connected by straight lines[1]". But it is not uncommon for two States, in applying the equidistance principle, to *agree* for mutual convenience to *simplify* the line by joining straight lines between. The resulting boundary nevertheless remains one based essentially on the application of the equidistance principle.

Two other precedents cited in the Counter-Memorials as examples of the equidistance principle, Treaties of 1908 and 1925 delimiting United States-Canadian boundaries, are contested in the Reply on the basis of a "suggestion" that boundaries "running along the middle of two channels" are rather examples of a thalweg boundary. In fact, the term "channel" in these cases seems to refer not to the navigational channel but simply to the waters intervening between the two shores, as in the expression "English Channel"; and the principle of delimitation thus would appear to be essentially that of equidistance.

56. The two Governments, in the above-mentioned Annexes of their Counter-Memorials, noted four precedents in which methods other than the equidistance line had been used for determining the territorial sea boundary. The Federal Republic observes in this connection that "many others could be added". Certainly, *some* further precedents of the same kind could be adduced, more particularly from somewhat earlier times, such as the Norwegian-Swedish boundary which was the subject of the well-known Grisbadarna arbitration. But it remains true that the equidistance-special circumstances rule, adopted by the International Law Commission and by the Geneva Conference for the delimitation both of the territorial sea and the continental shelf, was by no means a new concept thought up by the Committee of Experts in 1953. On the contrary, it was a natural evolution from an existing principle of boundary delimitation which had manifested itself often enough in the practice of States in the delimitation of various forms of maritime and fresh-water boundaries. Indeed, in paragraph 35 of the Reply the Federal Republic itself concedes that "*Obviously the authors of the Continental Shelf Convention would not have framed the rules on the delimitation of continental shelf boundaries without regard to the experience made with such methods in State practice, and*

[1] Reply, Annex, Sec. B, 3.

would not have chosen a method which they had not considered the most suitable for its purpose" (italics added).

In the light of that statement in paragraph 35 of the Reply, it is somewhat surprising to read in the very next paragraph:

> "The weight of the practice on which the Counter-Memorial relies, is further reduced by the fact that the supposed 'wide recognition' of the equidistance principle is mainly restricted to boundaries in rivers, straits, channels and coastal waters. *The situation in these cases is not comparable to a situation where boundaries have to be drawn through extensive maritime areas under the high sea* . . . As precedents carry weight only for comparable situations, *this practice cannot be regarded as relevant for other maritime situations* where such an equitable apportionment cannot be expected from the application of the equidistance principle under all circumstances." (Italics added.)

If, as the Federal Republic concedes in the previous paragraph, it is obvious that the authors of the Convention framed the rules on the delimitation of continental shelf boundaries after paying regard to the experience made with such methods in State practice and that they chose the method which they considered most suitable for the purpose, how can it say that the situations are in no way comparable or that the practice is in no way relevant to the delimitation of the continental shelf? The International Law Commission and the States at the Geneva Conference, *including the Federal Republic itself*, chose the equidistance principle as the "method" *most suitable for the purpose of the continental shelf.*

57. The two Governments, before turning to the State practice relating to the continental shelf itself, must express their reservations concerning the comment of the Federal Republic on the precedent of the European Fisheries Convention cited in the relevant Annexes of the Counter-Memorials [1] under the heading "Fishery Zones". Article 7 of this multilateral Convention, signed by the Federal Republic together with 12 other European Powers, provides for the application of the equidistance principle in the delimitation of the boundaries of the 12-mile fishery zones established by this Convention; and it does so both in the case of "opposite" States and in the case of "adjacent" States. Dealing with this precedent in paragraph 38 *(b)* of the Reply, the Federal Republic comments: "it should be noted that the Federal Republic of Germany has not ratified the European Fisheries Convention."

It may be true that the Federal Republic has not yet ratified this Convention. But, as the documents in Annexes 1-3 of this Rejoinder show, it is no less true that in 1964, together with Denmark, the Netherlands and the other Powers concerned, the Federal Republic signed a Protocol of Provisional Application of the Fisheries Convention [2]; and that under this Protocol the Convention has been and is being applied as between Denmark, the Netherlands and the Federal Republic. Again, in 1967 the Federal Republic and Denmark concluded an agreement by Exchange of Notes under which Denmark accorded to the Federal Republic the right to continue a traditional German fishery along the Danish coast *specifically with reference to Article 9, paragraph 1, of the Convention.* In that Exchange of Notes [3] it was also agreed that the temporary southern boundary of the fishery zone should be that laid down in the "partial"

[1] Danish Annex 13 and Netherlands Annex 15.

[2] Annex 1 to this Rejoinder.

[3] Annex 2 to this Rejoinder.

continental shelf boundary Treaty of 9 July 1965, pending its final determination later through an agreement between the two Governments. Furthermore, in connection with these negotiations the Federal Republic expressly stated in an Aide-Mémoire of 16 March 1967:

> "Although the Convention is not, as yet, in force for the Federal Republic of Germany, it is expected that the Federal Republic's instrument of ratification will be deposited during this summer, possibly before 1 July 1967. The delay in the ratification procedure is due to purely technical reasons.
>
> Already today, the Federal Republic of Germany considers herself bound by the provisions of the European Fisheries Convention of 9 March 1964 [1]."

Accordingly, the two Governments cannot regard the comment of the Federal Republic in its Reply as in any way affecting the significance of the European Fisheries Convention as an example of the application of the equidistance principle in the delimitation of maritime boundaries. Indeed, it remains as yet another instance of the recognition of the equidistance principle by the Federal Republic in the North Sea.

2. State Practice in Regard to the Delimitation of the Continental Shelf

58. In Annexes to their Counter-Memorials the two Governments set out 12 precedents of delimitations of continental shelf boundaries all of which have occurred since the Geneva Conference of 1958 (Danish Counter-Memorial, Annex 13; Netherlands Counter-Memorial, Annex 15); and, analysing this practice in Chapter 3, Part II of the Counter-Memorials, they showed that in all the precedents, including three in which the Federal Republic was concerned, there was an application of the equidistance principle (Danish Counter-Memorial, paras. 100-110; Netherlands Counter-Memorial, paras. 94-104). The sole exception, they further pointed out, was the Federal Republic's claims in the present case.

The Federal Republic has made certain comments on this practice in paragraphs 37 and 47-55 of the Reply and in Section A of the Annex thereto; in addition, it has drawn attention to certain further precedents which it puts forward as incompatible with the recognition of the equidistance principle.

59. In regard to the North Sea, the Federal Republic questions the reference in the Counter-Memorials to the Denmark-Netherlands Treaty of 31 March 1966 on the ground that its validity will entirely depend on the ruling of the Court in the present case. But this Treaty is not cited as a precedent *binding as such upon the Federal Republic*. It is cited merely as part of the general evidence of the conviction of States that the applicable principles and rules of international law in force today for the delimitation of the continental shelf are those expressed in Article 6 of the Continental Shelf Convention; and it is similarly cited as part of the evidence that all the North Sea States, with the single exception of the Federal Republic, have sought to delimit their continental shelf boundaries in accordance with those principles and rules. In those contexts, the Treaty is fully relevant, even if it may do little more than confirm an *opinio juris* on the part of Denmark and the Netherlands *which was already implicit in their previous ratifications of the Continental Shelf Convention.*

[1] Annex 3 to this Rejoinder.

The Federal Republic also questions the reference to the "partial boundary" treaties of 1 December 1964 between the Federal Republic and the Netherlands and of 9 June 1965 between the Federal Republic and Denmark, because "the Federal Republic of Germany upon signing these treaties, made it clear that it did not recognize the equidistance method as determining the further seaward course of the boundary line [1]". Here again it is not a question of a precedent binding as such upon the Federal Republic but of evidence of recourse to the principles of delimitation which are found in Article 6 of the Continental Shelf Convention. This aspect of the Treaties was gone into by the two Governments with some thoroughness in the Counter-Memorials (Danish Counter-Memorial, paras. 105-109; Netherlands Counter-Memorial, paras. 99-103), and the Federal Republic does not really seem to make any new point in paragraphs 29 and 30 of the Reply. All it seems to do is to clarify a little in paragraph 30 its explanation of its acceptance of the "partial" equidistance boundaries. It there says that the treaties "prove nothing more than the fact that the equidistance line may be employed for the delimitation of the continental shelves between adjacent States in the vicinity of the coast where the direction of a boundary line based on the equidistance method is *not yet influenced by the special configuration of the coast so much as to cause an inequitable result*" (italics added). The interesting thing about this explanation is that it really seems to be *indistinguishable from an invocation—however unjustified—of the "special circumstances" clause which forms an integral part of the rule contained in Article 6 of the Convention.* That it is completely unjustified will be shown later in Chapter 3. In the present connection it suffices to point out that the Federal Republic is able to rationalize its acceptance of the "partial" boundaries only by recourse to a thinly disguised version of the equidistance-special circumstances rule.

60. On four other North Sea delimitations—the treaty between Denmark and Norway of 8 December 1965 and the treaties between the United Kingdom and respectively Denmark, the Netherlands and Norway—the Federal Republic makes the comment that they "contain one or several points of equidistance which are connected by straight lines [2]". This comment, if it is intended to suggest that the four treaties in question do not establish boundaries determined by application of the principle of equidistance, merely serves to underline the decidedly forced character of the Federal Republic's arguments on this aspect of the case. All four Treaties expressly proclaim themselves as based on the application of the equidistance principle; and all four go as close to establishing an actual equidistance line all along the boundary as is consistent with the practical requirements of a definition of the line by reference to geographical co-ordinates.

61. As to the last of the North Sea precedents, the Belgian Bill introduced into the House of Representatives on 23 October 1967, the Federal Republic observes in paragraph 37 of the Reply that "it is not a treaty at all". This is, of course, true. But laws, decrees, proclamations, etc., promulgated unilaterally are unquestionably relevant forms of State practice in determining what are the generally recognized principles and rules of international law. The Federal Republic clearly recognizes that this is so, because it reverts to the Belgian Bill in paragraph 55 of the Reply where it criticizes the Bill as "a very weak precedent". In support of this criticism it further observes:

[1] Reply, para. 29.

[2] Reply, para. 37 *(d)*.

"Apart from the fact that it is at present only a proposal without the force of law, it is certainly within the discretion of any State to adopt the principle of equidistance for the delimitation of its continental shelf vis-à-vis its neighbours if it considers such delimitation equitable. It does not follow from the Exposé des Motifs of the Belgian Government which accompanies the proposal, that the Belgian Government had chosen delimitation by the principle of equidistance because Belgium is obliged to accept this mode of delimitation."

The Belgian Bill is, in fact, far from being a "very weak precedent"; on the contrary, it is of particular interest, seeing that Belgium has not yet become a party to the Continental Shelf Convention.

In the first place, the Belgian Bill does not stand alone as a purely unilateral act. In Annex 13 A to the Netherlands Counter-Memorial there is printed the text of a Note from the Belgian Embassy at The Hague to the Netherlands Government dated 15 September 1965, i.e., some two years before the submission of the Bill to the Belgian Parliament. In this Note the Belgian Government referred to projected consultations between the two Governments concerning the delimitation of their continental shelf boundary and then replied to the request of the Netherlands Government for Belgium's agreement to the co-ordinates 51° 48′ 18″ North and 2° 28′ 54″ East as the common point of delimitation between Great Britain, Belgium and the Netherlands. In this regard the Belgian Government expressed itself as follows:

"The Ministry of Foreign Affairs will certainly be aware of the fact that there is as yet no Belgian Act of Parliament in respect of the Continental Shelf; the Belgian Government is therefore unable to see in what way it could officially express its approval of the said co-ordinates as long as the Bill that was elaborated under the former Government and was held up on account of the dissolution of Parliament has not passed into law; in the opinion of the Belgian Government, such approval would be without foundation in domestic legislation.

The Belgian Government does not believe, however, that this point is such that it could create any difficulties, *seeing that nothing more is involved here than a question of time.*

The Belgian Government has therefore instructed its Embassy in The Hague to state that the former will meanwhile raise no objection to the co-ordinates 51° 48′ 18″ N and 2° 28′ 54″ E which have been agreed upon by the Governments of the Netherlands and Great Britain as determining the common point of delimitation *and which have been deemed acceptable by the Belgian experts.*" (Italics added.)

The co-ordinates in question, it hardly needs to be said, are those which had been accepted by the Belgian experts as at once the southern terminal of the Netherlands-United Kingdom median line and the northern terminal of the Netherlands-Belgian lateral equidistance boundary.

62. It is hardly conceivable that, before the matter had even been submitted to the Belgian Parliament, the Belgian experts and the Belgian Government would have gone so far in expressing their acceptance of the trilateral Netherlands-Belgian-United Kingdom equidistance point, if they had not been under the firm conviction that this was the terminal point of the Belgian-Netherlands boundary indicated by the generally recognized rules of international law; or that the Belgian Government would have gone so far as to say that "nothing more is involved here than a question of time", if they had not been convinced

that the generally recognized rules of international law governing the matter would in any event require the Belgian Parliament to endorse the trilateral equidistance point as the terminal of the Belgian-Netherlands boundary. This is all the more inconceivable in that Belgium is not a party to the Continental Shelf Convention and the area of the continental shelf which accrues to Belgium under boundaries determined by application of the principle of equidistance, though reflecting what naturally appertains to her coast, is not considerable. Belgium, like the Federal Republic, finds that the proximity of coasts of other neighbouring States limits the area of continental shelf which appertains to her own coasts. Unlike the Federal Government, however, the Belgian Government did not believe this to be any reason for displacing the equidistance principle as the applicable criterion of delimitation.

Nor does the matter rest there. Owing to delays imposed by the course of politics in Belgium, the Bill has not yet been voted upon by the Belgian Parliament. However, the projected consultations between the two Governments and their experts duly took place and full agreement was reached between them regarding the course of the Netherlands-Belgium continental shelf boundary on the basis of the principle of equidistance. In response to a request from the Netherlands Government, the Belgian Government has stated in a Note of 8 December 1967 that it has no objection to this agreement's being brought to the attention of the Court, provided that it is mentioned that the position taken by the Belgian Government is subject to the approval of the Belgian Parliament. The text and translation of this Note are reproduced in Annexes 4 and 4 A to this Rejoinder, and it will be seen that the Belgian Government there describes the agreement as follows:

> "Cet accord, non encore signé, porte sur la délimitation concrète du plateau continental. Conformément aux dispositions contenues dans le projet de loi belge, il affirme le principe de la ligne médiane dont tous les points sont équidistants des points les plus proches des lignes de base à partir desquelles est mesurée la largeur de la mer territoriale des deux pays.
>
> Sur cette base, l'accord consacrera que la délimitation sera tracée par les arcs de grand cercle entre les points suivants:
>
> (1) 51° 48′ 18″ N; 2° 28′ 54″ O."

And there follow the co-ordinates of seven further equidistant points[1]. In other words, the course of the boundary is expressed in a manner very similar to that in which the five equidistance boundaries already agreed upon by other North Sea States are expressed.

As to the Exposé des Motifs of the Belgian Bill, this certainly seems to confirm that the Belgian Government considered the delimitation of its continental shelf boundaries to be governed by the principles set out in Article 6 of the Convention. Having explained that Belgium would abstain from ratifying the Convention because of her dissatisfaction with the definition of the continental shelf and with the omission of any provision for compulsory arbitration, the Exposé des Motifs proceeds:

> "Cette abstention ne signifie pas que le Gouvernement belge n'accepte pas le principe même des droits de l'Etat riverain. Comme la mer du Nord ne constitue en réalité qu'un seul plateau continental physique, *que les droits que nous pourrions y détenir se trouvent nécessairement limités d'une*

[1] Illustrated in Appendix 1 to Annex 4.

manière concrète par ceux des autres Etats riverains, les lacunes de la Convention de Genève ne sauraient y avoir effet.

Aussi, le Gouvernement belge, à l'instar de ce qu'a fait le Gouvernement norvégien par sa loi du 21 juin 1963, a-t-il pris la décision d'affirmer les droits de la Belgique sur la part qui lui revient dans le plateau continental de la mer du Nord par la voie d'une loi nationale, *reprenant les dispositions de la Convention de Genève du 29 avril 1958 qu'il considère comme les plus appropriées au plateau continental belge* [1]". (Italics added.)

63. If the precedent of the Belgian Bill has been discussed in these paragraphs at some length, it is not only because of its obvious relevance to the issues before the Court but also because of its evident incompatibility with the arguments advanced by the Federal Republic in the present cases. The significance of the precedent is increased by its complete consistency with the position adopted by Iraq, another State which finds the rights that it can have to the continental shelf "nécessairement limités d'une manière concrète par ceux des autres Etats riverains", as the Belgian Government put it in the passage cited above from its Exposé des Motifs.

64. In fact there is yet another precedent which relates to the North Sea region, even if not actually within the North Sea itself, namely an Agreement signed on 24 July 1968 between Norway and Sweden for the delimitation of their continental shelf boundary in the northern part of the Skagerrak. The two Governments concerned have consented that this Agreement, although not yet made public, should be brought to the attention of the Court in this Common Rejoinder. The Agreement, as appears from Annex 5, is on much the same general lines as the North Sea Agreements mentioned above. Article 1 expressly states that "The boundary line . . . shall in principle be a line which at every point is equidistant from the nearest points of the baselines from which the territorial sea of Sweden and Norway is measured". Article 2 states that "In conformity with the principle set forth in Article 1 the boundary line shall, with certain minor divergencies for practical purposes be a line drawn through the following five points" which are then defined. Points 1 and 2—nearer to the shore—are not points of equidistance but are fixed by reference to the so-called Grisbadarna line established under the Award of the Permanent Court of Arbitration in 1909; in other words, by reference to a historic "special circumstance" similar to that in the U.S.S.R.-Finland Treaty of 1965 delimiting their common territorial sea and continental shelf boundary. Between Points 3 and 5 the line is evidently based upon the equidistance principle but, for administrative convenience, the curved line has been simplified by straight lines connecting Points 3 and 4 and Points 4 and 5. Point 5, the final Point, is a so-called "tripoint" between Denmark, Norway and Sweden.

The Norwegian-Swedish Agreement, it hardly needs to be said, relates to a *lateral* boundary between *adjacent* States. It therefore constitutes a case in the North Sea region in which *adjacent* States have expressly based themselves upon the equidistance principle largely reproducing the actual phraseology of Article 6, paragraph 2, of the Convention. Furthermore, one of these States—Norway—is not a party to the Convention.

65. Regarding precedents outside the North Sea, the Federal Republic does not comment on the Agreement of 9 June 1965 establishing a median line boundary between the continental shelves of Denmark and the Federal Republic in the Baltic otherwise than to insist in the Annex to the Reply that this is a

[1] Counter-Memorials, Annexes 14 and 14 A.

"dividing line between opposite States". But, as is emphasized in paragraph 74 below, the fact that the precedent may in some degree be regarded as a case of "opposite" States in no way diminishes its value as evidence of the application of the equidistance principle in State practice.

Regarding the two U.S.S.R.-Finland boundaries in the Baltic (Danish Counter-Memorial, Annex 13, pp. 260-263, *supra*; Netherlands Counter-Memorial, Annex 15, p. 388, *supra*), the Federal Republic comments in paragraph 37 *(d)* of the Reply that these "provide for boundaries following more or less precisely a general middle line"; and that "thereby it might be suggested that equidistance and middle lines are identical which clearly they are not". The pertinence of this comment is not understood. Both the Agreements in question expressly refer in their preambles to the Geneva Convention on the Continental Shelf and expressly provide for a "median line" boundary. As to the comment in the Annex to the Reply (p. 439, *supra*) that "the lateral boundary in the Gulf of Finland does not follow the equidistance line", this feature of the Treaty of 20 May 1965 reflects a special circumstance arising from the Soviet-Finnish Peace Treaties of 1940 and 1947, as was fully explained in the Counter-Memorials (Danish Counter-Memorial, para. 102; Netherlands Counter-Memorial, para. 96).

66. In the present connection, and more generally in connection with the legal position taken by the U.S.S.R., the attention of the Court is drawn to a recent "Decree by the Presidium of the U.S.S.R. Highest Soviet on the Continental Shelf of the U.S.S.R." (Annex 6). Dated 6 February of the present year, this Decree incorporates into the law of the U.S.S.R. the principles of Article 6 of the Continental Shelf Convention. Thus, by paragraph 2 *(b)* of the Decree it is expressly laid down that in the absence of any agreement with the States concerned and unless special circumstances justify another boundary:

> "the boundary of the continental shelf of the U.S.S.R. with a State whose shelf is adjacent shall be determined by application of the principle of equidistance from the nearest points of those baselines from which the breadth of the territorial sea of the U.S.S.R. and the corresponding State is measured".

This is precisely the legal position of Denmark and the Netherlands in the present case.

67. As to the Mediterranean, mention is made by the Federal Republic in its Annex (p. 449, *supra*) of a report that agreement has been reached concerning the delimitation of the Italian-Yugoslav continental shelf in the Adriatic Sea. The Federal Republic then comments: "It seems that the boundary considerably deviates from the equidistance line." However, the two Governments' understanding of the report is that the contemplated boundary is a median equidistance line modified only in a few places on account of problems presented by certain small islands [1].

68. In regard to South America, the Federal Republic cites in its Annex (pp. 437-438, *supra*) decrees of Chile, Peru and Ecuador providing for 200-mile maritime zones bounded by lines drawn along the parallels of latitude of the points where the land frontiers meet the sea. It suffices in the present connection to observe that these decrees formed part of highly special understandings and agreements between the three States concerned; and that the situation in regard to them bears no relation to the issue before the Court.

[1] A translation of the Agreement, published in *International Legal Materials*, Vol. VII, No. 3, May 1968, pp. 547-553, is reproduced as Annex 7.

The Federal Republic also refers in the Annex to the United Kingdom-Venezuela Treaty of 1942 (Gulf of Paria) as providing for boundary lines which are not equidistant. This treaty, which divides the waters of a gulf almost wholly enclosed between the island of Trinidad and the mainland of Venezuela, was concluded before the modern doctrine of the continental shelf had been set in motion by the Truman Proclamation of September 1945. Moreover, although it is true that the boundary does not follow the equidistance line, a comparison of the equidistance line and the treaty boundary as shown on figure B (see p. 498, *infra*) suggests that the departures from the equidistance line more or less balance each other and that the agreement reflects a compromise, the general basis of which was a division of expediency derived from the application of the equidistance principle. The actual course of the boundary was, it seems, dictated by particular local considerations.

69. In the Western Pacific the Federal Republic cites in its Annex the Commonwealth of Australia's Petroleum (Submerged Lands) Act 1967, the Second Schedule of which sets out the continental shelf boundaries of Australia's individual states and territories, as mutually agreed between them and the Federal Government. On this Act the Federal Republic comments that it is "an example of international law as applied between the individual states of a federation"; and it further comments that the boundary lines agreed between the states concerned "differ largely from equidistance, particularly as the frontier between Victoria and South Australia is concerned".

This Act, although clearly of interest from the point of view of international law, is an internal law of the Commonwealth and it is obvious that constitutional, fiscal and historical considerations have affected the agreements in regard to the inter-state boundaries. Even so, as figure C (see p. 499, *infra*) shows, the boundaries fixed in the Second Schedule would appear to indicate a large reliance on the principle of equidistance in their delimitation. In this connection, the Federal Republic's observation regarding "the frontier between Victoria and South Australia" is not understood, since the continental shelf boundary for these states, as defined in the Second Schedule and illustrated in the map produced in the Australian Parliament, appears to be a case of a boundary largely determined by reference to the equidistance principle.

In any event, the Act also provides for certain international boundaries and with regard to these boundaries, as appears from the Notes of the External Affairs Department of 19 June 1967 and 18 March 1968 [1] has considered the equidistance principle to be the applicable principle. Indeed, in the latter Note the Department expressly observes in regard to the boundaries between West Irian and the Territories of Papua and New Guinea that the principle of equidistance *mentioned in Article 6, paragraph 2*, i.e., the *adjacent* States provision, has been applied for the purpose of defining the boundaries.

In the case of Papua, a minor modification of the equidistance principle was in fact made in favour of the Territory for a special reason explained by the Minister of National Development when moving the second reading of the Bill in the Australian Parliament on 18 October 1967 [2]. Recalling that in the past certain exploration permits had been issued by the Territory of Papua on the basis of a boundary somewhat more favourable to Papua than the median line, he pointed out that to apply the median line would therefore result in a reduction of the area of continental shelf under the authority of the Territory. He then said:

[1] Annex 8, B.

[2] Annex 8, C.

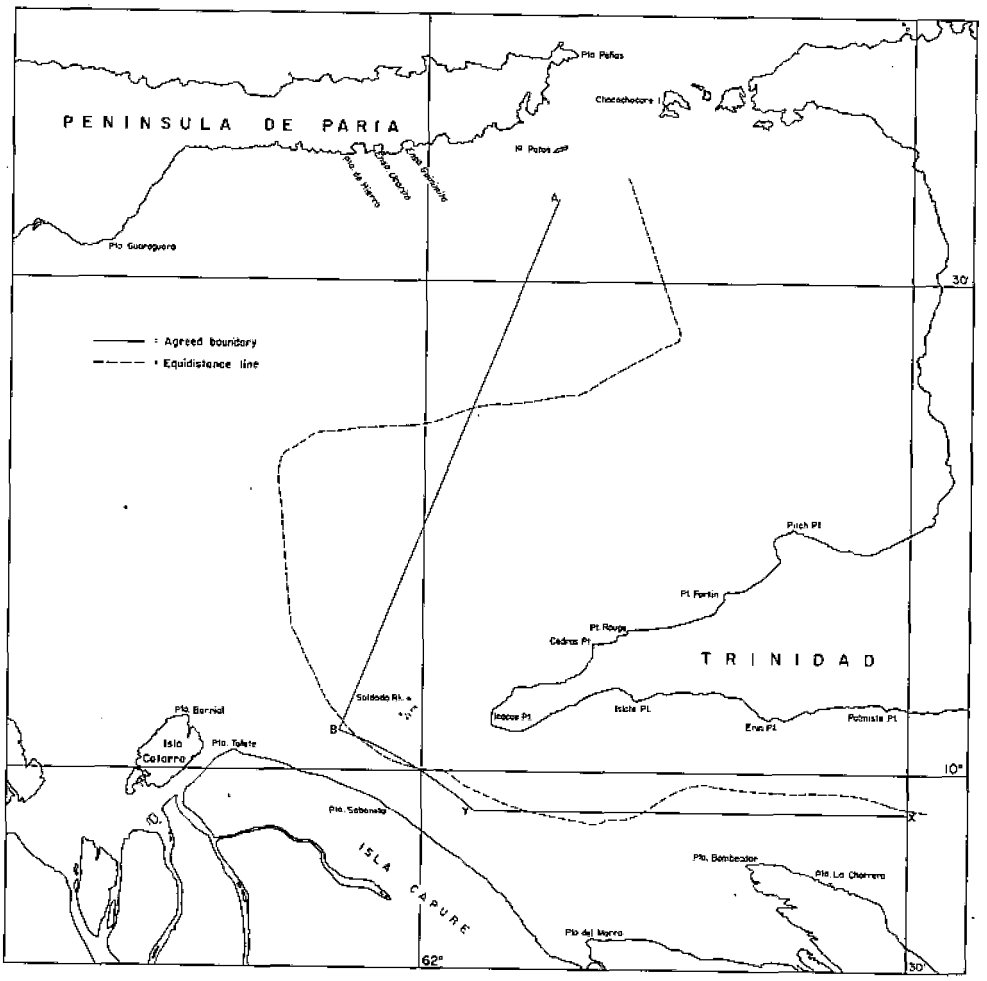
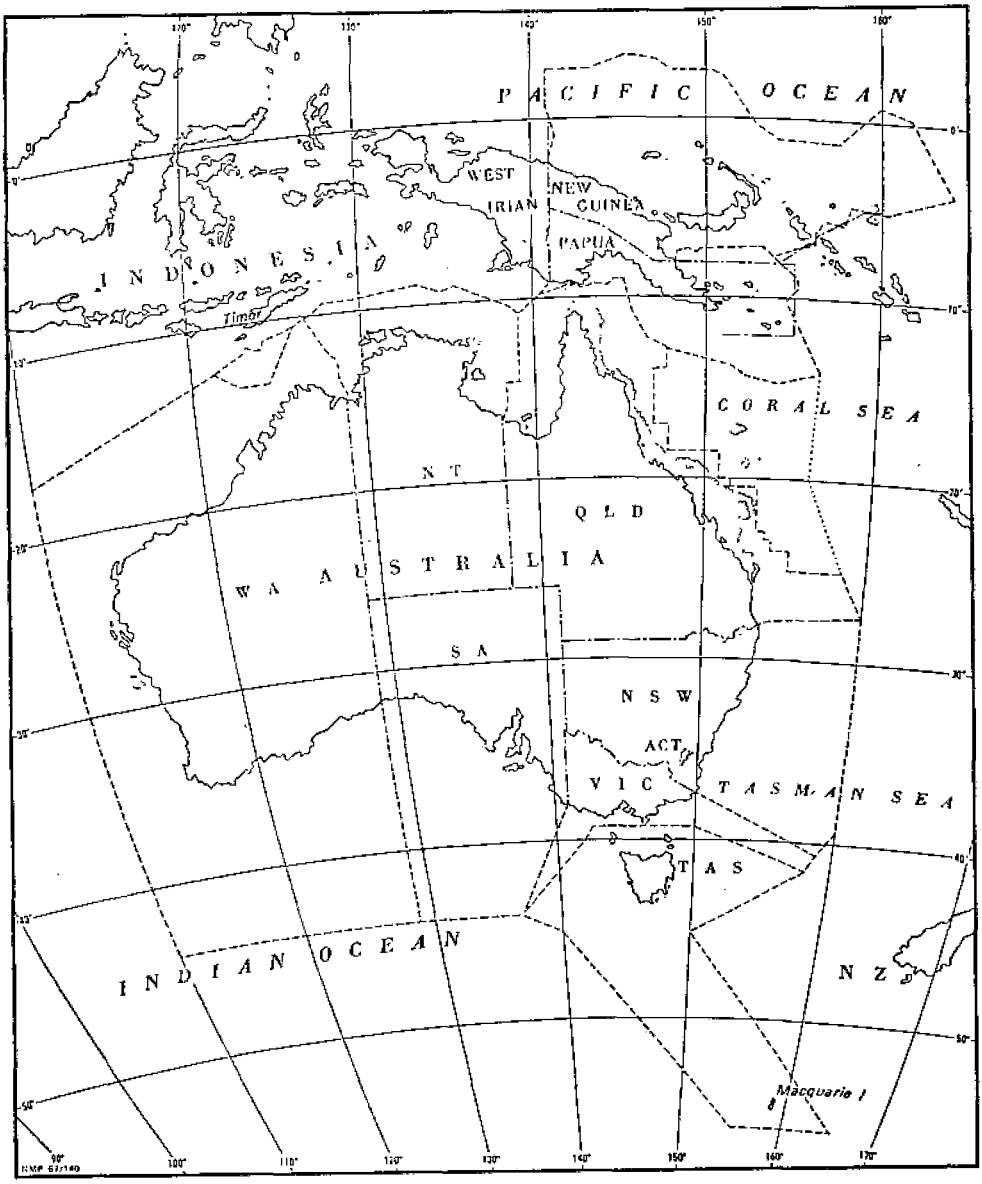


Figure B. Gulf of Paria — Treaty Boundary and Equidistance Line



PETROLEUM (SUBMERGED LANDS) BILL 1967
ADJACENT AREAS

NOTE:

The Bill applies only in relation to exploration for, and exploitation of, the petroleum resources of such submerged lands included in the adjacent area as have the character either-

(a) of seabed and subsoil beneath territorial waters, or

(b) of continental shelf within the meaning of the Convention on the Continental Shelf signed at Geneva on 29 April 1958.

Figure C

> "The Government considered that any transfer of part of these titles back to Australia—no matter how justifiable in terms of logic—might be misunderstood in Papua and New Guinea, and in any case that such action would be inconsistent with the high sense of responsibility which Australia displays in working to bring this Territory towards self-government."

In other words, the Minister explained that for those very special political reasons Australia would concede to the Territory a small part of continental shelf to which she would have been entitled under a normal application of the relevant principle—the median line.

70. Turning to the Persian Gulf, the Federal Republic queries the title of the Bahrain-Saudi Arabia Agreement to be considered an application of the equidistance principle. In the Annex to the Reply it comments: "although 'middle lines' and 'mid points' are mentioned in this treaty the boundary does not follow a line of equidistance"; and its cites *Padwa* as stating that the treaty does not "utilise the principle of equidistance" (*International and Comparative Law Quarterly*, Vol. 9, 1960, p. 630). The view of Mr. E. Lauterpacht, however, that "the wording of the First Clause (of the Treaty) suggests that an effort was made to establish a boundary line which approximates to a median line drawn in accordance with the principle of equidistance" is more correct (*ibid.*, Vol. 7, 1958, p. 518 ff.). The delimitation of this boundary involved consideration of disputed islets, coral shoals and pearling beds; and it reflects some of these factors. But, as the language of the Treaty shows, the delimitation was based upon the application of the equidistance principle in its median line form.

71. The Federal Republic, however, has adduced as a further precedent from the Persian Gulf the Kuwait-Kuwait Shell Concession Agreement of 1961 which it interprets as an example of a "dividing line" which "follows the general direction of the land frontier and does not reflect the principle of equidistance" (Reply, Annex, pp. 438-439, *supra*). This interpretation is not justified. Indeed, the very fact that the concession agreement speaks of the "*approximate* boundaries of the seabed to which Kuwait is entitled" and makes no reference to the geographical position of her land frontier is a strong warning against such an interpretation. If Kuwait had conceived her continental shelf boundary to be a line following the general direction of her land frontier, it would have been natural to say so in defining the boundary and to formulate the definition by reference to the position of the land frontier. In fact, as will be shown, there can be no doubt that the boundary in the concession is inspired by the concept of a delimitation based upon an application of the equidistance principle. Having regard to the complexity of the geographical factors at the northern end of the Persian Gulf and to the absence of specific agreements between Kuwait and her neighbours, it was also natural for the concession to speak only of "approximate boundaries".

The "dividing line" in question, as shown in Annex 9 B, is a delimitation which concerns not only the adjacent State Iraq, but also the opposite State Iran, and the adjacent territory of the Neutral Zone. The Federal Republic's "Note" in its Annex mentions only the general direction of *the* land frontier without specifying which. But the Danish and Netherlands Governments assume that the Federal Republic means to refer to a continuation of the general direction of the land frontier between Kuwait and Iraq.

One thing is very clear: Iraq, Kuwait's adjacent neighbour, does not consider their continental shelf boundary to be a continuation of the general direction of their land frontier. It appears from Annex 9 A that in 1958, in

connection with the extension of Iraq's territorial sea to 12 miles, the Iraqi Government asked a Norwegian expert, Commander Coucheron-Aamot, to measure on a chart the territorial sea and continental shelf areas which it considered to appertain to Iraq. At any rate, by a Note of 22 August 1960 the Iraqi Foreign Ministry transmitted to the Danish Embassy in Baghdad a copy of an official chart showing the areas of territorial sea and continental shelf of Iraq as delimited in accordance with the measurements of the Norwegian expert. This chart, on which the northern boundary of the Kuwait-Kuwait Shell concession has also been added for ease of comparison, is reproduced in figure D (see p. 502, *infra*). This chart demonstrates:

(1) Iraq has based the delimitation of her territorial sea and continental shelf in the Persian Gulf, *vis-à-vis both States adjacent to her*, on the strict application of the equidistance principle.

(2) The northern boundary of the Kuwait-Kuwait Shell concession does not follow the general direction of the land frontier but is practically identical with the equidistance line claimed by Iraq as her territorial sea and continental shelf boundaries.

It is equally clear that the other boundaries of the Kuwait-Kuwait Shell concession are not continuations of the general direction of the land frontier. Study of detailed charts of this part of the Persian Gulf shows that the delimitation of the actual international boundaries between Kuwait and respectively Iran and the Neutral Zone involves consideration of the use of various islands and low-tide elevations as base-points for the application of the equidistance principle; and it may be surmised that the other concession lines are "working" boundaries pending the completion of negotiations between the States concerned.

72. The Iraqi precedent, as already indicated in paragraph 63 above, is of particular interest. Iraq, like Belgium and the Federal Republic, is not a party to the Continental Shelf Convention; indeed, like Belgium, she is not even a signatory to either the Territorial Sea or Continental Shelf Conventions. Like Belgium and the Federal Republic, Iraq is a country whose coast abuts upon a "single natural continental shelf" and whose rights thereover, in the words of the Belgian Exposé des Motifs, "are necessarily limited in a concrete manner by the rights of other coastal States". Again, like Belgium and the Federal Republic, Iraq finds that the area of continental shelf appertaining to her under the equidistance principle is not considerable. In other words, Iraq's situation has obvious parallels with that of Belgium and the Federal Republic, and more especially that of the Federal Republic. *Like Belgium, but unlike the Federal Republic*, Iraq has automatically considered that the equidistance principle expressed in Article 6 of the Continental Shelf Convention would govern the delimitation of her continental shelf in the absence of an agreement or of special circumstances justifying another boundary line.

73. The Danish and Netherlands Governments accordingly persist in thinking that the State practice since the Geneva Conference of 1958 points in the strongest and most unequivocal manner to the acceptance by States of the principles and rules expressed in Article 6 of the Convention as the generally recognized rules of international law applicable to the delimitation of continental shelf boundaries today.

74. The two Governments further consider that there is no substance whatever in the argument, often repeated and invoked again in regard to this State practice in paragraphs 49, 51 and 53 of the Reply, that for the most part it relates to boundaries between "opposite" States. They have already underlined

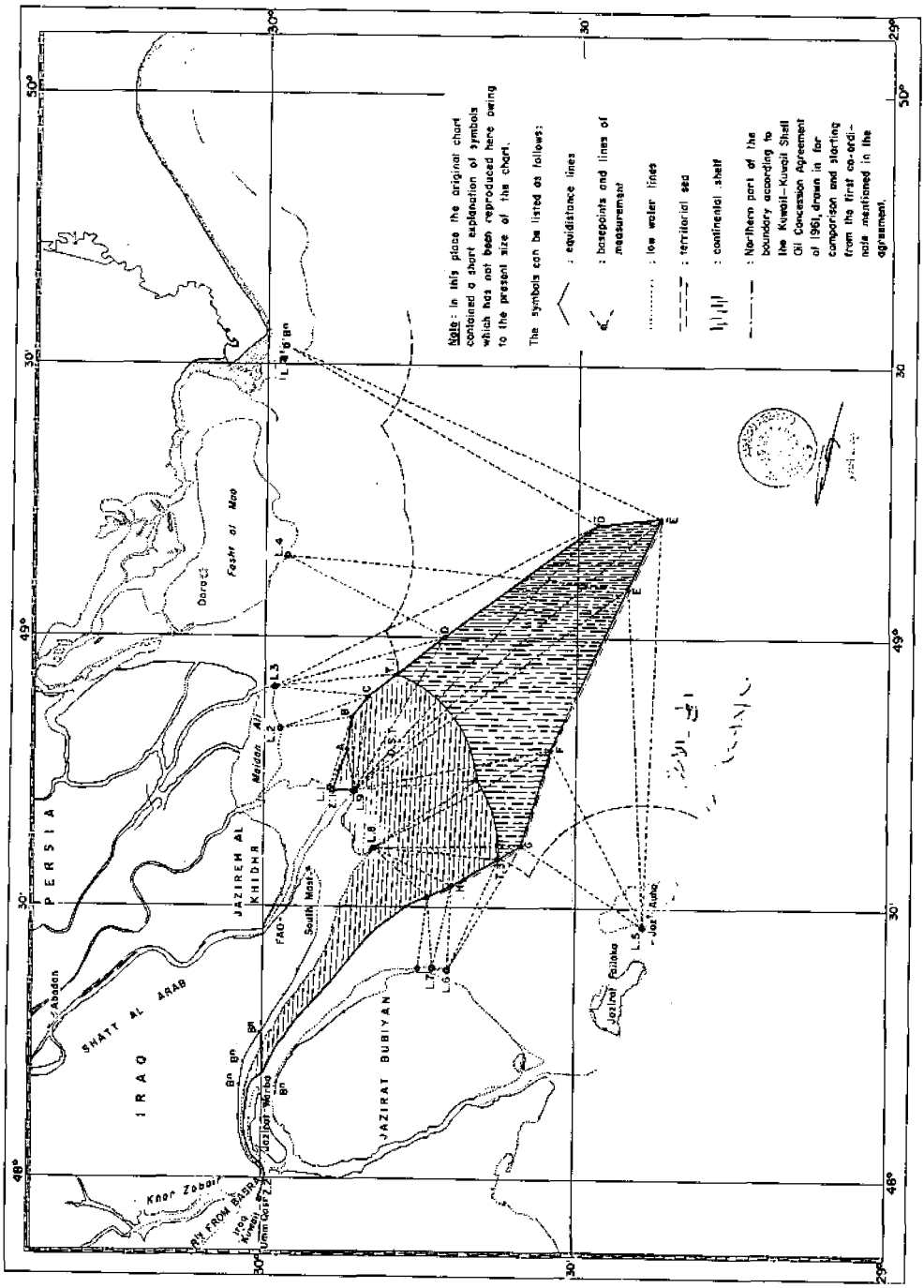


Figure D: Iraqi territorial sea and continental shelf

that the International Law Commission and the Geneva Conference made not the slightest difference between the cases of "opposite" and adjacent States either in regard to the territorial sea or the continental shelf (see paras. 45-47 above). As to the State practice itself, Belgium, Iraq and the U.S.S.R. provide clear cases of the recognition of the equidistance principle as the general rule applicable between "adjacent" States, quite apart from the position taken, from the first and independently, by both Denmark and the Netherlands in regard to the boundaries now before the Court and the position taken by the Netherlands in regard to the Netherlands-Belgium boundary. The Federal Republic, in fact, stands alone in the sharp distinction which it seeks to make between "opposite" and "adjacent" States. Furthermore, the reasons for not making any such distinction are compelling. In both cases the equidistance principle establishes an objective criterion for determining what in the generality of cases is to be considered an equitable delimitation. In both cases also, notwithstanding the apparent opinion of the Federal Republic to the contrary, certain types of geographical factors may amount to "special circumstances justifying another boundary line". An insignificant offshore island, for example, may affect a delimitation between "opposite" States just as much as one between "adjacent" States. There is, in short, not a shred of justification either in law or in fact for the distinction on which the Federal Republic so heavily relies in trying to undermine the significance of the State practice.

75. In concluding their examination of the State practice, therefore, the two Governments reaffirm their contentions that the principles and rules of international law expressed in Article 6, paragraph 2, of the Continental Shelf Convention are *the generally recognized principles and rules of international law applicable to the delimitation of the continental shelf between "adjacent" States.*

Section III. The Position of the Federal Republic in Relation to the Equidistance-Special Circumstances Rule

76. In Chapter II of the Reply (para. 19) the Federal Republic complains that the Counter-Memorials "do not distinguish clearly enough between the *intrinsic merits* of the equidistance method on the one hand and the *source of obligation* for a State to settle its boundary vis-à-vis its neighbour States by application of this method". Then, while conceding that in many cases the equidistance line may be regarded as the most equitable boundary line, the Federal Republic asserts:

> "But there remains the question *under what legal title the equidistance line can be imposed on the Federal Republic of Germany*; here the Counter-Memorial fails to prove its case." (Italics added.)

It goes on to recall the observations of the two Governments in the Counter-Memorials that:

> "Denmark and the Netherlands having delimited their continental shelf boundaries specifically on the basis of generally recognized principles and rules of law, these delimitations are *prima facie* not contrary to international law and are valid with regard to other States . . . In the present case it is not a question of Denmark and the Netherlands seeking to impose a principle or rule upon the Federal Republic; it is rather a question of the Federal Republic's seeking to prevent Denmark and the Netherlands from applying in the delimitation of their continental shelf boundaries the principles and rules of international law generally recognized by States."

And again asserts:

> "But all these contentions beg the question, because they start from the unproved assumption that Germany is bound to regard the equidistance line as an obligatory rule of international law. *The legal source of that obligation, however, remains an open question*". (Italics added.)

77. Continuing on the same line of argument later in the Chapter (para. 62) the Federal Republic further complains that the Counter-Memorials try to shift the onus of proof with regard to the existence of customary law. Challenging contentions in the Counter-Memorials that the onus is on the Federal Republic "to show why Denmark or the Netherlands should not be entitled to apply the generally recognized principles and rules of delimitation in delimiting their respective continental shelf boundaries", it argues that the onus of proof of the existence of any customary rule obliging the Federal Republic to accept delimitations in accordance with those principles and rules is, on the contrary, upon Denmark and the Netherlands. In this connection, it invokes a well-known dictum in the *Asylum* case relating to a regional custom:

> "The Party which relies on a custom of this kind must prove that this custom is established in such a manner that it has become binding on the other Party . . ."

This dictum, it says, "is in harmony with the general principle of law recognized in all law systems that *the Party relying on a right has to prove its existence*" (italics added). On this basis it asks the Court to conclude:

> "If, therefore, the customary law character of the rules contained in Article 6 of the Continental Shelf Convention *cannot be established beyond doubt, the Kingdom of Denmark and the Kingdom of the Netherlands cannot rely on those rules against the Federal Republic of Germany* [1]." (Italics added.)

78. The two Governments consider that this manner of presenting the matter to the Court misstates fundamentally the position of the Parties in relation to the applicable principles and rules of law.

79. As to the question of proof of customary law, the dictum in the *Asylum* case, like the similar dictum in the *Rights of Nationals of the United States in Morocco* case (*I.C.J. Reports 1952*, p. 200), relates to a *regional*, not general, custom. When a party relies on a regional custom, it is invoking a special right which is either a derogation from or an addition to the general law; and in consequence it is absolutely logical and inevitable that the onus of proof of the custom rests upon the party invoking it. But it is not a regional custom which is in question in the present case; it is the general principles and rules of international law applicable today to the delimitation of continental shelf boundaries.

There is not, and cannot be, any burden of proof in regard to a general principle or rule of international law. *Jura novit Curia:* it is solely for the Court to appreciate the relevant indications of a general custom and to determine whether or not they show the hallmarks of general acceptance as law.

80. But the Federal Republic misstates the legal position even more fundamentally when it contends that Denmark and the Netherlands cannot establish their title to the delimitation of their continental shelf boundaries on the basis of the equidistance principle without first establishing a specific

[1] Reply, para. 62.

obligation resting upon the Federal Republic to respect those equidistance boundaries. This contention seems to be inspired by the notion that, State sovereignty being the basis of international law, no obligation can be considered to rest on the Federal Republic unless it is proved that it has accepted that obligation either specifically in a treaty to which it is a party or through a custom which is specifically binding on the Federal Republic. But the Federal Republic overlooks the fact that the sovereignty of Denmark and the Netherlands are also to be reckoned with. These States, as the Federal Republic itself acknowledges, *ipso jure* possess rights over the areas of the continental shelf adjacent to their coasts. It therefore seems somewhat bold for the Federal Republic to maintain that the two States may exercise and enjoy these rights to the extent admitted under the generally accepted principles and rules only if they can establish a specific obligation resting upon the Federal Republic *to allow them to do so.*

81. In the *Fisheries* case (*I.C.J. Reports 1951*, p. 132), as the two Governments recalled in their Counter-Memorials (Part II, Chapter 2), the Court has stated authoritatively the position of a coastal State with regard to the delimitation of sea areas. It did not say that the validity of a delimitation by a coastal State vis-à-vis another State depends upon the will of that other State *or upon the latter's subjective concept of the sea areas which it would consider a just and equitable allocation to itself.* The Court said that the validity of the delimitation with regard to other States depends upon *international law.* Accordingly, it would seem very necessary to examine the rights, and the source of the rights, of the coastal State in the sea areas concerned before beginning to talk of the invalidity of its delimitation owing to any lack of proof of a specific obligation on the part of a neighbouring State to respect that delimitation.

82. The Federal Republic, it may be, does not accept that part of the definition of the continental shelf in Article 1 of the Convention which refers to exploitable areas beyond a depth of 200 metres. Subject to this, the Federal Republic considers that "it is generally recognized today that the coastal State, by virtue of its geographic position . . . is vested with exclusive sovereign rights over the continental shelf adjacent to its coast for the purpose of exploiting its natural resources" (Memorial, para. 29). It also seems to accept that the general recognition of these rights of the coastal State today is substantially in the terms in which they are expressed in Articles 1 to 3 of the Continental Shelf Convention; for it later speaks of the general recognition of the exclusive rights of the coastal State over the continental shelf lying adjacent to its coasts *specified in Articles 1 to 3 of the Convention.* In short, there is no material divergence between the view of the Federal Republic and the views of the two Governments as to the nature and scope of the rights of a coastal State over the continental shelf adjacent to its coast which are generally recognized in international law today.

It follows that the Federal Republic is in agreement with the two Governments that these exclusive rights of the coastal State attach to it *automatically* "*by virtue of its geographic position*". Indeed, in the Memorial the Federal Republic was at pains to remove any doubt as to its views on this point (para. 29):

> "It is immaterial whether these exclusive sovereign rights over the continental shelf adjacent to its coast are vested in the coastal State *ipso jure*, as assumed in Article 2 paragraph (3) of the Convention on the Continental Shelf—
>
> 'the rights of the coastal State over the continental shelf do not depend upon occupation, effective or notional, or on any express proclamation,'

or whether the coastal State must assert such rights by some formal and unequivocal action. *In any case, it is generally recognized* that the rights of the coastal State over the continental shelf adjacent to its coast are exclusive *in the sense that other States are excluded a limine from claiming or acquiring rights over that part of the continental shelf which 'appertains' to the coastal State.*" (Italics added.)

From this undoubtedly correct statement of the law as it exists today the Federal Republic jumped to a discussion of "distributive justice" and the alleged principle of the "just and equitable share" of the continental shelf of the North Sea as a whole *without considering either the legal implications of the exclusive rights of the coastal State as generally recognized or the compatibility of its own alleged principle with the exclusive rights so recognized.* But when these two matters are examined, it becomes obvious that the Federal Republic's insistence on the need for Denmark and the Netherlands to prove a customary rule conferring upon them a specific "legal title" under which the equidistance line can be *imposed* on the Federal Republic of Germany lacks any real basis.

83. Since the applicable law accepted by the Federal Republic recognizes the *automatic* extension of the exclusive sovereign rights of a coastal State over the area of the continental shelf which is *adjacent* to the coast of its territory, the existence of these rights necessarily entails a corresponding obligation on the part of *all* other States to respect those *exclusive* rights. But logically the rights precede the obligation and determine its nature and scope. In consequence, the question is not whether the Federal Republic has undertaken, by treaty or by custom, an obligation towards Denmark and the Netherlands to respect the exclusive rights of these States, but whether the exclusive rights in fact claimed and exercised by them are indeed recognized by the principles and rules of international law.

Inherent in the recognition of the coastal State's *exclusive* rights over the continental shelf *adjacent* to its coast is the concept that the continental shelf adjacent to the coast of a State is, in principle, to be considered as appertaining to that State. Inherent in this concept is then the further concept that continental shelf which is nearer to one coast than to another is, in principle, to be considered as adjacent to the nearer coast. Otherwise, not only the term "adjacent" but also the very principle of recognizing the automatic extension of the "exclusive" rights of the coastal State over the adjacent continental shelf would begin to lose their meaning.

This view of the matter is reinforced by the specific provision in Article 6 of the Convention that, in the absence of agreement or of special circumstances justifying another boundary line, the boundary is to be determined by reference to the principle of equidistance both as between "opposite" and as between "adjacent" States. Whether or not this provision is regarded as the expression of a distinct customary rule binding as such upon the Federal Republic, it is certainly a reflection of what the States at the Geneva Conference—including it would seem the Federal Republic—conceived to be an expression of what should be considered the area of continental shelf "adjacent" to a coast and as *prima facie* appertaining to the coastal State. The principle of equidistance, it hardly needs to be said, comprises within itself the most obvious and the most objective criterion of "adjacency".

When Denmark and the Netherlands delimited their respective continental shelves by application of the principle of equidistance, each State included within the "adjacent" areas over which it has exclusive rights only those points

of the continental shelf nearer to its coasts than to the coast of any other State. In doing so, each State has respected the principle of "adjacency", applied an internationally accepted method of delimitation and acted in accordance with principles generally recognized by States as applicable in the delimitation of continental shelf boundaries. It necessarily follows, in the view of the two Governments, that these delimitations are *prima facie* valid on the international plane.

84. It further follows, in the view of the two Governments, that the Federal Republic is *prima facie* under an obligation under international law to respect those delimitations. Accordingly, it is for the Federal Republic to show a better title, recognized by the applicable principles and rules of international law, to specific areas of those parts of the continental shelves claimed respectively by Denmark and the Netherlands as adjacent to their coasts. The remarkable feature of the present case is that although the generally recognized principles and rules of international law admit, in the "special circumstances" clause, a specific ground on the basis of which, under certain conditions, a better title may be made out to areas *prima facie* adjacent to another State, the Federal Republic has shown a decided reluctance to try and establish a better title on that ground.

85. The Federal Republic does not advance at all its own claim to a better title by insisting that it has not ratified the Continental Shelf Convention or by seeking, as it does in paragraphs 43 and 44 of the Reply, to minimize the significance of the Convention and in particular of Article 6. In paragraph 43 its argument reads as follows:

> "If States conclude a law-making convention, they create, by ratifying it, a contractual obligation among themselves to the effect that each of them has to apply the rules contained in the convention. They are, however not exercising a mandate to 'legislate' for the whole international community, for which they would require express authority. If an obligation to apply the substantive rules of the convention is also to be incumbent on States that have not yet ratified the convention or did not even attend the conference, it would need some legal basis other than the convention. Such a basis could be found only in the long accepted conditions for the formation of customary international law: practice coupled with the recognition that such practice should be the law. Therefore, if it is contended that rules adopted by a law-making convention are generally binding on all States, it must be shown either that these rules were already customary law at the time the convention was concluded, or that also the States not bound by the convention consistently apply these rules in practice."

Leaving aside for the moment the question whether the provisions of Article 6 express what today are existing rules of customary law, the two Governments feel bound to stress the deficiency and inappositeness of the reasoning in that paragraph *in relation to the issue which concerns the Court in the present case.*

86. When a "law-making convention" recognizes to *all States generally* exclusive sovereign rights over certain areas as inhering in them *ipso jure* in virtue of their sovereignty over their territory, it is obvious that it is not a matter of contractual obligations among particular States which is involved. Those exclusive sovereign rights over the areas in question either exist *erga omnes*, or they do not exist at all as exclusive sovereign rights. No doubt, it is theoretically possible to argue that a State which has not ratified or otherwise

become a party to such a convention is free to ignore the convention despite its adoption by more than two-thirds of the international community. But when the convention itself is a vital link in the international recognition of exclusive sovereign rights, because it is the determining factor in their establishment as rights and in the definition of their nature and scope, then it would seem logically and legally impossible for any State which asserts pretensions to enjoy those rights to ignore the legal basis of their recognition in the convention.

87. *A fortiori*, is it impossible for the Federal Republic in the circumstances in which the coastal State's rights in the continental shelf have received general recognition, to ignore the legal basis of that recognition in the Geneva Convention while asserting pretensions to those rights? As pointed out in the Counter-Memorials and as recalled in paragraph 39 of the present Chapter, throughout the period during which the codification and progressive development of the law of the sea was under consideration the whole doctrine of the continental shelf was still in course of formation. The unilateral claims which had been made by some States varied largely in their nature and extent and many States, including all the Parties to the present case, had not promulgated any claim. The work of the International Law Commission helped to consolidate and clarify the doctrine of the continental shelf in all its aspects and to develop a consensus as to its acceptability; and even in its final report on the eve of the Geneva Conference the Commission preferred to rest the doctrine on general considerations rather than to speak of an already established customary right. As to the Federal Republic, even at the opening of the Conference its delegation was one of the few opposing its recognition of the exclusive sovereign rights of the coastal State. Only when the intention of the Conference became clear to *recognize the exclusive rights of the coastal State on the basis of the Commission's proposals* did the Federal Republic decide to join in the general recognition of those rights and subsequently to claim them for itself. The Federal Republic is, therefore, of all States the one least entitled to ignore the function of the Continental Shelf Convention in establishing the recognition of the exclusive sovereign rights of the coastal State over the continental shelf adjacent to its coast or the legal basis on which those rights were recognized by the international community.

88. In fact, the Federal Republic is here seeking to distinguish between the contractual obligations of a ratified "law-making" convention and customary law for the purpose of taking the benefit of the recognition in the Geneva Convention of the coastal State's exclusive rights while at the same time repudiating the limitation, inherent in the legal basis of that recognition, of those exclusive rights to a specific area through the principle of adjacency. Such an attempt to split up the component elements of the recognition given at a world-wide international conference to an extension of exclusive sovereign rights and to separate the rights from the conditions of their recognition is wholly incompatible with modern concepts of the formation, codification and progressive development of general international law by custom and treaty. Under these concepts it is, in the view of the two Governments, inadmissible for a State to claim exclusive sovereign rights and at the same time to ignore the limitations in space attached to the recognition of those rights by invoking the fact that the world-wide Convention recognizing and defining them has not been ratified by that State.

89. Accordingly, the two Governments regard the explanations and arguments of the Federal Republic in Section 2 of Chapter II of the Reply con-

cerning its "attitude towards the equidistance line" as without pertinence. They do not touch the central point that in the present dispute the Federal Republic invokes the general recognition of the exclusive rights of the coastal State in the Continental Shelf Convention and at the same time, discarding the conditions of its recognition, asserts a claim in its own case *to define the scope of its own rights in its own manner and not in that envisaged in the form in which general recognition was given to those rights.*

90. The reference in that section (para. 25) to the dictum of the International Court of Justice in the *Norwegian Fisheries* case concerning the ten-mile rule for bays is similarly without pertinence, because the situation in regard to the ten-mile limit for bays was entirely different from that in regard to the equidistance principle for the delimitation of the continental shelf. Before any question of a ten-mile limit arose the exclusive rights of the coastal State over enclosed bays had already been recognized for a very long time: the recognition goes back to Grotius and beyond. The question in the *Norwegian Fisheries* case (*I.C.J. Reports 1951*, p. 131) was whether in the course of the nineteenth and the early part of the present century a customary rule had grown up introducing a ten-mile limit as a restriction upon the size of the bays which could be treated by coastal States as enclosed. It was in that very different context that the Court said: "In any event the ten-mile rule would appear to be inapplicable as against Norway inasmuch as she has always opposed any attempt to apply it to the Norwegian coast." The recognition of the exclusive rights of the coastal State in that case had, in short, been quite independent of the particular limitation which was said by the United Kingdom to have afterwards become attached to them under customary law.

91. In addition, the conduct of Norway in relation to the ten-mile limit differed considerably from that of the Federal Republic in relation to the equidistance-special circumstances rule. Norway had from the first persistently opposed the application of the rule to the Norwegian coast and had refused to participate in the drawing up and adoption of the North Sea Fisheries Convention of 1882 on that very ground. In the present instance, on the other hand, the Federal Republic while objecting to some elements in the text of the Continental Shelf Convention in 1958 voted in favour of Article 6. Afterwards, as recalled in the Counter-Memorials, on the penultimate day before the Convention ceased to be open for signature the Federal Republic deliberately associated itself with the Convention by signing the text (Danish Counter-Memorial, para. 99; Netherlands Counter-Memorial, para. 93). Furthermore, although making a special declaration with reference to Article 5, it made no comment of any kind in regard to Article 6. Nor did it voice any objection or misgivings in regard to Article 6 either in its Continental Shelf Proclamation of 20 January 1964 or in the Exposé des Motifs accompanying the Bill to give effect to the Proclamation (Annexes 10 and 11 to both Danish and Netherlands Counter-Memorials). Indeed, in a Note of 26 August 1963 questioning the view of the Netherlands Government that the eastern boundary of the Netherlands continental shelf would be delimited by the equidistance line beginning at a named point, the Federal Republic stated that "*there are historical reasons and other special circumstances that justify* adoption in the area of the continental shelf under the North Sea of a delimitation line, the position of which differs in more than one respect from that claimed by the Royal Netherlands Government [1]" (italics added). This statement could not fail to give the impression

[1] Netherlands Counter-Memorial, Annex 9 A.

that the Federal Republic was taking a position under the provisions of Article 6, the application of which to itself, it now disavows. Subsequently, in the Joint Minutes of 4 August 1964 drawn up in connection with the negotiations for the conclusion of the "partial boundary near the shore", the Federal Republic's delegation used language which could not fail to give the impression that the Federal Republic regarded the delimitation of its continental shelf boundary as a matter falling under Article 6 of the Convention (Memorial, Annex 4 A). It is true that in these Joint Minutes and in the similar Joint Press Communiqué and Protocol with Denmark regarding the Danish-German partial boundary the Federal Republic reserved its position as to the further course of the boundary and the principles to be applied in its delimitation (Memorial, Annexes 7 A and 8 A). It is true that in connection also with the conclusion of other North Sea delimitation treaties the Federal Republic reserved its position in regard to the application of the equidistance principle. But it equally accepted the application of the equidistance principle for its boundary with Denmark in the Baltic.

92. Admittedly, the Federal Republic seeks in paragraph 28 of the Reply to give a different aspect to its Continental Shelf Proclamation and to the Exposé des Motifs of the Statute giving effect to it. It there states:

> "A careful reading of those instruments (reproduced as Annexes 10 and 11 of the Danish Counter-Memorial) would have shown that recognition of the customary law character of the provisions of the Continental Shelf Convention was limited to the rules contained in *Articles 1 and 2 of the Convention*, according to which every State has *ipso jure* an exclusive right to exploit the natural resources of the continental shelf adjacent to its coast. Not a single word, however, appeared in these instruments on the delimitation of the continental shelf which could be interpreted as a recognition of Article 6, paragraph 2, of the Convention or of the rules contained therein as customary international law; on the contrary, the Proclamation expressly declared that the delimitation of the German continental shelf vis-à-vis the continental shelves of other States would remain the subject of agreements with those States." (Italics added.)

This statement cannot be accepted for one moment. Indeed, if it were correct the Court might wonder why those obviously pertinent documents of the Federal Republic were omitted from the Federal Republic's own Memorial and had to be brought to light by the Danish and Netherlands Governments.

Neither the Proclamation nor the Exposé des Motifs makes the slightest difference between the different parts of the Geneva Convention. Indeed, the Exposé des Motifs speaks expressly in its third paragraph of the Federal Republic's *assumption* that "the contents of its rights" over the continental shelf "*conform to those established for coastal States by the Geneva Convention*" (italics added). And the paragraph which follows refers not only to the statement of the rights in Article 2 but also to the restrictions attaching to them *under Articles 3 and 5* of the Convention. Even more pertinent, the Proclamation itself not only speaks "of the development of *general international law as expressed . . . in particular in the Convention*" (italics added) but also refers specifically to the delimitation of the German continental shelf in language which is highly significant. It does not say, as the Reply states, that the *delimitation* of the German continental shelf vis-à-vis the continental shelves of other States will remain the subject of international agreement. What it says is that the "*detailed* delimitation" of the German continental shelf is to be subject to such agreement; and in this form the statement is strongly suggestive of the detailed

determination of a boundary already indicated in the provisions of the Convention.

93. Accordingly, the position of the Federal Republic in the present case is fundamentally different from that of Norway in regard to the ten-mile rule for bays. Until the opening of the present proceedings the Federal Republic conducted itself as if it regarded the principles and rules of international law set out in Article 6 as the generally recognized rules applicable in the matter. It declared its views concerning the inapplicability of the equidistance principle to its own North Sea boundaries beyond the "partial boundaries near the shore". But that is all.

94. Moreover, the Danish and Netherlands Governments see no reason whatever to modify the conclusion reached by them in the Counter-Memorials that the provisions of Article 6 express what today are the generally recognized rules of international law governing the delimitation of continental shelf boundaries. This conclusion, if correct, is by itself enough in their view, to establish the validity of the delimitations made respectively by Denmark and the Netherlands on the basis of the equidistance principle unless the Federal Republic can satisfy the Court that in the present case there exists a "special circumstance justifying another boundary" within the meaning of the rule expressed in Article 6. If no such special circumstances exist, the Federal Republic is, in their view, completely incompetent in law, by its mere *ipse dixit*, to deny either to Denmark or to the Netherlands the exclusive sovereign rights over their adjacent continental shelves which appertain to them under and in virtue of the generally recognized principles and rules of law governing the continental shelf.

95. That conclusion of the two Governments is based on the work of the International Law Commission promoting a general consensus in regard to the law of the continental shelf, the comments of Governments during the Commission's work, the proceedings of the Geneva Conference, the virtual unanimity of the vote adopting the text of Article 6, the ratification of the Convention by no less than 37 States, and the subsequent recourse to the equidistance-special circumstances rule for the delimitation of the continental shelf both by States which have already ratified the Convention and by States which are not yet parties to it. The State practice since the adoption of the Continental Shelf Convention has been re-examined in paragraphs 58-75 above and it points in the clearest manner to the general recognition of the principles and rules expressed in Article 6.

96. In the Reply the Federal Republic in effect challenges the two Governments to specify whether they consider the principles and rules of international law expressed in Article 6 not merely to be generally recognized but to constitute general rules of customary law binding upon the Federal Republic. As previously indicated, having regard to the nature of the exclusive rights of the coastal State over the continental shelf and the circumstances in which they have been recognized to attach *ipso jure* to every coastal State, the two Governments consider it sufficient for the purposes of the present case that the principles and rules expressed in Article 6 are generally accepted as those applicable to the delimitation of the continental shelf. Whether these principles and rules are at the same time to be considered as customary rules of international law binding as such upon the Federal Republic is a matter for the appreciation of the Court. But, if the two Governments do not think that they are called upon to establish this point, it is certainly their view that the principles and rules expressed in Article 6 today have the character of general customary law.

97. Apart from arbitrarily and inadmissibly asking the Court to shut out of its consideration all the State practice relating to median lines—a point already dealt with above—the Federal Republic advances three general objections to the thesis that Article 6 expresses what is now customary law.

In paragraph 35 of the Reply, while conceding that the equidistance "method" was incorporated in the Convention in the light of the experience made with methods of delimitation in State practice and because it was considered to be the most suitable for its purpose, the Federal Republic argues:

> "A law-creating effect in customary law, however, could be attributed to the incorporation of the equidistance method into the Convention only if that method was chosen and sanctioned by the Convention on the ground that it was the only one uniformly and consistently applied in the past."

On reading this statement, the Court may feel inclined to ask itself how then the Federal Republic can reconcile its claim in the Memorial that the exclusive rights of the coastal State recognized in Articles 1 to 3 of the Convention are today generally recognized as customary law (Memorial, para. 61) with its concept of the conditions required for the formation of customary law, as set out in the Reply. If anything is certain, it is that the unilateral claims made by States prior to the Geneva Conference exhibited more numerous and more fundamental variations with regard to the nature and scope of the rights of the coastal State than did the practice of States in the delimitation of maritime boundaries.

The process of the creation of customary law is one of the mysteries of the law, whether in international law or in national legal systems, and the conditions for its operation cannot be reduced to the kind of simple formula propounded by the Federal Republic in the above statement. Most authorities today, for example, accept that the duration of the State practice needed for the creation of a customary rule may be fundamentally affected in some spheres by the existence of world-wide international organizations like the United Nations and the Specialized Agencies. The concentrated multilateral negotiations and taking of legal positions in such organizations may, it is recognized, greatly accelerate the process of the formation of international customary law. The rapid development of the law of outer space is a clear example of this phenomenon. In much the same way the United Nations processes of codification and progressive development of international law, involving as they do discussion in the International Law Commission, observations of Governments communicated to the Commission, debates in the Sixth Committee and finally full-scale consideration by States at a world-wide multilateral conference convened by the General Assembly may bring about a rapid recognition of a customary rule. Otherwise, the Federal Republic may not find it easy to sustain its statement in the Memorial about the provisions of Articles 1 to 3 of the Convention.

Especially may these United Nations processes accelerate the recognition of a customary rule when the rule is implicitly discernible in the State practice, is suggested alike by the precedents and the nature of the matter in question and is the one "most suitable for its purpose".

The Federal Republic, it may be added, distorts the focus of the problem by apparently trying to isolate the question of the recognition of the rule by the adoption of the Convention from the work of the Commission and the State practice which followed the Geneva Conference. The formation of customary law is a composite process.

98. Secondly, in regard to the State practice since the Geneva Conference, the Federal Republic contends in paragraph 49 of its Reply:

"To sustain the argument that the rules contained in Article 6 had become customary international law, the Counter-Memorial should have shown that the equidistance method was *applied in recognition of an obligation to apply that method as the 'general rule'*. There is, however, no evidence of such a practice." (Italics in the original.)

The *opinio juris* of States evidencing a customary *rule* is more often manifested tacitly through conduct than by express words and is primarily a matter of the appreciation of their acts. Accordingly, it seems a somewhat extravagant assertion to say that there is no evidence of a practice evidencing *opinio juris*, when States not parties to the Convention, like Norway, Belgium and Iraq have automatically considered the principles in Article 6 to be applicable to their coast. Nor is express evidence lacking when Norway, a non-party, reproduces in her delimitation treaties the *ipsissima verba* of the Convention; and when the Belgian Government does likewise in a Bill proposed to the Belgian Parliament at the same time explaining that it has decided to assert the rights of Belgium *over its due share of the continental shelf of the North Sea* by means of that Act of Parliament. Indeed, as shown in paragraphs 91-92 above, there is more than a little trace of *opinio juris* even in the documents of the Federal Republic itself. It may be added that here again the Federal Republic seems to distort the focus of the problem before the Court since the question at issue is rather the exclusive rights of the coastal State over its adjacent continental shelf than any matter of obligation.

99. Thirdly, the Federal Republic returns in paragraphs 45 and 50 of the Reply to an argument already advanced in the Memorial concerning reservations to Article 6 of the Convention (Memorial, paras. 52 and 55). This argument is that, since the Convention permits reservations at the time of signature, ratification or accession to articles other than to Articles 1 to 3, it must be assumed that the Geneva Conference recognized that the other articles and, in particular Article 6, did not constitute customary law. In the Counter-Memorials, however, the two Governments pointed out that a wide freedom to formulate reservations is quite normal in general multilateral treaties, including codification conventions, and that this is only for the purpose of facilitating the maximum number of acceptances by allowing States having special difficulties to make reservations. They further pointed out that the freedom to make reservations is, in any event, subject to the over-riding condition that the reservations are compatible with the object and purpose of the Convention; and that, in consequence, freedom to make reservations is by no means inconsistent with the recognition of the main principles of the provisions in question as customary law. In this connection they noted that such major codifying conventions as those on the Territorial Sea and Contiguous Zone, the High Seas and Diplomatic Relations contain no clause restricting the making of reservations. They added that in the present instance the reservations clause had been introduced in Article 12 of the Continental Shelf Convention for the purpose more of prohibiting reservations to Articles 1 to 3 than of legalizing reservations to the remaining articles; and that the fact that reservations to Articles 4 to 7 are not excluded in no way implies that those articles were not considered to be an integral and important part of the Convention.

The Federal Republic, while not contesting the general truth of those observations, says that they do not touch the crucial point and that it cannot be contended that express permission to formulate reservations is irrelevant. Stating that the crucial issue in the present dispute is the question whether

Article 6 creates generally binding law by the mere fact that the Convention has been accepted by a sufficient number of States, the Federal Republic argues:

> "This cannot be the case for the simple reason that a rule contained in an Article of the Convention to which reservations are permitted and reservations have already been made by States parties to the Convention, could not at the same time become binding on other States not parties to the Convention which had not been in a position to contract out of such a rule [1]."

From this it further argues that a non-party could only become bound by the principles expressed in Article 6 if it has accepted them by customary application.

This argument greatly oversimplifies the question. In the first place, it again isolates the recognition of the equidistance-special circumstances rule in the Convention from its context—the prior practice in maritime delimitations, the prior work of the Commission, the attitude of Governments to the Commission's proposals and the subsequent practice of States consonant with the principles expressed in Article 6. Again, as already stated, a faculty to make reservations does not include a faculty to make reservations incompatible with the object and purpose of the treaty. In the present instance this would obviously mean that any reservation in regard to Article 6 which is incompatible with the recognition of the *exclusive* sovereign rights of the coastal State over the continental shelf *adjacent* to its coast would not be consistent with the faculty to make reservations provided for in Article 12. Since the equidistance principle is by its very nature linked to the concept of adjacency to the coast, it by no means follows that, by admitting a faculty to make reservations to Article 6 amongst other articles, the Geneva Conference intended to recognize an absolute freedom for parties to the Convention to "contract out" of the equidistance-special circumstances rule. Furthermore, the distinction, which the Federal Republic apparently seeks to draw between an express and an implied power to make reservations—no doubt in order to escape the fact that reservations are impliedly admitted to such great codifying conventions as the Territorial Sea, High Seas and Diplomatic Relations Conventions—does not really affect the substance of the question. The provisions of these conventions are today regarded as expressive of general rules of customary law despite the fact that, in principle, the faculty exists to make reservations which are not incompatible with the object and purpose of the treaties and that reservations have been made by some States to particular articles.

100. As to the reservations which have actually been made to the Continental Shelf Convention—by France, Venezuela, Iran and Yugoslavia, those were analysed in the Counter-Memorials (Danish Counter-Memorial, paras. 93-98; Netherlands Counter-Memorial, paras. 87-92).

The two Governments there showed that in none of those cases did the State concerned seek to reject the equidistance principle as the general rule; that Yugoslavia merely stated that she recognized no "special circumstances" which could affect her own delimitation; that Iran merely stated her understanding of the "special circumstances" clause with reference to possible delimitations of the boundary from the high-water mark; and that the other two cases France and Venezuela by the terms of their reservations assumed

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[1] Reply, para. 46.

the general applicability of the provisions of Article 6, while declaring their position as to the existence of special circumstances in particular areas off their coasts. Accordingly, they felt justified in concluding that these reservations, so far from weakening the character of the equidistance principle as a general rule, merely served to confirm it.

In paragraph 50 of the Reply the Federal Republic claims that this is "a clear misinterpretation" of the reservations of France, Iran and Venezuela "and of the purpose they should serve". It asserts:

> "The very purpose of these reservations was to preclude other States from invoking Article 6 and claiming the equidistance line if "special circumstances" were not recognized. The three States wanted to exclude any claim to an equidistance boundary within the defined areas in reliance on Article 6. Therefore, these reservations are certainly not a recognition of the primary role of the equidistance principle; on the contrary, they go to show that the rules contained in Article 6 were not thought acceptable within the areas defined because Article 6 might be interpreted as it is in fact done by the Counter-Memorial, in a way which establishes the principle of equidistance as the 'general rule'."

This assertion bears no discernible relation to the content of Iran's reservation of which the Federal Republic itself said in paragraph 55 of the Memorial that it "is not of interest here".

As to France and Venezuela the Federal Republic itself recognizes that it is only with respect to certain "defined areas" of their coasts that those States have made any reservation at all to Article 6. In regard to the "defined areas" both States make express reference to "special circumstances" as being the basis of their reservations. No doubt by invoking "special circumstances" in the form of a "reservation", they intended to exclude any obligation for themselves to have Article 6 applied to them except on the basis of the recognition of the existence of "special circumstances" in the "defined areas". But that does not alter the fact—which rather it emphasizes—of their recognition of the provisions of Article 6 as the generally applicable law. The Federal Republic says that these two States made their reservations with respect to the "defined areas" because they thought that "Article 6 might be interpreted, as it is in fact done by the Counter-Memorials, in a way which establishes the principle of equidistance as the 'general rule'". A more natural and more objective explanation of the action of these States in including their reservations would be that *they themselves interpreted Article 6 in a way which establishes the principle of equidistance as the "general rule"*.

101. In paragraph 54 of the Reply the Federal Republic has given a new twist to its argument regarding the faculty to make reservations. It says that in consequence of its repeated protests and reservations all the North Sea States knew that it does not recognize the principle of equidistance as applicable for the delimitation of its continental shelf. Then it argues as follows:

> "If it was permissible for the parties to the Continental Shelf Convention, to exclude, by way of a reservation under Article 12, the application of the principle of equidistance to certain areas before its coast, as did France in its reservations with respect to certain parts of its Atlantic and North Sea coasts, why should Germany be forbidden to make a similar declaration with respect to the continental shelf before its North Sea coast? If Germany were obliged, as the Counter-Memorial contends, to accept the rules contained in Article 6 of the Convention as customary interna-

tional law, this obligation could evidently not be more stringent than for States which have ratified or accepted the Convention, but may attach reservations to Article 6 excluding the applicability of the equidistance principle for certain maritime areas before their coasts."

This argument is another example of the Federal Republic's ambivalent attitude towards the Continental Shelf Convention. While always keeping the argument on the plane of *customary* law, it rejects the relevance of those articles it does not like but asserts the relevance of those it does like—even essentially *contractual* articles like Article 12.

102. The law of reservations forms part of the general law of treaties and is governed by the principles of mutual consent and of good faith. A reservation to a multilateral treaty requires the express or implied consent of another party to the treaty if it is to be considered as established with respect to that party. When the other party has objected to the reservation, the treaty itself does not come into force between the two States concerned unless the objecting State has indicated a different intention; and in the latter event the provisions to which the reservation relates do not apply as between the two States (see Articles 17 and 19 of the Vienna Draft Convention on the Law of Treaties).

Accordingly, if the Federal Republic is to indulge in the make-believe that it has made a reservation to a Convention which it has not ratified, it must at the same time make-believe that its reservation has been objected to by both Denmark and the Netherlands; for each of these States has unequivocally rejected any claim by the Federal Republic that there is a "special circumstance" in the present case and any claim by the Federal Republic to exclude the application of the equidistance principle as between itself and the Federal Republic. And what then? The Federal Republic would have done nothing towards establishing that there is "a special circumstance justifying another boundary" in the present case and nothing towards establishing that it has a better claim than Denmark or than the Netherlands to points on the continental shelf which lie nearer to the coast of the one or the other country than to the Federal Republic. At best, under this game of make-believe the Federal Republic might be considered as having negatived the application of the equidistance-special circumstances clause *as such* in respect of the defined area off the German North Sea coast. But in that event, on what basis is the Federal Republic to invoke the legal concept of "special circumstances" at all?

The Federal Republic's game of make-believe is, of course, in itself inadmissible; for there is a world of difference between the faculty to make a formal reservation to a multilateral treaty and the faculty which the Federal Republic seems to claim for itself to interpret, *as and when it wills*, the scope of its own rights under customary law without regard to the exclusive rights vested by that same customary law in other States. A reservation is a formal act which, subject to the consents of the other States concerned, establishes *definitively* the legal position of the State concerned on a *contractual* plane, at the moment when it becomes a party to the treaty and *thereby* entitled to the rights provided for by the treaty. But the faculty claimed by the Federal Republic seems to be of a quite different kind and to invoke a power, outside the treaty, to adjust and modify the formulation of its legal position at any chosen moment according as the situation demands.

103. The Federal Republic, as pointed out in the Counter-Memorials (Danish, para. 77; Netherlands, para. 71) voted in favour of the text of what is now Article 6. Moreover, in an "explanation of vote", the delegation of the Federal Republic stated that, when a certain Venezuelan amendment had been

rejected, it had accepted the views of the majority of the Committee, subject to an interpretation of the words "special circumstances" as meaning that "any exceptional delimitation of territorial waters would affect the delimitation of the continental shelf [1]". On the plane of customary law, that would seem to have been an indication of an acceptance of the principles in Article 6 subject only to an interpretative declaration regarding special circumstances on a point quite unrelated to anything that arises in the present case. Again, on signing the Convention on 30 October 1958, the Federal Republic made a declaration regarding Article 5 but said nothing whatever regarding Article 6; on the plane of customary law, this also would seem to have been an indication—even more developed—of an acceptance of the principles of Article 6, and by now all trace of any reservation by the Federal Republic in regard to "special circumstances" had disappeared from the acceptance. Then as explained in paragraph 91 above, in a diplomatic Note of 26 August 1963, it gave the Netherlands Government every impression of *expressly invoking the provisions of Article 6* when it claimed that "there are historical reasons and other *special circumstances* that justify adoption in the area of the continental shelf under the North Sea of a delimitation line, the position of which differs in more than one respect from that claimed by the Royal Netherlands Government [2]" (italics added). If words mean anything, this was not a reservation to *Article 6*; it was a claim of right *under the article*. Shortly afterwards, in January 1964, the Federal Republic issued its Continental Shelf Proclamation [3] which expressed no reservation, objection or misgivings with reference either to the content of the provisions of Article 6 or to the application to any "defined area", of the German continental shelf. Thus, on the plane of customary law the whole of the Federal Republic's conduct up to this point is consistent only with its acceptance of the principles and rules expressed in Article 6 and this without the formulation of any reservation whatever.

As to the subsequent statements of the Federal Republic in the Joint Minutes, the Joint Press Communiqué and certain Aide-Mémoires (Memorial, Annexes 4, 8, 10, 13 and 15), their entirely general terms do not admit of their interpretation as a "reservation" to the provisions of Article 6 even if, on the plane of customary law, it were to be considered open to the Federal Republic to change its position in that way. The natural interpretation of those statements is simply that the Federal Republic was taking the position that areas of continental shelf which the other States concerned were claiming as within their boundaries do not, under the applicable principles and rules of international law, appertain to those States but to the Federal Republic.

It was not until the present proceedings that the Federal Republic took the position that it is entitled to have its continental shelf delimited *wholly independently of the principles in Article 6*. It was not until the Reply itself that the Federal Republic began, as an alternative method of argument to speak of a "reservation in regard to special circumstances" analogous to the Venezuelan and French reservations to Article 6.

104. The Federal Republic seems to have been so far conscious of the evident inconsistency of its earlier attitude with the positions which it has taken in the pleadings as to think it necessary in paragraph 26 of the Reply to find plausible explanations for that inconsistency. In that paragraph it insists

[1] *Official Records of the Geneva Conference*, 1958, Vol. VI, p. 98, para. 38.
[2] Netherlands Counter-Memorial, Annex 9 A.
[3] Counter-Memorials, Annex 10 A.

that "the German attitude at the Geneva Conference cannot be properly appreciated in retrospect from the present dispute". Continuing, it says that the Federal Republic could not possibly know that Denmark and the Netherlands "would go so far as to maintain that the acts of unilateral delimitation of their continental shelf areas by the equidistance line 'are *prima facie* not contrary to international law and are valid with regard to other States' (Danish Counter-Memorial, para. 59, p. 177, *supra*; Netherlands Counter-Memorial, para. 53, 331, *supra*) and to interpret Article 6 of the Convention in such a way (see Danish Counter-Memorial, paras. 126 *et seq.*, pp. 203 *et seq.*, *supra*; Netherlands Counter-Memorial, paras. 120 *et seq*, pp. 356, *et seq.*, *supra*) as to reduce the importance of the reservation of 'special circumstances' practically to nothing". The Federal Republic's delegation, it adds, voted with the majority who were in favour of Article 6 because it "regarded the rule contained therein also as a workable solution, provided that its interpretation would pay due regard to its purpose, namely to reach an equitable solution of the boundary problem". Finally, it points out that "in 1958, the delimitation problem had not been the main German concern", but rather the possible prejudice to freedom of the high seas and fisheries; and that this is why its signature was accompanied by a reservation to Article 5 but not to Article 6.

105. These statements are quite unconvincing as explanations of its change of front with respect to the principles in Article 6. In the first place, as indicated in the Danish Counter-Memorial (paras. 73-74) the Federal Republic had every reason to know how the Government of Denmark would be likely to interpret the principles expressed in Article 6. In a Note Verbale of 13 May 1952 to the Secretary-General commenting upon the Commission's proposals, the Danish Government expressed its support for the median line principle of delimitation, then specified only for opposite States (Danish Counter-Memorial, para. 63; Netherlands Counter-Memorial, para. 57). It attached to its Note Verbale a sketch map illustrating its interpretation of the Commission's proposals *when applied to the Danish coasts*. The Note Verbale, *inter alia*, stated expressly:

> "This sketch is primarily based on the boundaries fixed on 3 September 1921 *between Danish and German territorial waters east and west of Jutland*, and the boundary fixed by agreement of 30 January 1932 between Danish and Swedish waters in the Sound and the prolongation of these lines *combined with the median line, where the latter is applicable, and otherwise based on planes forming the locus of points closer to Denmark than to any other country involved*[1]." (Italics added.)

The Note Verbale thus made it very clear that the sketch concerned the Danish-German boundary, applied the "median line" where relevant and otherwise applied the principle of distance from the respective coasts—of adjacency to one coast rather than to the other. The Note added that "the sketch might serve as an illustration of a division under concrete conditions" and that the "principles outlined" might also be applicable to analogous cases in other geographical areas.

The Note Verbale was printed both in the report and the Yearbook of the International Law Commission and the map, although not reproduced in those publications, was obtainable from the Secretariat of the United Nations. In addition, publicity was given to the sketch map in the Danish press. The sketch map, which was itself a mere concretisation of the principles stated in the

[1] Danish Counter-Memorial, Annex 8.

Note Verbale, depicted Denmark's continental shelf boundary vis-à-vis the Federal Republic almost precisely in the form in which it is depicted in the maps before the Court as representing the equidistance boundary between Denmark and the Federal Republic. In the Reply the Federal Republic has not made any suggestion that it was unaware of the existence either of the Note Verbale or of the map.

Accordingly, the claim in paragraph 26 of the Reply that in 1958 the Federal Republic "could not possibly know" how Denmark would interpret the equidistance-special circumstances rule in practice simply cannot be accepted for one moment.

Nor, in any event, could it be accepted that the Federal Republic "could not possibly know" in 1958 that the equidistance-special circumstances rule would be interpreted by Denmark and the Netherlands in the way which they have done, *when that is precisely the way in which all the other North Sea States, other than the Federal Republic, have automatically proceeded to interpret it.*

The same applies to the complaint that the Federal Republic could not possibly know that Denmark and the Netherlands would go so far as to maintain that the unilateral delimitation of their continental shelves by the equidistance line are *prima facie* not contrary to international law and are valid with regard to other States. Why should this be so far outside the perspective of the Federal Republic in 1958 when it is the natural consequence of the provisions of Article 6 in the absence of special circumstances or of an agreement to the contrary? Why, again, should the Federal Republic be so little in a position to foresee an interpretation of Article 6 which is the very one that has been adopted by other States—by Belgium and Iraq for example? Why, furthermore, should the Federal Republic be so surprised that a State might think that a conscientious attempt to delimit its continental shelf in accordance with the generally recognized principles governing the matter would be *prima facie* not contrary to law and valid in regard to other States?

106. Consequently, the observations of the Federal Republic in paragraph 26 of the Reply do nothing to explain away the inconsistencies in the Federal Republic's attitude towards the principles expressed in Article 6 of the Convention. Equally, they do nothing to diminish the significance of the recognition at first given by the Federal Republic to the provisions of Article 6 as the embodiment of the generally accepted principles and rules of international law applicable to the delimitation of continental shelf boundaries. Since the Federal Republic now places its case on the basis of customary law supplemented by an alleged "general principle of law", its recognition prior to the present proceedings of the principles of Article 6, which are incompatible with that alleged "general principle", is doubly significant. It is significant, first, in regard to the determination of the question whether the principles in Article 6 are to be regarded as forming part of the customary law of the continental shelf on which the Federal Republic relies. Secondly, it is significant in regard to the determination of the question of the applicability of the alleged "general principle of law" calling for the division of the continental shelf on the basis of "just and equitable shares" *independently of the principles in Article 6.* The attitude adopted by the Federal Republic at the Geneva Conference and in its practice after the Conference is compatible, it is clear, only *with the first question being answered in the affirmative, and the second in the negative.*

107. The attitude adopted by the Federal Republic towards the principles in Article 6 at and after the Geneva Conference is significant also from another point of view. The remarkable feature of the Federal Republic's action in the present disputes, as previously observed in paragraph 103 above, is that although

it began by recognizing the applicability of the principles in Article 6 and although these principles contain a specific ground on which, under certain conditions, a right to derogate from the equidistance principle may be established, *in the present proceedings it has shown a decided reluctance to ask for a decision upon that ground.* Under the pressure of the arguments in the Counter-Memorials a tentative—purely subsidiary—invocation of the "special circumstances" clause, has crept into the Federal Republic's Submission 2 *(c)*, after finding no place in its submissions in the Memorial. When the Court recalls the earlier attitude of the Federal Republic and its earlier invocation of the clause in its practice, it may feel that the only rational explanation is that the Federal Republic itself has come to think that its own case—the "defined area" off its own coast—cannot possibly be brought within the meaning of the "special circumstances" exception recognized in Article 6 of the Convention.

Section IV. The Alleged General Principle of Just and Equitable Shares

108. The Federal Republic's submission, that the delimitation of the continental shelf in the North Sea is governed by the principle of "just and equitable share" was strongly criticized by the two Governments in their respective Counter-Memorials on two main grounds. First they objected that it lacks any framework of legal criteria by which to determine what is just and equitable and that the submission is, in consequence, tantamount to asking for a delimitation *ex aequo et bono.* Secondly, they pointed out that the concept of the sharing out of the continental shelf as if it were a *common* space to be distributed among the coastal States is in complete conflict with the whole legal approach to the determination of boundaries in international law which is that of the *delimitation* of space on the basis of which State has established the "better claim" to the areas in question.

109. This alleged "general principle", of which there is no mention in the Continental Shelf Convention, was explained by the Federal Republic in the Memorial as falling under the head of "distributive justice" (para. 30):

> "If goods or resources which are held in common by several parties by virtue of the same right have to be divided up between these parties, it is a recognized principle in law that each of these parties is entitled to a just and equitable share which is to be meted out in accordance with an appropriate standard equally applicable to all of them. This principle, hereafter called *the principle of the just and equitable share,* is a basic legal principle emanating from the concept of distributive justice and a generally recognized principle inherent in all legal systems, including the legal system of the international community. Nobody would probably deny the convincing force of that principle; therefore, it is not surprising that it has been applied in international situations of the same kind as a matter of course." (Italics in the original.)

The Federal Republic then went on to claim that this principle had been applied in the State practice regarding the continental shelf in the period between 1945 and the Geneva Conference (para. 31).

A little later in the Memorial (para. 37) the Federal Republic insisted that the alleged principle is one of "*law* and not merely one of *equity*", because "its substance derives its binding force from the legal conviction of the international community". Then it added:

> "It could be regarded as an emanation of the principle of equality of States: the just and equitable share to which each State is entitled must be measured by a standard equally applicable to all of them."

110. One of the three pillars on which the Federal Republic sought to rest its "general principle" in the Memorial—the "equality of States"—seems to have disappeared from the Reply. The two Governments pointed out in their respective Counter-Memorials that the alleged "general principle", so far from being an "emanation of the principle of the equality of States", violates this principle (Danish Counter-Memorial, para. 159; Netherlands Counter-Memorial, para. 154). In the present context the equality of States means their equality before the law—their right to the even-handed application to them of the relevant rules of international law on the same basis as other States. The Federal Republic, however, invokes its so-called "*general* principle" for the very purpose of withholding from Denmark and the Netherlands the delimitation of their continental shelves on the basis of the *generally applied* principles and rules; and of requiring them to have those delimitations made *under a system of legal rules different from that under which other North Sea States have had the delimitations of their continental shelf boundaries determined.* At any rate, in the Reply the principle of the equality of States no longer figures as part of the parentage of the alleged general principle of "just and equitable share".

111. As to the practice of States, the two Governments showed in their respective Counter-Memorials that in fact the State practice, both before and after the Geneva Conference, consistently reflects the concept of *the delimitation of the boundaries of coastal States in their adjacent areas of continental shelf, not that of dividing up a common area of continental shelf like a cake.* This is so plain from the terms of the various proclamations and treaties that the Federal Republic seems to have thought it wiser in the Reply not to ask the Court to consider in detail whether the terms of the various proclamations and treaties in fact reflect its concept of sharing out the shelf or a concept of delimiting boundaries. In paragraph 12 it finds no other expedient than to make an *ex cathedra* reassertion of its contention while ignoring the many indications in these proclamations and treaties that it is the delimitation of boundaries, not the division of spoils which is the basis of the law in this matter.

112. At any rate, in Chapter I of the Reply it is Article 38, paragraph (1) *(c)*, of the Statute of the Court which is put in the forefront of the Federal Republic's argument as the legal source of the so-called principle of "just and equitable share". The Federal Republic, it seems, now recognizes that, in order to convince the Court of the relevance of its "principle", something more is needed than its own bare assertions in the Memorial. Accordingly, in paragraphs 10-13 of the Reply it tries to put those assertions into what may plausibly pass for legal clothing:

> "The principle of the just and equitable share as advocated by the Federal Republic of Germany, belongs to the realm of the general principles of law to which the international judge is authorized to recur in order to avoid *non liquet* in cases where there are no rules of treaty or customary law at hand which might be applied, or where these rules are so general that they need supplementation. The doctrinary question whether the general principles of law are a formal or merely a material source of international law, can be left aside here, because the Court is expressly authorized, by Article 38 (1), lit. *(c)*, of its Statute, to apply not only treaty or customary law, but also general principles of law recognized by all nations for the legal solution of controversies [1]."

[1] Reply, para. 10.

Here it calls in aid a passage from an article by Sir H. Lauterpacht in *Symbolae Verzijl* (1958) entitled "Some Observations on the Prohibition of '*Non Liquet*' and the Completeness of the Law". This passage, however, does no more than make a strong plea for the recognition of the significance of Article 38 (1) *(c)* of the Statute with regard to the completeness of the legal order and the avoidance of a *non liquet*. It is entirely general and contains nothing to indicate that, in the view of Judge Lauterpacht, the situations in the present cases would call for the application of a "general principle of law" within the meaning of Article 38 (1) *(c)*; nor does it contain anything to indicate that, in his view, the application of the so-called principle of just and equitable share in the present cases could possibly be a legitimate use of the Court's powers under that provision of its Statute.

The argument of the Federal Republic then proceeds:

> "Today it is generally accepted that general principles of law recognized by all nations form part of international law; they are the outcome of legal convictions and values acknowledged all over the world. Some of them may even impose themselves as having an inherent, self-evident, and necessary validity."

Here it calls in aid another article from the *Symbolae Verzijl* (1958)—by Sir Gerald Fitzmaurice and entitled "The Formal Sources of International Law". But this again does no more than examine "general principles of law" in general terms and to provide a text for the statement that "some may even impose themselves as having an inherent self-evident and necessary validity". It does nothing to support the view either that the present cases call for the application of Article 38 (1) *(c)* of the Statute or that the application of the so-called principle of the "just and equitable share" could possibly be legitimate in the context of these cases.

113. The argument of the Federal Republic seems, in the final analysis to be that which is found in paragraphs 12 and 13. The earlier paragraph runs:

> "It is the function of the principle of the just and equitable share to supplement the emerging law on the continental shelf. While it had been gradually recognized in the practice of States that every coastal State has *ipso jure* an exclusive right to the seabed and subsoil of the submarine areas 'adjacent' to its coast (cf. Articles 1 and 2 of the Continental Shelf Convention), generally accepted rules on the delimitation of a continental shelf adjacent to more than one State were, and still are, lacking. It had been shown in Part II, Chapter I, of the German Memorial (cf. paras. 29-38, pp. 30-36, *supra*) that the practice of States as well as the authors of the Continental Shelf Convention started from the premiss that any rule, method or formula for the delimitation of a continental shelf adjacent to the coast of two or more States should apportion a just and equitable share to each of these States. That this was the *raison d'être* of the formulation of Article 6, paragraph 2, of the Continental Shelf Convention, had been totally ignored in the arguments put forward by Denmark and the Netherlands in favour of the equidistance line."

This passage contains the *ex cathedra* reassertion regarding the State practice which has been mentioned in paragraph 111 above. So far from ignoring the *raison d'être* of the formulation of Article 6, paragraph 2, the two Governments, meticulously examined the State practice and meticulously traced the formulation of the provisions of Article 6 from the Committee of Experts through the International Law Commission and the Geneva Conference to the

text of that article; and they showed that the *raison d'être* of its provisions was *not* the sharing out of the continental shelf *but the delimitation of the boundaries of the continental shelf adjacent to each coastal State.* If any "ignoring" has occurred in this connection, it is the ignoring by the Federal Republic of the plain and consistent meaning of the State acts, the proposals of the Experts and the International Law Commission and of the text adopted at the Conference in a sense contrary to its own assertions.

114. Paragraph 13, however, gives a slightly new turn to the argument:

> "Article 6, paragraph 2, of the Continental Shelf Convention was but one cautious step in the attempt to find a formula which might lead to an equitable solution of the boundary problem; it is exaggerating to say that Article 6 had already 'translated this general concept into the more concrete criteria for the delimitation of continental shelf boundaries' (Dan. C.-M., para. 55, p. 175, *supra*; Neth. C.-M., para. 49, p. 329, *supra*) *because it offers no criteria as to the circumstances which allow the application of the equidistance line, or which are so 'special' as to justify another boundary line.* Therefore, it is not surprising that the authors of the Continental Shelf Convention by a very wise decision put the agreement between the States concerned in the first place and thereby made it an obligation for the States concerned to seek a settlement primarily by agreement. What purpose should this provision serve if one side were allowed to start negotiations from the outset with the pre-established argument that the equidistance line is the only applicable rule, without considering whether the equidistance line would provide an equitable result? *By proposing the principle of the just and equitable share as the controlling principle for the delimitation of the continental shelf, the Federal Republic of Germany asks the Court to provide the Parties with a guiding line for the negotiation of an agreement.* If the Court felt able to add some *more precise criteria to guide the Parties in the special case of the North Sea* (like those submitted in Part II, Chapter III, of the German Memorial; cf. paras. 76-87), it would certainly help the Parties to reach agreement more easily." (Italics added.)

This paragraph seems to the two Governments to be somewhat unclear on the question whether the Court is being asked to oust the equidistance-special circumstances rule altogether as a rule applicable as between the Parties or to direct that the principle of "the just and equitable share" should be regarded as a principle controlling the application of that rule. But, however the matter is put to the Court, the two Governments are strongly of the opinion that the Federal Republic's whole thesis regarding the application of the principle of the "just and equitable share" as a "general principle of law" within the meaning of Article 38 (1) *(c)* of the Statute is, in the circumstances of the present cases, without any foundation whatever.

115. The two Governments will assume, for the purpose of the argument, the existence of a general principle of law of the kind alleged by the Federal Republic. In doing so, however, they must express every reservation on that point; for despite the extreme importance which it gives to this principle in its argument, the Federal Republic has made not the slightest attempt to demonstrate the existence or the nature of such a "general principle" or the categories of legal titles with reference to which it may have application. The Federal Republic has simply asserted that the alleged principle has an "inherent, self-evident and necessary validity". This being so and the alleged principle being wholly incompatible with the "legal convictions" of States in international

law, the two Governments do not feel called upon to examine the actual position in the legal systems of the world in regard to the "principle" of the "just and equitable share".

116. It has been demonstrated in Chapter 1 of this Common Rejoinder, as also in the Counter-Memorials (Part II, Chapter 1), that the alleged principle is inconsistent with the very basis of the whole corpus of rules by which in international law boundaries, whether over land or in maritime areas, are determined. The question has already been dealt with fully in Chapter 1 and there is no need to repeat the arguments. In international law the rules governing the determination of boundaries do not start from the premiss that there is an area of land or sea or seabed to be distributed on the basis of shares to be allotted by reference to some criterion of proportion. They start from the premiss of the extension in space of the sovereignties of the States concerned and the matter is decided by reference to the question of which of them, on the basis of the applicable rules, has the better claim to the extension of its sovereignty over the particular areas. In maritime areas moreover, the fundamental principle for determining the title of a coastal State to extend its sovereignty over any given areas is the adjacency and appurtenance of those areas to its own coasts rather than to the coasts of any other State.

117. In short, the Federal Republic is asking the Court to apply in the present cases a so-called "general principle of law", alleged to exist in national legal systems, that is incompatible with the principles on which, in the international legal system, the positive law regulating the matter is based. The two Governments, while not in any way questioning the significance of Article 38 (1) *(c)*, consider that to appeal to it under those conditions is completely inadmissible. The general principles of law derived from national legal systems which have been applied under Article 38 (1) *(c)* have always been principles recognized to be equally appropriate in the relations between States. The Federal Republic itself speaks of the general principles of law applicable under Article 38 (1) *(c)* as "the outcome of legal convictions and values acknowledged all over the world". How can this be said of a principle which runs directly counter to the principles recognized in international law itself as representing "the legal convictions of States" in the matter? Least of all can it be so said when the "legal convictions" of States have been deliberately and recently expressed in a sense contrary to the alleged principle in a general convention intended to codify the law.

118. An equally fundamental objection to the Federal Republic's invocation of Article 38 (1) *(c)* is that there is no question here of the absence of any relevant principle of international law by which to determine the issues in the cases before the Court. In the view of the two Governments, the relevant principles and rules of international law are those expressed in Article 6 of the Continental Shelf Convention; and the application of the special circumstances exception has to be determined by reference to the indications contained in the work of the International Law Commission, the Geneva Conference and in the practice of States. These indications, as will be shown in the next Chapter of this Common Rejoinder, provide definite enough criteria for determining the existence or otherwise in the present cases of any "special circumstance justifying another boundary line".

119. It is further the view of the two Governments that, even if the principles and rules of international law are not considered by the Court to be applicable as between the Parties, there is no possible question of a *non liquet* in the present cases. They contend that, in that event, the Court's clear course will be to

determine the applicable principles and rules of international law by reference to the language in which and the conditions under which the exclusive rights of the coastal State over the adjacent continental shelf have been recognized in Articles 1 and 2 of the Continental Shelf Convention. That Articles 1 and 2 express generally binding principles of law is a matter upon which the Parties are agreed. These principles, in the view of the two Governments, in themselves furnish a perfectly adequate objective rule for determining the delimitation of the continental shelf boundaries respectively as between Denmark and the Federal Republic and as between the Netherlands and the Federal Republic. This is that the boundary is to be determined *on the basis of the exclusive rights of each Party over the continental shelf adjacent to its coast and of the principle that the boundary is to leave to each Party every point of the continental shelf which lies nearer to its coast than to the coast of the other Party*. This rule, unlike the alleged principle of the "just and equitable share", is in full conformity with the general principles of international law regarding the delimitation of boundaries, and especially of maritime boundaries.

If there is no trace of an exception for "special circumstances" in this rule, it is not the fault of the two Governments. It is the Federal Republic which denies that the equidistance-special circumstances rule is binding as between the Parties in the present cases.

120. Since the Federal Republic has persisted in the Reply in contending that the principles and rules of international law expressed in Article 6 of the Convention are not applicable as between the Parties, the two Governments think it right to add to the submissions presented to the Court in their respective Counter-Memorials a fourth submission in the terms of the rule stated in the preceding paragraph.

121. In concluding this Chapter, the Danish and Netherlands Governments also think it right to emphasize their view that in the determination of any boundary under international law the question at issue is which of the two States concerned has the better claim in law to the areas involved. In this connection, they feel justified in again underlining that:

(1) *Denmark and the Netherlands* are claiming to delimit their respective continental shelf areas in conformity with the accepted concept of the extension of the exclusive sovereign rights of a State over the continental shelf adjacent to its coast; in accordance with an internationally accepted method of boundary delimitation; and in accordance with the principles and rules of delimitation expressed in the Continental Shelf Convention adopted in 1958 for the purpose of establishing the generally accepted principles and rules of international law governing the matter.

(2) The *Federal Republic*, on the other hand, is claiming that the Parties shall be directed to agree upon the boundary on the basis of a supposed principle of the just and equitable share which is incompatible with the generally accepted principles of international law for determining boundaries, furnishes no objective legal criterion for determining the boundary and finds no mention in the Continental Shelf Convention of 1958.

CHAPTER 3

THE QUESTION OF SPECIAL CIRCUMSTANCES

122. The main object of this Chapter is to interpret the "special circumstances" clause (Section I) and to put the facts of the two cases before the Court to the test, whether special circumstances within the meaning of the Convention are present (Section II). The Reply, paragraph 76 (pp. 421-422, *supra*) seems to follow the line laid down in the Memorial but in the new Submission 2 *(c)*, the clause has been directly and expressly—although in a quite general and subsidiary way—invoked in case the Court finds that the second sentence in Article 6, paragraph 2, of the Continental Shelf Convention is applicable between the Parties. The Federal Republic has thus, however belatedly, invited the Court to pronounce on the application of the "special circumstances" clause.

Section I. The Meaning of the Clause of "Special Circumstances" Justifying Another Boundary Line

123. It is beyond doubt that the "special circumstances" clause sets out to correct the principle of equidistance in cases where a strict application of this principle would lead to a result unacceptable from a legal point of view. The intention of the Geneva Convention on the Continental Shelf was to lay down rules of law between States. This is particularly obvious from the replies of the Governments to the International Law Commission's 1951 report and the Commission's reaction thereon (Danish Counter-Memorial, paras. 64 and 65, Netherlands Counter-Memorial, paras. 58 and 59). The legal concept of special circumstances has found expression in the Convention in the form that special circumstances are to be taken into account only when they *justify* another boundary line. If Article 6 is applied as a rule of law this must necessarily mean that the correction of the equidistance principle which the clause clearly intends, can take place *only if deviation from the equidistance line is justified towards both States—i.e., the State which "gains" and the State which "loses" by the correction.* In this consideration the two Governments find an essential guidance for the understanding of the "special circumstances" clause.

124. Certain forms of coastal configurations exist where, despite essential divergencies between the continental shelf areas of the adjacent countries, no correction of an equidistance boundary is justified. This is clearly illustrated in figure 1 of the Danish Counter-Memorial (p. 200, *supra*). The difference between the shelf area which under the equidistance principle appertains to Middleland and the areas appertaining to Leftland and Rightland seems indisputably clear. At the same time nobody would suggest correcting the equidistance line thereby enlarging the area appertaining to Middleland. The figure primarily illustrates an equidistance delimitation in the median-line form, a delimitation which the Federal Republic of Germany agrees would lead to just and equitable results unless islands interfere.

125. The reason why the area of Middleland must remain unchanged is not simply that it is a median line. The reason is that foundations for a correction of the equidistance principle are entirely absent—a correction *would not be justified.* The areas of the continental shelf, to which each of the four States shown in figure 1 is entitled under the equidistance principle constitute in regard

to each individual State a natural continuation of the territory of the State into the sea and the outcome in its entirety is in conformity with the general geographical situation. Any correction in favour of Middleland would involve areas to which one or more of the other States is undoubtedly entitled. Irrespective of how much geographical conditions limit the continental shelf of Middleland in relation to the two adjacent States, these geographical conditions could not be taken to constitute a special circumstance *justifying* another boundary line. It seems thus legitimate to interpret the "special circumstances" clause *to the effect that it can be invoked against a State whose continental shelf boundary under the equidistance principle reflects projecting geographical features (primarily certain islands and peninsulas) whereas it cannot be applied against a State whose continental shelf has a solid geographical connection with the territory of that State thereby constituting a natural continuation of the territory of the State in conformity with the general geographical situation.* This interpretation is confirmed by the *travaux préparatoires.*

126. According to the Reply, paragraph 82, there is "every indication that 'special circumstances' which may influence the determination of boundaries must be understood in the broadest sense". This passage seems to indicate that the *travaux préparatoires* of Article 6 of the Convention offer foundations for this interpretation. In paragraph 82 of the Reply, however, there is no reference to the *travaux préparatoires* and a perusal of the entire Reply will only show repeated references to the Commentary of the International Law Commission (*Yearbook of the I.L.C.*, 1956, Vol. II, p. 300) which states with regard to special circumstances that "this case may arise fairly often so that the rule adopted is fairly elastic".

This statement is presumably the foundation for the several times repeated assertion of the Reply that the interpretation given to the "special circumstances" clause by the two Governments is too narrow and restricted. The Commentary, however, is in full agreement with their interpretation of the clause. The Commentary states that a modification of the strict application of the equidistance principle may often be required and since there are a great number of small, insignificant islands throughout the world—also situated in such a way that they may influence the delimitation of the continental shelf—it is obvious that the interpretation laid down here will frequently make the clause applicable.

127. In the Memorial, paragraphs 69-72, the Federal Republic examines the meaning of the expression "special circumstances" in greater detail. It is interesting to note that all its quotations regarding special coastal geographic configurations from the International Law Commission, from the Geneva Conference, and from the doctrine after 1953 refer solely to certain small, insignificant islands and peninsulas. A thorough examination covering the work in the International Law Commission and at the Geneva Conference—also including the Paper mentioned in the Memorial, paragraph 40, distributed by the British delegation to the Geneva Conference—will show that the only specific coastal geographical configurations which are described as falling within the "special circumstances" clause and thereby giving foundation for a correction of the strict application of the equidistance principle are those just mentioned: small insignificant islands and certain peninsulas (promontories). The statements in the *travaux préparatoires* fully support the present interpretation whereas there is no foundation for the assertion in paragraph 82 of the Reply that "there is every indication that 'special circumstances' which may influence the determination of boundaries must be understood in the broadest sense".

128. It remains to examine further the statement made above that the application of the "special circumstances" clause leads to a deviation from the strict equidistance boundary. No doubt it is because the exception is applied only when the geographical configuration does not constitute an adequately "solid geographical connection" (Reply, para. 60) between the continental shelf and the territory of the State concerned that the following suggestion was made by Mr. Kennedy, the United Kingdom Delegate at the Geneva Conference (*Official Records*, Vol. VI, p. 93):

> "he suggested that, for the purposes of drawing a boundary, islands should be treated on their merits, very small islands or sand cays on a continuous continental shelf and outside the belts of territorial sea being neglected as base points for measurement and having only their own appropriate territorial sea".

A delimitation on these lines would be illustrated by the Agreement between Italy and Yugoslavia as this is understood by the two Governments. According to the information received the contemplated boundary is a "median" equidistance line modified in a few places on account of problems presented by certain small islands (para. 67 above). Such a method of delimitation shows that the rule of equidistance is in principle applicable even if certain corrections are made with regard to particular basepoints and will always furnish a sufficient legal basis for the determination of a boundary.

129. The special circumstances clause as interpreted by the two Governments will always offer a criterion providing objective directions for the determination of the line of the boundary. This would not be the case if the interpretation invoked by the Federal Republic of Germany were accepted. The consequences of the interpretation of the Federal Republic appear in the German Submission 4 (Reply, p. 435, *supra*), the single operative submission. As pointed out in paragraph 25 above, the so-called principle which the Federal Republic asks the Court to declare in Submission 4 simply does not furnish any basis for determining the boundary by agreement. To interpret the "special circumstances" clause in a manner which does not provide for a delimitation based upon law cannot be correct.

It is in conformity with this completely vague interpretation of the "special circumstances" clause given by the Federal Republic of Germany—and indeed with its whole position in the case—that in the Reply the Federal Republic does not even try to indicate, what actual boundary line it claims to be entitled to as a matter of right. It is therefore difficult to understand how in paragraph 31 of the Reply, the Federal Republic can talk of "the disputed area" vis-à-vis Denmark. It does not appear that there is any specific area with regard to which it can be said that there are conflicting claims of right.

Section II. The Absence of Any "Special Circumstances" in the Cases Before the Court

130. In considering the question whether in the cases before the Court special circumstances justify another boundary line, it would be natural first to ascertain whether on the one hand the Danish continental shelf in the North Sea and whether on the other hand the Netherlands continental shelf in the North Sea, both delimited according to the equidistance principle may legitimately be regarded as continuations of the territories of these two States respectively. If this is so, the Federal Republic of Germany (Reply, para. 60) recognizes that these two States have legal titles to these continental shelves. According to the Reply the continental shelf may legitimately be regarded as a continuation of the

territory provided it has a solid geographical connection with and forms a natural continuation of the territory. A glance at each of the charts presented in the case will show that these conditions have been fulfilled. This is particularly obvious in figure 3 in the Danish Counter-Memorial (p. 213, *supra*) and in figure 4 in the Netherlands Counter-Memorial (p. 366, *supra*), in which figures the Danish and Netherlands continental shelves in the North Sea have been sketched in such a way that they can be judged alone and without comparison with the continental shelf of the Federal Republic. It is notable that *the Federal Republic of Germany nowhere in its Memorial or its Reply has been able to assert that the continental shelves of Denmark and the Netherlands delimited according to the equidistance principle should not in themselves be normal and just.* In the commentary to the above-mentioned figures (Reply, para. 85) *the Federal Republic recognizes that the impression given by the geographical facts shown by the two figures is that the Danish share as well as the Netherlands share of the continental shelf in the North Sea are perfectly normal,* though it goes on to add *that compared with the German share calculated in relation to the respective coastlines, they are not as "normal" as they should appear.* When the Federal Republic of Germany nevertheless invokes special circumstances, it builds upon two wholly different and seemingly irreconcilable points of view.

131. The Federal Republic argues from the principle laid down in the Reply, paragraph 82, that if geographical conditions bring about that an equidistance boundary will have the effect of causing inequitable apportionment of the continental shelf between the States adjacent to that continental shelf, such circumstances are "special" enough to justify another boundary line. Paragraph 83 next asserts that the almost rectangular bend in the German coastline will make the equidistance boundaries against Denmark and the Netherlands meet before the coast of the Federal Republic, thereby reducing its share of the continental shelf in the North Sea to a disproportionately small part if compared with the shares of the other North Sea States. This way of arguing must be rejected. As stated in paragraph 126 above, the special circumstances clause may have a comparatively frequent application but the condition for applying it must be that a correction is justified. *The fact that the Federal Republic finds its area too small can never justify a reduction of Denmark's and the Netherlands' areas as these are in themselves unquestionably fully "normal" and "legitimate".* The Federal Republic apparently overlooks the fact that Denmark and the Netherlands also have titles to areas of the continental shelf under international law which *in their legal basis* are identical to that of the Federal Republic. The complete lack of foundation of the standpoint of the Federal Republic, as formulated in the Reply, paragraph 83, is made evident by examining figure 1 of the Danish Counter-Memorial (p. 200, *supra*). Whatever the reason why Middleland (the Federal Republic of Germany) finds her shelf area insufficient, Middleland cannot obtain compensation from Rightland (Denmark) and Leftland (the Netherlands), since the areas of these two States are fully "normal" and "legitimate" as continuations of their respective coasts.

132. The Federal Republic of Germany also attempts to invoke—however tentatively and sketchily—the concept of "special circumstances" in another way. In its Reply, paragraphs 88-89, 92, 95, and 97, the Federal Republic tries to present a picture in which its equidistance area depends upon specific points upon the coast, projecting points—or parts—or promontories. This picture is drawn with marked caution—stronger when discussed in a general sense and weaker when nearer to the actual case. This standpoint is revealed clearly in paragraph 92 in the comments to figure 5 (Reply, p. 430, *supra*) a diagram which obvi-

ously is a highly simplified illustration of the case before the Court. The Federal Republic contends that "*two projecting parts of the coasts of State A and State C*" (italics added) cause that the German share of the continental shelf, calculated in accordance with the equidistance principle, is too small.

133. The only possible reply to this assertion is that it is completely untrue. Figure 5 has nothing resembling a projecting part which may influence the equidistance line. Any true map of the area illustrates this still more clearly, and the Federal Republic of Germany has not given *the slightest hint of what part is to be considered as projecting or what influence on the boundary lines such a part might have*. The equidistance lines between on the one hand Denmark and the Federal Republic and on the other hand the Netherlands and the Federal Republic have been drawn on the basis of coastal configurations fully in conformity with the land masses behind them and the equidistance areas of all three States therefore become a natural continuation of the territory of each State—in conformity with the general geographical situation. Neither Denmark nor the Netherlands in themselves offer any foundation for a theory based upon the effect of a "projecting part".

134. But, as stated above, paragraph 92 of the Reply mentions *two projecting parts of the coasts of the two countries*. As such parts are non-existent the only way of understanding the argument of the Federal Republic of Germany is to regard the Netherlands as a "projecting part" on the Danish-German coast (which runs north-south) and Denmark as a projecting part of the Netherlands-German coast (which runs west-east). That this assumption lacks reason is evident at once. The crux of the entire argumentation is, however, that the Federal Republic of Germany in paragraphs 59-61 of the Reply gives an interpretation of the "special circumstances" clause—viz. that certain projecting parts are to be disregarded, thus correcting the strict equidistance principle—and then in paragraph 88 goes on to present the case before the Court as if there were projecting parts on the coasts relevant in the cases before the Court. This is obviously untrue and this chain of argument does not afford any foundation for the contention that there are special circumstances justifying another boundary line.

135. The fact is simply that *the general course of these ordinary coastlines* leads to a result somewhat less satisfying to the Federal Republic than to Denmark and the Netherlands respectively because the coastline of the North Sea changes direction approximately in the middle of the German coast. But as illustrated in figure 1 (Danish Counter-Memorial, p. 200, *supra*), *entirely different courses of ordinary coastlines may lead to quite similar results*. There is nothing "special" in this. An adjustment of equidistance lines in cases of this nature would lead to encroachments upon the fully legitimate continental shelf of the adjacent State and mean a general redistribution of shelf areas. It was never contemplated that the "special circumstances" clause should have such an effect and lead to a redistribution of the continental shelf which is not justified in relation to the State from which part of the area naturally appertaining to it is taken away.

136. This Section has not dealt with the German thesis that *the North Sea as such is "a special case"*. The reason is that although this thesis is mentioned in the Reply on several occasions, it seems now to have been given up. When stating in the Reply, paragraph 79, that the drawing of boundaries must be "*a joint concern of all North Sea States*" (italics added) the Federal Republic can only mean—as the comparatively small areas of France and Belgium have never been mentioned—that the shares of the United Kingdom and Norway must

be included in the evaluation. At the same time the Federal Republic of Germany states in paragraph 98 that the shares of these two States are just and equitable. Consequently, no arguments or conclusions can be deduced from either the size of the shelf areas of the two States or from the delimitations about which Denmark and the Netherlands respectively have agreed with the two States in Treaties concluded with them.

Incidentally it may be noted that in figure 5 (Reply, p. 430, *supra*)—the graphic version of the case which the Federal Republic now apparently prefers to present to the Court—the territories representing the North Sea States, the United Kingdom and Norway, give an entirely misleading impression of the situation as it actually exists in the North Sea. The whole object of the Federal Republic now seems to be to isolate the delimitation of the boundaries of the three States Parties to this dispute from the delimitation of boundaries of the continental shelf of the North Sea as a whole.

Consequently all the considerations so much elaborated in the Memorial regarding the North Sea as a special case can be left out of account.

Section III. A Comparison between the "Coastal Frontage" Concept and the Special Circumstances Clause

137. Although the shortcomings of the "coastal frontage" concept have been exposed in paragraph 26 above, it may be of interest to compare the rule of the Geneva Convention—the clause of special circumstances justifying another boundary line—with this concept.

138. As developed above, the clause of special circumstances must be interpreted as a rule of law which justifies a correction of the strict equidistance principle in cases where its application owing to the existence of special projecting coastal configurations—certain islands and peninsulas—would lead to results not in agreement with the general geographical situation. This *correction of basepoints on the coastline* ensures that each of the States is given a continental shelf which constitutes the true and actual continuation of the territory into the sea. The correction can be made in such a way that the boundary is drawn according to the equidistance principle but *from a different basis, more in conformity with the general geographical situation.*

139. The concept of the "coastal frontage" is also based on geometrical deviations from the actual geographic situation. But this deviation is—in its basis as well as in the consequences drawn from it—completely different from the one envisaged in the Geneva Convention.

140. As will be seen from figures 2 and 3 (Reply, pp. 427-428, *supra*) and particularly from figure A in this Rejoinder (p. 470, *supra*), the tenor of "the coastal frontage" concept is that *the solid direction and position of the coast is neglected and the general geographic situation is changed.* The coastal configurations for which the Federal Republic of Germany wants adjustment are quite normal and express the general geographical situation. In other words—the parts of the territories of the Netherlands and Denmark which are "cut off" for the purpose of indicating the so-called "coastal frontages" of the two States are considerable portions of the solid mainlands. The "coastal frontage" of the Federal Republic is simply a line through the North Sea with no relation to either the territory or the coast of that State. The difference here from the possible deviation envisaged in the Geneva Convention and according to which certain specific projecting coastal configurations are left out of consideration is very apparent.

141. Even more striking is the difference as to the consequences drawn from

the two kinds of deviation. If according to the "special circumstances" clause a deviation is made, some basepoints are disregarded and *the boundary line is delimited by application of the rule of equidistance based on other—and better—basepoints.* The deviation advocated by the Federal Republic results in the so-called "coastal frontages", the sole function of which is that *the proportion of the lengths of the "coastal frontages" of the States involved shall serve as a correction of the sizes of the continental shelf delimited according to other criteria.* Neither the position nor the direction of the alleged "coastal frontage" has any bearing on the delimitation and consequently no "coastal frontage" can ever by itself give the solution to a boundary question.

It is apparent that a concept of this kind has no connection with the provisions of the Geneva Convention.

Section IV. Individual Observations of the Two Governments

142. The *Danish Government* wants to supplement what has been developed in Chapter 3, Section I, of this Common Rejoinder by adding the following observations bearing upon the interpretation of the "special circumstances" clause presented by the two Governments and to be taken into account before the conclusion formulated in paragraph 125:

(a) It should be examined what kind of geographical configurations will come under the clause, when it is understood to the effect that the correction of the equidistance principle can take place *only if deviation from the equidistance line is justified towards both States—i.e., the State which "gains" and the State which "loses" by the correction* (para. 123 above). In figure E (opposite) two States A and B are fronting each other with the entire sea area between them forming a continental shelf and with a small, insignificant island—possibly an uninhabited sand reef—belonging to State A placed almost in the middle. In this case a delimitation of the boundary between the two States according to a strict application of the equidistance principle would also take the island into account and an equidistance boundary would thus run much closer to State B than to State A. Ostensibly this would be in conformity with the rule of adjacency upon which the equidistance principle is founded. But part of the continental shelf which would thus be allocated to A could not be considered a natural continuation of State A's territory into the sea, and the result could not be said to be in conformity with the general geographic position. In a case like this, the question of the application of the clause clearly arises and it may be that the strict application of the equidistance principle must be corrected. In this event in disregarding the small insignificant island the deviation from the equidistance line will be *justified not only towards State B but also towards State A.*

(b) Not only small and insignificant islands but also geographical configurations regarding the mainland coast may influence the delimitation in this manner and thus be considered a special circumstance justifying another boundary line. Figure F (see p. 534, *infra*) illustrates the effect of a true equidistance delimitation caused by a sharply projecting—but in itself insignificant—part of the mainland coast and figure G (see p. 535, *infra*) illustrates how this example largely corresponds to the example illustrated by figure E in respect of an island. Also in these instances a correction of the equidistance line seems justified. The reason for this, in relation to State A and State B, is exactly the same as described in paragraph *(a)* above—that the shelf area accruing to State A based on the peninsula is not a natural

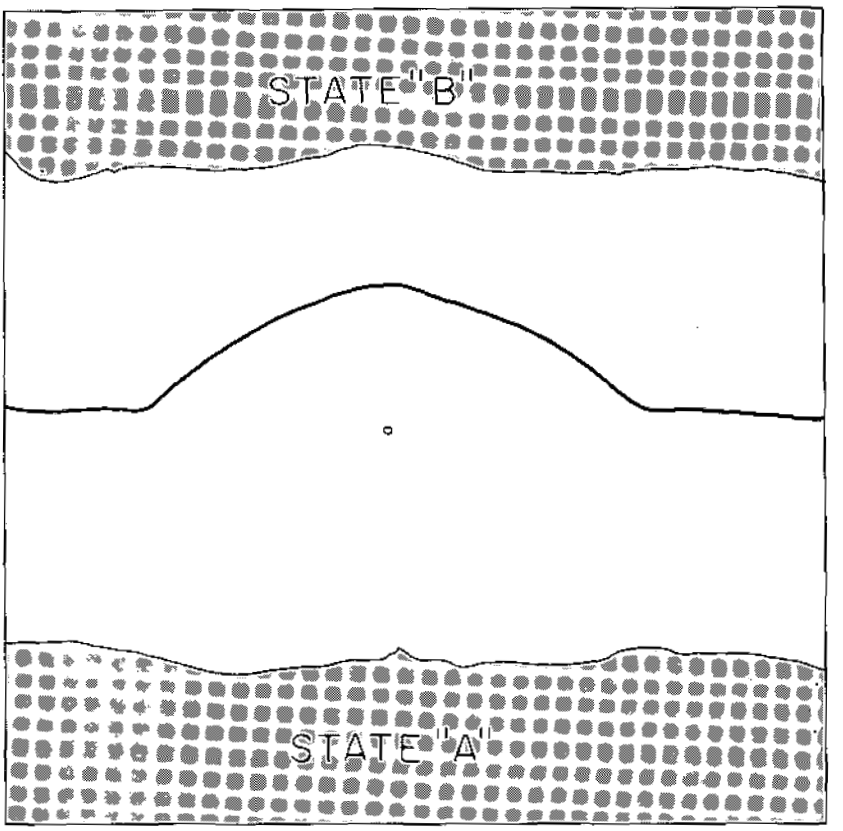


Figure E

continuation of State A's territory, and the result as a whole is not in accordance with the general geographic situation.

(c) It should be noted that these conclusions are wholly in conformity with paragraphs 59 and 60 of the Reply. These paragraphs are designed to prove that strict "propinquity" in itself is not all-important. This holds good in so far as concerns the situations mentioned in the Reply, paragraphs 59 and 60, which have been examined and interpreted above. In such instances a correction of the equidistance principle is called for and the grounds on which it is done are embodied in the "special circumstances" clause. This conclusion is also endorsed by the Reply in paragraph 61. In the light of the statements in paragraphs 59-61 of the Reply, it is astonishing that the Federal Republic of Germany invokes the application of special circumstances in relation to Denmark. To a certain extent this arises from the fact that the Federal Republic later in its Reply also classes what are quite different geographical configurations as special circumstances but the main reason is that where it comments on the actual case the Federal Republic of Germany uses the expressions "projecting

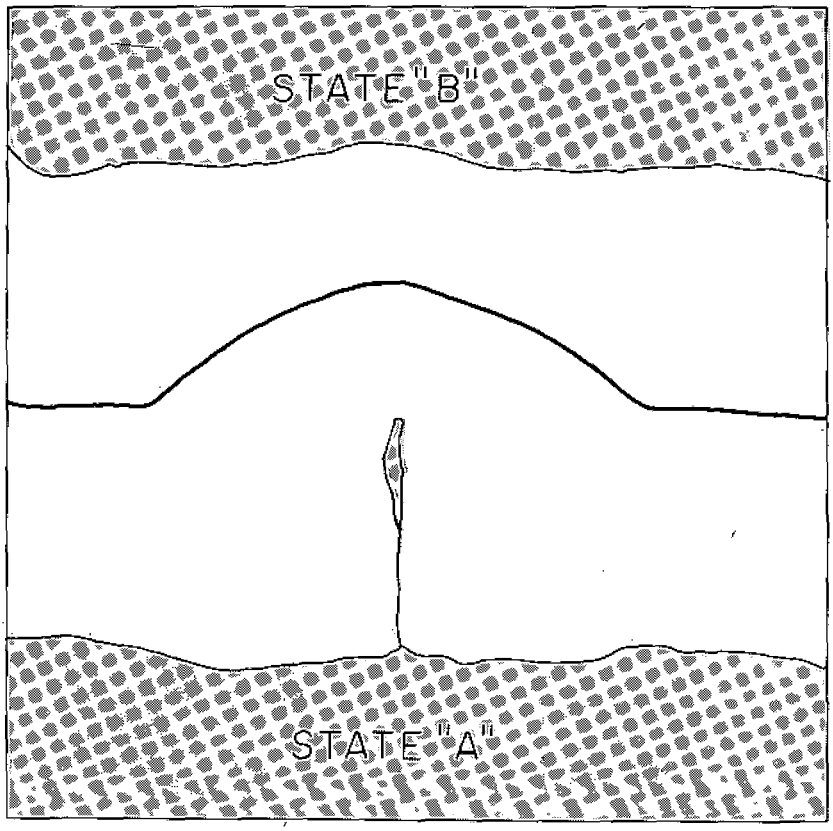


Figure F

part" and "projecting point" of a coast in an entirely different and unrealistic way at variance with the meaning of paragraphs 59 and 60 of the Reply.

143. The *Netherlands Government* does not consider it necessary in the present Rejoinder to express its opinion on the question whether the configuration of coastlines *other* than the North Sea coastlines of the Netherlands, the Federal Republic and Denmark, is such as to justify particular deviations from the true equidistance lines. It would merely wish to reiterate what has been stated in paragraph 145 of the Netherlands Counter-Memorial relating to the low-tide elevation called the "Hohe Riff". Indeed it is clear from the map, in the Netherlands Counter-Memorial [1], that in this case a "projecting part" of the Federal Republic's coastline *has* automatically been used as a basepoint for the determination of the boundary line in accordance with the equidistance principle, to the benefit of the Federal Republic. The

[1] See pocket inside back cover.

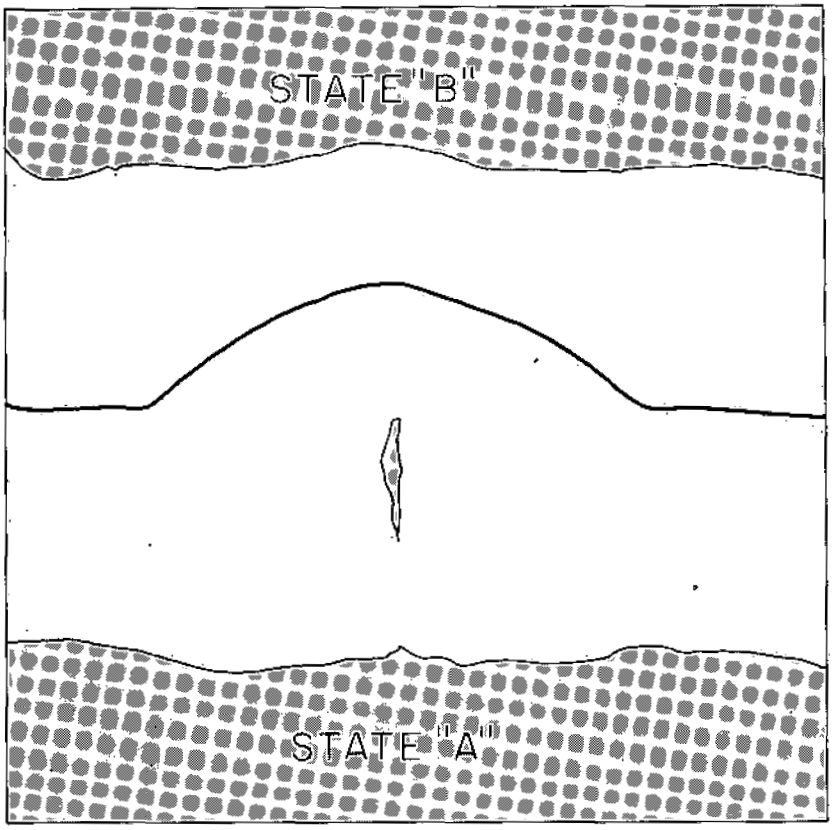


Figure G

Netherlands and the Federal Governments, though fully aware of the fact, that the taking into account of this, in itself totally insignificant, low-tide elevation influences the location of the boundary line on the continental shelf over a considerable distance out into the sea, never imagined that there could be any question of the use of the "Hohe Riff" as a basepoint for the construction of the equidistance line.

Section V. Conclusion

144. In the opinion of the two Governments, the only special circumstances which fall to be considered by the Court in the context of the present cases are geographical special circumstances.

In the light of the considerations advanced in the preceding sections of this Chapter and of the interpretation of the special circumstances clause which they believe to be correct, the two Governments contend that *no geographical circumstance exists in the present cases, which could possibly constitute a special circumstance within the meaning of that clause.*

PART II. SUBMISSIONS

In view of the facts and arguments presented to the Court by the Governments of Denmark and of the Netherlands in their respective Counter-Memorials and in this Common Rejoinder, the two Governments severally reaffirm the considerations and submissions presented by each of them to the Court in Part III of their respective Counter-Memorials.

In view of those same facts and arguments and with regard to the delimitation of the boundaries of the continental shelves, first, as between Denmark and the Federal Republic and, secondly, as between the Netherlands and the Federal Republic,

May it further please the Court to adjudge and declare:

4. If the principles and rules of international law mentioned in Submission 1 of the respective Counter-Memorials are not applicable as between the Parties, the boundary is to be determined between the Parties on the basis of the exclusive rights of each Party over the continental shelf adjacent to its coast and of the principle that the boundary is to leave to each Party every point of the continental shelf which lies nearer to its coast than to the coast of the other Party.

30 August 1968.

(Signed) Bent JACOBSEN
Barrister at the Supreme Court
of Denmark
Agent for the Government
of the Kingdom of Denmark

(Signed) W. RIPHAGEN
Agent for the Government
of the Kingdom of the Netherlands

PART III. ANNEXES TO THE COMMON REJOINDER SUBMITTED BY THE GOVERNMENTS OF THE KINGDOM OF DENMARK AND THE KINGDOM OF THE NETHERLANDS

Annex 1

PROTOCOL OF PROVISIONAL APPLICATION OF THE FISHERIES CONVENTION
(9 March 1964)

The Governments of Austria, Belgium, Denmark, France, the Federal Republic of Germany, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden and the United Kingdom of Great Britain and Northern Ireland

Have agreed as follows:

Article 1.

The Contracting Parties will raise no objection if a Government which has ratified or approved the Fisheries Convention opened for signature at London on 9th March, 1964, applies provisionally the provisions of the Convention, having first notified its decision to the Government of the United Kingdom of Great Britain and Northern Ireland.

Article 2.

(1) The provisional application of the provisions of the Fisheries Convention by a Contracting Party will entail the establishment of the list of arbiters provided for in Article 1 of Annex II of the Convention.

(2) A Contracting Party which has provisionally applied the provisions of the Convention shall be bound by its provisions, in particular Article 13, and shall not object if they are invoked by a Government which has signed the present Protocol and the Convention, even if the latter Government has not yet ratified or approved the Convention, with a view to settling a dispute raised by this provisional application.

Article 3.

The present Protocol shall be open for signature from 9th March, 1964 to 10th April, 1964. It shall enter into force, when it has been signed by two Governments as between those Governments, and in respect of any Government which signs it thereafter on the date of signature by that Government.

Article 4.

(1) Upon the entry into force of the Convention, the present Protocol shall automatically cease to have effect as between Governments which have become parties to the Convention.

(2) The present Protocol will cease to have effect in respect of any Government which notifies the Government of the United Kingdom of Great Britain and Northern Ireland of its decision not to ratify or approve the Convention.

Article 5.

The Government of the United Kingdom of Great Britain and Northern

Ireland shall immediately inform all the signatories of the present Protocol of each notification received in accordance with Article 1 or with paragraph 2 of Article 4.

In witness whereof the undersigned, being duly authorised thereto, have signed the present Protocol.

Done at London this ninth day of March 1964, in the English and French languages, each text being equally authoritative, in a single original which shall be deposited in the archives of the Government of the United Kingdom of Great Britain and Northern Ireland, which shall transmit a certified true copy to each signatory and acceding Government.

For the Government of Belgium:
(Signed) J. DE THIER

For the Government of Denmark:
(Signed) Nils SVENNINGSEN

For the Government of France:
(Signed) G. de COURCEL

For the Government of the Federal Republic of Germany:
(Signed) Hasso VON ETZDORF

For the Government of Ireland:
(Signed) Seán F. LEMASS

For the Government of Italy:
(Signed) P. QUARONI

For the Government of Luxembourg:
(Signed) A. J. CLASEN

For the Government of the Netherlands:
(Signed) C. W. VAN BOETZELAER

For the Government of Portugal:
(Signed) Humberto ALVES MORGADO

For the Government of Spain:
(Signed) SANTA CRUZ

For the Government of Sweden:
(Signed) Gunnar HÄGGLÖF

For the Government of the United Kingdom of Great Britain and Northern Ireland:
(Signed) R. A. BUTLER

Annex 2

EXCHANGE OF NOTES BETWEEN THE ROYAL DANISH EMBASSY AT BONN AND THE GERMAN MINISTRY OF FOREIGN AFFAIRS, DATED 30 NOVEMBER 1967

Königlich Dänische Botschaft

Bonn, den 30. November 1967.

Herr Minister,

Ich habe die Ehre, den Empfang Ihrer Note vom 30. November 1967 zu bestätigen, die folgende Wortlaut hat:

"Ich habe die Ehre, Ihnen im Namen der Regierung der Bundesrepublik Deutschland folgendes mitzuteilen:

Die Bundesregierung hat davon Kenntnis genommen, dass in Ausführung des dänischen Gesetzes Nr. 195 vom 26. Mai 1965 mit Wirkung vom 1. Juli 1967 eine Fischereizone vor dem Küstenmeer des Königreichs Dänemark errichtet wurde. Dies geschah in Übereinstimmung mit dem Europäischen Fischerei-Übereinkommen, das von unseren beiden Regierungen am 9. März 1964 in London unterzeichnet wurde.

Bei den Besprechungen, die am 22. und 23. August d.J. zwischen Vertretern unserer beiden Regierungen stattgefunden haben, wurde Einverständnis darüber erzielt, dass eine deutsche traditionelle Fischerei im Sinne der Artikel 3 und 4 des oben erwähnten Fischerei-Übereinkommens in folgendem Umfang vor den dänischen Küsten besteht:

. . . . . .

Die deutsche traditionelle Fischerei kann in dem oben bezeichneten Umfang in Anwendung des Artikels 9 Abs. 1 des Londoner Fischerei-Übereinkommens im Gebiet zwischen 3 und 6 Seemeilen von der Basislinie bis zum 1. Juli 1968 fortgesetzt werden. Nach Ablauf dieses Tages wird diese traditionelle Fischerei in dem Gebiet zwischen 6 und 12 Seemeilen von der Basislinie weiterhin erlaubt sein.

Als südliche Grenze der dänischen Fischereizone soll vorläufig die jenige Linie dienen, die in dem Vertrag vom 9. Juni 1965 zwischen unseren beiden Staaten über die Abgrenzung des Festlandsockels der Nordsee in Küstennähe vereinbart wurde. Die Wahl dieser Grenzlinie beruht nicht auf rechtlichen Überlegungen, sondern soll nur zur Erleichterung der fischereipolizeilichen Überwachung für eine Übergangszeit dienen. Die endgültige Festlegung der südlichen Grenze der dänischen Fischereizone in der Nordsee wird später durch eine Vereinbarung zwischen den beiden Regierungen erfolgen.

Ich erlaube mir vorzuschlagen, dass diese Note und die entsprechende Antwortnote Euer Exzellenz eine Vereinbarung zwischen unseren beiden Regierungen bilden sollen, die mit dem Datum Ihrer Antwortnote in Kraft tritt und auch für das Land Berlin gilt, sofern nicht die Regierung der Bundesrepublik Deutschland gegenüber der Regierung des Königreichs Dänemark innerhalb von drei Monaten nach Inkrafttreten dieser Vereinbarung eine gegenteilige Erklärung abgibt."

Ich habe die Ehre Ihnen mitzuteilen, dass meine Regierung mit dem Inhalt dieser Note und damit einverstanden ist, dass Ihre Note und diese Antwortnote eine Vereinbarung zwischen unseren beiden Regierungen bilden soll, die mit dem Datum dieser Note in Kraft tritt.

Genehmigen Sie, Herr Minister, die Versicherung meiner ausgezeichnesten Hochachtung.

KNUTH-WINTERFELDT.

Seiner Exzellenz
dem Bundesminister des Auswärtigen der Bundesrepublik Deutschland
Herrn Willy Brandt.

Annex 2 A

(Translation)

Royal Danish Embassy

Bonn, 30 November 1967.

Your Excellency,

I have the honour to acknowledge the receipt of your Note of 30 November 1967, reading as follows:

"On behalf of the Government of the Federal Republic I have the honour to inform you as follows:

The Government of the Federal Republic has been informed that a fishing zone in the coastal waters of the Kingdom of Denmark has been established as from 1 July 1967 pursuant to the Danish Act No. 195 of 26 May 1965. This took place in conformity with the European Fisheries Convention signed in London by our two Governments on 9 March 1964.

During talks between the representatives of our two Governments on 22 and 23 August this year, agreement was reached that pursuant to Articles 3 and 4 of the above-mentioned Fisheries Convention there is a traditional German fishery along the Danish coast as follows:

. . . . . .

Within the limits outlined above, the German traditional fishing may, pursuant to Article 9, paragraph 1, of the London Fisheries Convention be allowed to continue in the area between 3 and 6 nautical miles from the baseline until 1 July 1968. After that date the traditional fishing may still continue in an area between 6 and 12 nautical miles from the baseline.

The boundary between our two States agreed upon in the Treaty of 9 June 1965 concerning the delimitation of the continental shelf of the North Sea in the coastal areas constitutes the temporary southern border of the Danish fishing zone. This choice of borderline is not based upon legal considerations but serves merely to facilitate fishing inspection at the present time. A final determination of the southern borderline of the Danish fishing zone in the North Sea will take place later through agreement between the two Governments.

I beg to propose that this Note and Your Excellency's Note of reply shall enter into force as an agreement between our two Governments as from the date of your Note of reply and shall also apply to Land Berlin provided that the Government of the Federal Republic of Germany has not made a contrary declaration to the Government of the Kingdom of Denmark within three months of the date of entry into force of the agreement."

I have the honour to inform you that my Government is in agreement with the contents of this Note and with the proposal that your Note and this Note of reply shall constitute an agreement between our two Governments entering into force as from the date of this Note.

Accept, Your Excellency, the assurances of my highest consideration.

(Signed) KNUTH-WINTERFELDT.

His Excellency
Minister for Foreign Affairs of the Federal Republic of Germany
Mr. Willy Brandt.

Annex 3

AIDE-MÉMOIRE FROM THE GERMAN EMBASSY AT COPENHAGEN TO THE DANISH MINISTRY OF FOREIGN AFFAIRS, DATED 16 MARCH 1967

P.M.

Die deutsche Regierung ist davon unterrichtet, dass der dänische Fischereiminister eine Bekanntmachung nach § 38 Abs. 4 des dänischen Fischereigesetzes Nr. 195 vom 26. Mai 1965 erlassen hat, die die Absätze 2 und 3 des § 1 des dänischen Fischereigesetzes mit Wirkung vom 1. Juli 1967 in Kraft setzt. Hier ist bekannt, dass nach Absatz 7 des § 1 des dänischen Fischereigesetzes Sonderregelungen mit fremden Staaten getroffen werden können, die diese weiterhin in bestimmten Gebieten der erweiterten dänischen Fischereizone (12 sm) zur Ausübung des Fischfangs berechtigen.

Die Bundesrepublik Deutschland und Dänemark gehören zu den Unterzeichnerstaaten des Londoner Fischereiübereinkommens am 9. März 1964. Beide Staaten haben auch das Protokoll über die vorläufige Anwendung des Übereinkommens unterzeichnet. Für die Bundesrepublik Deutschland ist zwar zur Zeit das Übereinkommen noch nicht in Kraft getreten, mit der Hinterlegung der deutschen Ratifikationsurkunde kann aber noch im Laufe dieses Sommers, evtl. noch *vor* dem 1. Juli 1967 gerechnet werden. Die Verzögerung des Zustimmungsverfahrens ist nur aus rein technischen Gründen eingetreten.

Die Bundesrepublik Deutschland betrachtet sich schon heute an die Bestimmungen des Londoner Fischereiübereinkommens vom 9.3.1964 gebunden. Aus diesem Grunde hat sie auch keine Einwendungen gegen die Schaffung des in dem Fischereiübereinkommen näher bezeichneten Fischereiregimes durch Dänemark erhoben (§ 1 des dänischen Fischereigesetzes). Die deutsche Regierung rechnet andererseits damit, dass die dänische Regierung bereits bei der Vorbereitung der einschlägigen Durchführungsverordnungen die deutschen historischen Fischereirechte vor der dänischen Nordseeküste, deren Gewährleistung die Konvention vorsieht, gebührend berücksichtigen wird.

Kopenhagen, den 16. März 1967.

Annex 3 A

(Translation)

P.M.

The Government of the Federal Republic of Germany has been notified that the Danish Minister of Fisheries has issued a Decree in pursuance of Clause 38, paragraph 4, of the Danish Fisheries Act (No. 195 of 26 May 1965) under which paragraphs 2 and 3 of Clause 1 of the Danish Fisheries Act shall take force as from 1 July 1967. The Federal Government is aware that in pursuance of Clause 1, paragraph 7, of the Danish Fisheries Act, special agreements may be concluded with foreign States permitting their continued fishing in certain areas within the extended Danish fishing zone (12 nautical miles).

The Federal Republic of Germany and Denmark are among the signatories to the European Fisheries Convention of 9 March 1964. Both States have also signed the Protocol concerning the provisional application of the Convention. Although the Convention is not, as yet, in force towards the Federal Republic of Germany, it is expected that the Federal Republic's instrument of ratification will be deposited during this summer, possibly before 1 July 1967. The delay in the ratification procedure is due to purely technical reasons.

Already today, the Federal Republic of Germany considers herself bound by the provisions of the European Fisheries Convention of 9 March 1964. In consequence hereof the Federal Republic of Germany has raised no objections to the introduction by Denmark of the fishing regime as defined in the Fisheries Convention (the Danish Fisheries Act, Clause 1). On the other hand, the Government of the Federal Republic expects that already when drawing up orders of implementation, the Danish Government will duly consider the historical fishing rights of the Federal Republic off the Danish North Sea coast in respect of which the Convention foresees guarantees.

Copenhagen, 16 March 1967.

Annex 4

NOTE FROM THE PRESIDENT OF THE BELGIAN DELEGATION FOR THE DELIMITATION OF THE CONTINENTAL SHELF BETWEEN BELGIUM AND THE NETHERLANDS TO THE PRESIDENT OF THE NETHERLANDS DELEGATION
DATED 8 DECEMBER 1967

Bruxelles, le 8 décembre 1967

Monsieur le Président,

J'ai l'honneur d'accuser la réception de la lettre par laquelle vous me demandez s'il y a objection à ce que le Gouvernement néerlandais communique à la Cour internationale de Justice la position prise en matière de délimitation du plateau continental entre la Belgique et les Pays-Bas.

Il n'y a aucune objection à ce que vous fassiez connaître à cette éminente institution que le Gouvernement belge a déposé devant les Chambres législatives un projet de loi comportant notamment un article 2, § 2 conçu dans les termes suivants:

> "La délimitation du plateau continental vis-à-vis des pays dont les côtes sont adjacentes aux côtes belges, c'est-à-dire la France et les Pays-Bas, est déterminée par application du principe de la ligne médiane dont tous les points sont équidistants des points les plus proches des lignes de base à partir desquelles est mesurée la largeur de la mer territoriale de chacune des puissances intéressées. Cette délimitation peut être aménagée par un accord particulier avec la Puissance intéressée."

Ce projet de loi n'a pas encore reçu l'approbation du Parlement. Toutefois des négociations ont déjà eu lieu entre la Belgique et les Pays-Bas et ont abouti à un accord de principe, qui ne pourra être signé que lorsque le Parlement aura approuvé la loi qui affirme le principe des droits de la Belgique et permet la conclusion d'un accord particulier.

Cet accord, non encore signé, porte sur la délimitation concrète du plateau continental. Conformément aux dispositions contenues dans le projet de loi belge, il affirme le principe de la ligne médiane dont tous les points sont équidistants des points les plus proches des lignes de base à partir desquelles est mesurée la largeur de la mer territoriale des deux pays.

Sur cette base, l'accord consacrera que la délimitation sera tracée par les arcs de grand cercle entre les points suivants:

1) 51° 48′ 18″ N	2° 28′ 54″ O
2) 51° 39′ 41″	2° 45′ 40″

A Monsieur le Professeur Riphagen,
Président de la délégation néerlandaise
pour la délimitation du plateau
continental entre la Belgique et
les Pays-Bas.

3) 51° 37′ 55″	2° 49′ 09″
4) 51° 34′ 36″	2° 55′ 56″
5) 51° 31′ 23″	3° 04′ 13″
6) 51° 28′ 23″	3° 12′ 08″
7) 51° 27′ 14″	3° 13′ 25″
8) 51° 24′ 40″	3° 17′ 53″

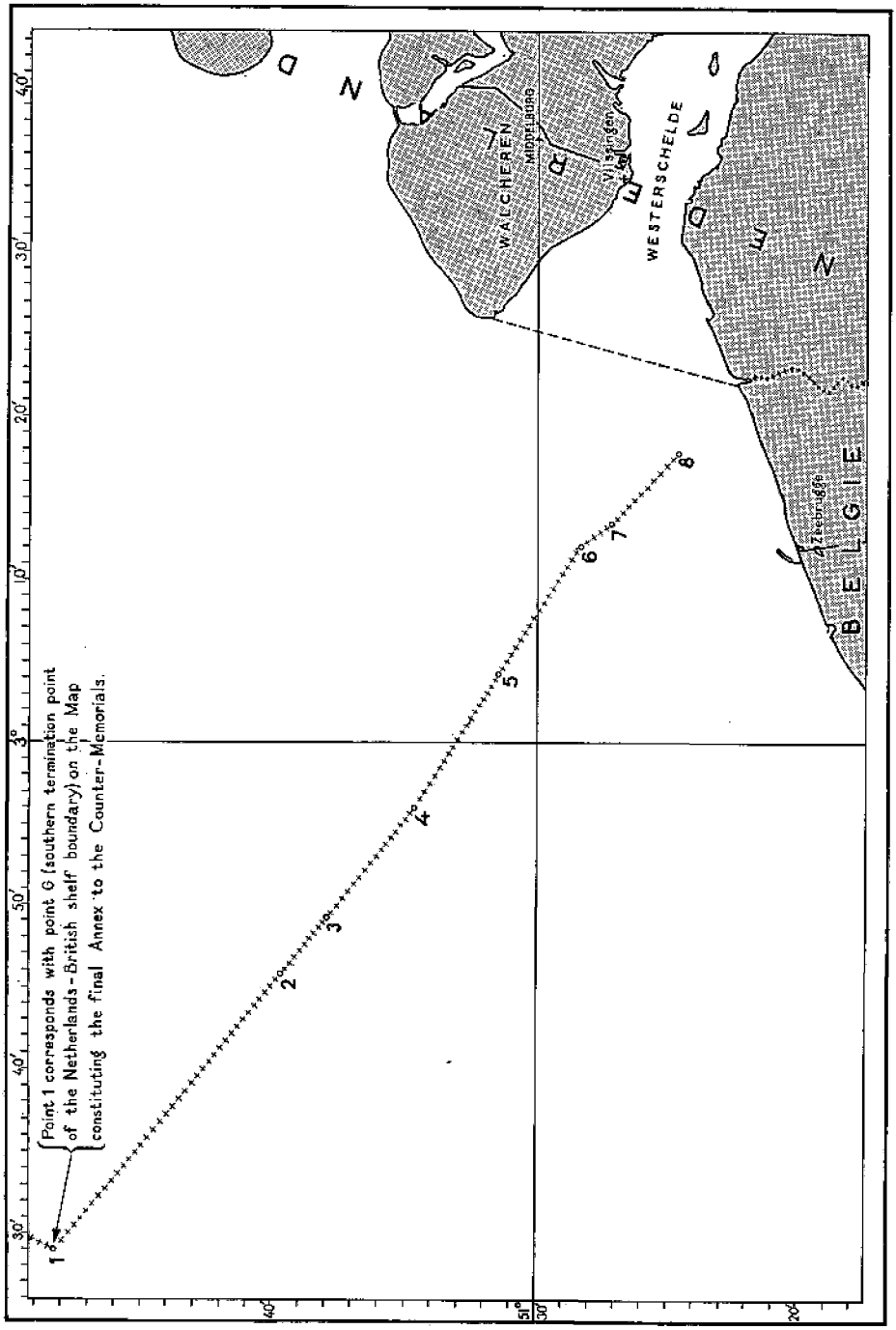
Il n'y a aucune objection à ce que votre Gouvernement fasse connaître la teneur de la présente lettre à la Cour internationale de Justice, en ajoutant que la position du Gouvernement de Bruxelles est communiquée sous réserve de l'approbation du Parlement belge.

Je vous prie d'agréer, Monsieur le Président, l'assurance de ma haute considération.

Le Président de la délégation belge,

(Signé) A. VAN DER ESSEN.

Appendix 1 to Annex 4



Annex 4 A

(Translation)

Ministry of Foreign Affairs
and Commerce.

Brussels, 8 December 1967.

Mr. President,

I have the honour to acknowledge receipt of the letter in which you asked me if there were any objections to letting the Netherlands Government communicate to the International Court of Justice the position taken regarding the delimitation of the continental shelf between Belgium and the Netherlands.

There is no objection to your letting this eminent institution know that the Government of Belgium has deposited with the legislative chambers a Bill containing, *inter alia*, an Article 2, paragraph 2, worded as follows:

> "The delimitation of the continental shelf vis-à-vis countries whose coasts are adjacent to the Belgian coasts, that is to say France and the Netherlands shall be determined by application of the principle of equidistance from the nearest points of the baselines from which the breadth of the territorial sea of each of the Powers concerned is measured. This delimitation may be adjusted by a special agreement with the Power concerned."

This Bill has not yet been passed by Parliament. Negotiations have nevertheless already taken place between Belgium and the Netherlands resulting in an agreement in principle, which cannot be signed until Parliament has passed the Bill confirming the principle of the rights of Belgium and permitting the conclusion of a specific agreement.

This agreement, as yet unsigned, concerns the actual delimitation of the continental shelf. In conformity with the provisions contained in the Belgian Bill, the agreement confirms the principle of 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 the two States is measured.

On this basis, the agreement will lay down that the line of delimitation shall be drawn by means of arcs of great circles between the following points:

(1) 51° 48′ 18″ N	2° 28′ 54″ E
(2) 51° 39′ 41″	2° 45′ 40″
(3) 51° 37′ 55″	2° 49′ 09″
(4) 51° 34′ 36″	2° 55′ 56″

Professor Riphagen,
President of the Netherlands Delegation
for the Delimitation of the Continental Shelf
between Belgium and the Netherlands.

(5) 51° 31′ 23″	3° 04′ 13″
(6) 51° 28′ 23″	3° 12′ 08″
(7) 51° 27′ 14″	3° 13′ 25″
(8) 51° 24′ 40″	3° 17′ 53″

There is no objection to letting your Government make the contents of this letter known to the International Court of Justice, at the same time adding that the position of the Government of Brussels, now communicated to you, is subject to approval by the Belgian Parliament.

Please accept, Sir, the assurance of my highest consideration.

The President of the Belgian
Delegation.

(Signed) A. VAN DER ESSEN.

Annex 5

AGREEMENT BETWEEN SWEDEN AND NORWAY CONCERNING THE DELIMITATION OF THE CONTINENTAL SHELF

Överenskommelse mellan Sverige och Norge om avgränsning av kontinentalsockeln:

Regeringen i Konungariket Sverige och regeringen i Konungariket Norge,

som beslutat att fastställa gränslinjen mellan de områden på kontinentalsockeln över vilka Sverige respektive Norge utövar suveräna rättigheter i fråga om utforskande och tillgodogöranda av naturtillgångar,

har enats om följande:

Artikel 1

Gränslinjen mellan de områden av kontinentalsockeln över vilka Sverige respektive Norge utövar suveräna rättigheter i fråga om utforskande och tillgodogörande av naturtillgångar skall i princip vara en mittlinje, som är så bestämd att varje punkt på denna befinner sig på lika stort avstånd från de närmaste punkterna på de baslinjer från vilka bredden på Sveriges respektive Norges territorialhav räknas.

Artikel 2

I överensstämmelse med den i artikel 1 bestämda principen men med vissa avvikelser för att uppnå en praktisk och ändamålsenlig sträckning av gränslinjen skall denna dragas mellan följande fem punkter:

1. Den västligaste punkten på den yttre gränsen för Sveriges sjöterritorium mot Norge. Punkten har följande koordinater:
   58° 54′ 50,2″ N, 10° 45′ 28,1″ O.
2. Den punkt där gränslinjen enligt den internationella skiljedomen den 23 oktober 1909 angående fastställandet av en del av sjögränsen mellan Sverige och Norge träffar den yttre gränsen för Norges sjöterritorium dragen på ett avstånd av en geografisk mil (7420 meter) från den norska baslinjen, sådan denna bestämts i Kgl. resolusjon av 18. juli 1952 om fiskerigrensen syd for Traena (Norsk *Lovtidend*, 1952, 2. avd., side 824 flg). Punkten har följande koordinater:
   58° 53′ 34,0″ N, 10° 38′ 25,0″ O.
3. Skäringspunkten mellan en linje dragen på ett avstånd av 12 nautiska mil från nämnda norska baslinje och en linje dragen på ett avstånd av 12 nautiska mil från den svenska baslinjen, sådan denna bestämts i Kungl. kungörelsen den 3 juni 1966 med närmare bestämmelser om beräkningen af Sveriges sjöterritorium (Svensk *författningssamling* nr 375). Punkten har följande koordinater:
   58° 45′ 41,3″ N, 10° 35′ 40,0″ O.
4. Punkten har följande koordinater:
   58° 30′ 41,2″ N, 10° 08′ 46,9″ O.
5. Punkten har följande koordinater:
   58° 15′ 41,2″ N, 10° 01′ 48,1″ O.

Positionerna för ovannämnda fem punkter har definierats i förhållande till European Datum (Första utjämning, 1950).

Gränslinjen drages mellan punkterna 1, 2 och 3 som räta linjer (kompasslinjer) och mellan punkterna 3, 4 och 5 som storcirkelbågar.

Artikel 3

Positionerna för de i artikel 2 definierade punkterna 1-5 framgår av bifogade sjökort (norskt sjökort nr 305), på vilket också inlagts den i samma artikel bestämda gränslinjen.

Artikel 4

Om naturtillgångar på havsbottnen eller i dennas underlag sträcker sig på ömse sidor om den i artikel 2 bestämda gränslinjen och de naturtillgångar som finns på den ena statens område av kontinentalsockeln helt eller delvis kan utvinnas från den andra statens område skall på endera statens begäran de båda staterna söka överenskomma om hur dessa naturtillgångar mest effektivt skall utnyttjas och hur avkastningen skall fördelas.

Artikel 5

Överenskommelsen skall ratificeras och ratifikationsinstrumenten utväxlas i Oslo.

Överenskommelsen träder i kraft den dag ratifikationsinstrumenten utväxlas.

Som skedde i Stockholm den 24. juli 1968 i två exemplar på svenska och norska språken, vilka båda texter äger lika vitsord.

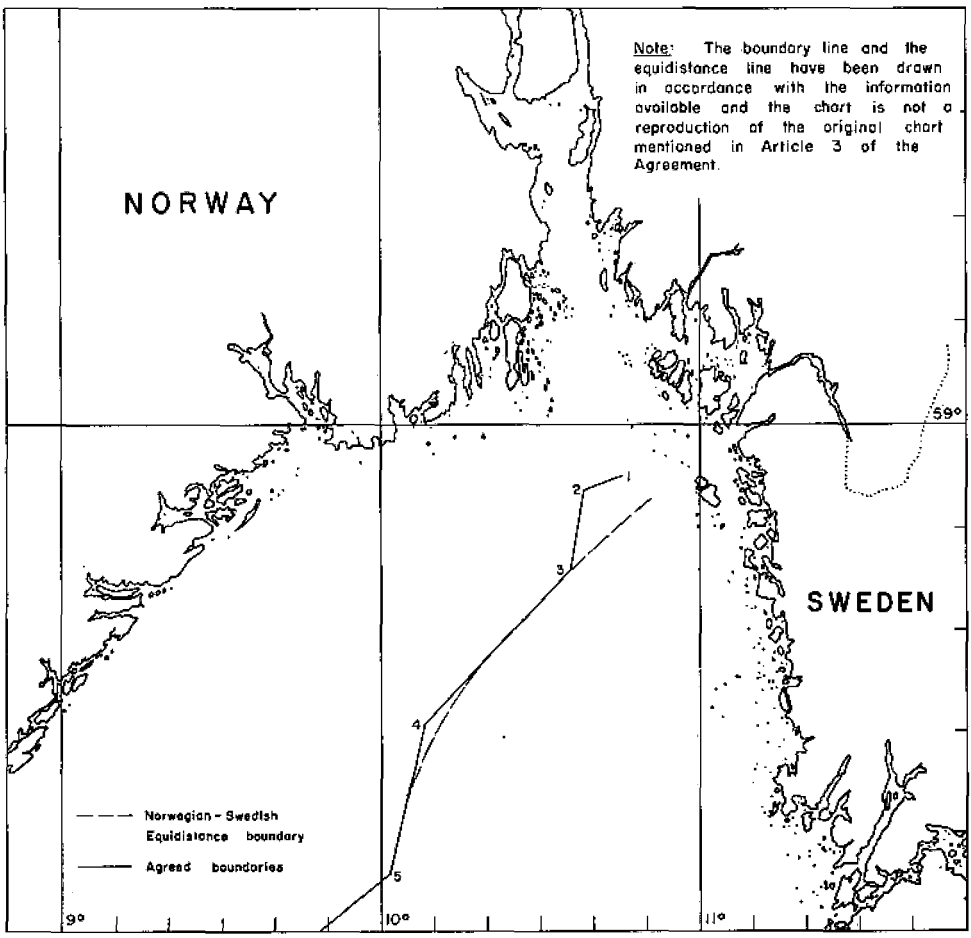
För regeringen i
Konungariket Sverige

Torsten NILSSON

För regeringen i
Konungariket Norge

Henrik BROCH

Appendix 1 to Annex 5



Annex 5 A

(Translation)

The Government of the Kingdom of Sweden and the Government of the Kingdom of Norway:

Desiring to establish their common boundary between the areas of the continental shelf over which the Kingdom of Sweden and the Kingdom of Norway respectively exercise sovereign rights for the purpose of exploration and exploitation of the natural resources:

Have agreed as follows:

Article 1

The boundary line between that part of the continental shelf over which Sweden and that part over which Norway respectively exercise sovereign rights for the purpose of exploration and exploitation of the natural resources shall in principle be a line which at every point is equidistant from the nearest points of the baselines from which the territorial sea of Sweden and Norway is measured.

Article 2

In conformity with the principle set forth in Article 1, the boundary line shall, with certain minor divergencies for practical purposes be a line drawn through the following five points:

1. The westernmost point of the outer boundary of the sea territory of Sweden towards Norway. This point has the following co-ordinates:
   58° 54′ 50,2″ N, 10° 45′ 28,1″ E.
2. The point of intersection between the boundary line in conformity with the Award of 23 October 1909 concerning the delimitation of part of the sea boundary between Sweden and Norway and the outer boundary of the sea territory of Norway drawn at a distance of one geographical mile (7420 metres) from the Norwegian baseline as laid down in Royal Resolution of 18 July 1952 on the fishery zone boundary south of Traena (Norsk *Lovtidend,* 1952, Part 2, pp. 824 *et seq*). The co-ordinates are:
   58° 53′ 34,0″ N, 10° 38′ 25,0″ E.
3. The point of intersection between a line drawn at a distance of 12 nautical miles from the aforementioned Norwegian baseline and a line drawn at a distance of 12 nautical miles from the Swedish baseline as laid down in Royal Proclamation of 3 June 1966 relating to the delimitation of the sea territory of Sweden (Svensk *Författningssamling* No. 375). This point has the following co-ordinates:
   58° 45′ 41,3″ N, 10° 35′ 40,0″ E.
4. This point has the following co-ordinates:
   58° 30′ 41,2″ N, 10° 08′ 46,9″ E.
5. This point has the following co-ordinates:
   58° 15′ 41,2″ N, 10° 01′ 48,1″ E.

The positions of the five above-mentioned points are defined by latitude and longitude on European Datum (1st Adjustment 1950).

The boundary line between points 1, 2 and 3 shall be drawn as straight lines (compass lines) and between points 3, 4 and 5 as arcs of great circles.

Article 3

The positions of points 1-5 as defined in Article 2 and the boundary line have been drawn on the chart annexed to this Agreement (Norwegian Chart No. 305).

Article 4

If natural resources on the seabed or in its subsoil extend across the boundary line as defined in Article 2 and natural resources situated in the area of one State are exploitable, wholly or in part, from the area of the other State, the States shall, at the request of either State, seek to reach agreement as to how these natural resources shall be most effectively exploited and how the proceeds deriving therefrom shall be apportioned.

Article 5

This Agreement shall be ratified. Instruments of ratification shall be exchanged at Oslo as soon as possible.

The Agreement shall enter into force on the date of the exchange of instruments of ratification.

Done in duplicate at Stockholm the 24th of July 1968 in the Swedish and Norwegian languages, both texts being equally authoritative.

For the Government of the Kingdom of Sweden

(Signed) Torsten NILSSON.

For the Government of the Kingdom of Norway

(Signed) Henrik BROCH.

Annex 6

DECREE BY THE PRESIDIUM OF THE U.S.S.R. HIGHEST SOVIET ON
THE CONTINENTAL SHELF OF THE U.S.S.R.
(6 Februari 1968)

УКАЗ ПРЕЗИДИУМА ВЕРХОВНОГО СОВЕТА СССР

О континентальном шельфе Союза ССР

Президиум Верховного Совета СССР **постановляет:**

1. СССР осуществляет суверенные права над континентальным шельфом, примыкающим к внешней границе территориального моря СССР, в целях разведки и разработки его естественных богатств.

Континентальным шельфом СССР являются поверхность и недра морского дна подводных районов, примыкающих к побережью или к островам СССР, но находящихся вне зоны территориального моря, до глубины 200 метров или, за этим пределом, до такого места, до которого глубина покрывающих вод позволяет разработку естественных богатств этих районов.

Поверхность и недра морского дна впадин, расположенных в сплошном массиве континентального шельфа СССР, независимо от их глубины, являются частью континентального шельфа СССР.

2. Граница континентального шельфа СССР в тех случаях, когда он примыкает к шельфам других государств, определяется соглашениями с этими государствами. При отсутствии таких соглашений и если иная линия границы не оправдывается особыми обстоятельствами:

а) границей континентального шельфа СССР с государством, берега которого расположены против берегов СССР, служит срединная линия, каждая точка которой равно отстоит от ближайших точек тех исходных линий, от которых отмеряется ширина территориального моря СССР и соответствующего государства;

б) граница континентального шельфа СССР с государством, шельф которого является смежным, определяется по принципу равного отстояния от ближайших точек тех исходных линий, от которых отмеряется ширина территориального моря СССР и соответствующего государства.

3. Естественные богатства континентального шельфа являются государственной собственностью СССР. Разведка и разработка этих богатств, а также любые исследования на континентальном шельфе осуществляются на основе действующего законодательства Союза ССР и союзных республик.

Под естественными богатствами континентального шельфа понимаются минеральные и прочие неживые ресурсы поверхности и недр морского дна, а также живые организмы «сидячих» видов, т. е. организмы, которые в надлежащий, с промысловой точки зрения, период своего развития либо прикреплены к морскому дну или под ним, либо могут передвигаться только по морскому дну или в его недрах. Перечень видов живых организмов, являющихся естественными богатствами континентального шельфа СССР, утверждается Министерством рыбного хозяйства СССР и опубликовывается для всеобщего сведения.

. . . . . .

Председатель Президиума Верховного Совета СССР Н. ПОДГОРНЫЙ.
Секретарь Президиума Верховного Совета СССР М. ГЕОРГАДЗЕ.

Москва, Кремль, 6 февраля 1968 г.
№ 2338–VII.

Annex 6 A

(Translation)

The Presidium of the Highest Soviet of the U.S.S.R. decrees:

1. The U.S.S.R. shall exercise sovereign rights over the continental shelf adjacent to the outward boundary of the territorial sea of the U.S.S.R. for the purposes of exploring and exploiting its natural resources.

The continental shelf of the U.S.S.R. shall be the seabed and subsoil of the submarine areas adjacent to the coast or to islands of the U.S.S.R., but outside the area of the territorial sea, 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 these areas.

The seabed and subsoil of depressions situated in the continuous mass of the continental shelf of the U.S.S.R., irrespective of their depth, shall be part of the continental shelf of the U.S.S.R.

2. In those instances when it is adjacent to the shelf of other States the boundary of the continental shelf of the U.S.S.R. shall be determined by agreements with those States. In the absence of such agreements and unless a different boundary line is justified by special circumstances:

(a) the median line, every point of which is equidistant from the nearest points of the baselines from which the breadth of the territorial sea is measured, shall serve as the boundary of the continental shelf of the U.S.S.R. with States whose coasts are opposite the coasts of the U.S.S.R.;

(b) the boundary of the continental shelf of the U.S.S.R. with a State whose shelf is adjacent shall be determined by application of the principle of equidistance from the nearest points of those baselines from which the breadth of the territorial sea of the U.S.S.R. and the corresponding State is measured.

3. The natural resources of the continental shelf shall be in the State ownership of the U.S.S.R. Exploration and exploitation of these resources, as well as any research on the continental shelf, shall be carried out on the basis of prevailing legislation of the U.S.S.R. and union republics.

The natural resources of the continental shelf consist of mineral and other non-living resources of the seabed and subsoil, as well as living organisms belonging to sedentary species, that is, organisms which, at the harvestable stage, either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil. A list of species of living organisms which are natural resources of the continental shelf of the

U.S.S.R. shall be approved by the Ministry of Fisheries of the U.S.S.R. and shall be published for general information.

. . . . . .

Chairman of the Presidium of the
Highest Soviet of the U.S.S.R.
N. PODGORNYI.

Secretary of the Presidium of the
Highest Soviet of the U.S.S.R.
M. GEORGADZE.

Moscow, the Kremlin, 6 February 1968.

(Source: *Vedomosti verkhovnogo soveta S.S.S.R.* (Gazette of the Highest Soviet of the U.S.S.R.), No. 6, item 40 (1968)).

Annex 7

ITALY-YUGOSLAVIA: AGREEMENT ON DELIMITATION OF THE CONTINENTAL SHELF*
[Done at Rome, January 8, 1968]

AGREEMENT

BETWEEN ITALY AND YUGOSLAVIA CONCERNING THE DELIMITATION OF THE CONTINENTAL SHELF BETWEEN THE TWO COUNTRIES

The Government of the Italian Republic and the Government of the Socialist Federal Republic of Yugoslavia,

Desiring to establish the line of delimitation between their respective parts of the continental shelf,

Have agreed as follows:

Article 1

The line of delimitation of the continental shelf between the Contracting Parties is established by circular arcs between certain points, defined by latitude and longitude, which are listed in the final paragraph of this Article.

These coordinates have been plotted on Italian nautical chart number I.I.170, scale 1 : 750,000 (issued February 1964), updated through issue No. 20 (1966) of the "Avviso ai Naviganti," [Notice to Mariners] and on Yugoslav nautical charts, issued by the Hydrographic Institute of the Yugoslav Ratna Mornarica, scale 1 : 750,000, number 101 (issued February 1963) and number 102 (issued December 1952), both updated through June 1966.

The points and the line of delimitation have been drawn on maps identical to those cited above, copies of which are attached to the present Agreement.

The Contracting Parties agree that, for the present, the delimitation will not extend beyond point 43.

The coordinates referred to in paragraph 1 of this Article are as follows:

Points	*Italian coordinates on chart number 170*	*Yugoslav coordinates on chart number 101*
01	45° 27′ .2 N 13° 12′ .7 E	45° 27′ .2 N 13° 12′ .9 E
02	45° 25′ .9 13° 11′ .4	45° 25′ .5 13° 11′ .1
03	45° 20′ .1 13° 06′ .1	45° 20′ .1 13° 06′ .0
04	45° 16′ .8 13° 03′ .8	45° 16′ .8 13° 03′ .8
05	45° 12′ .3 13° 01′ .2	45° 12′ .3 13° 01′ .1

*Translated by the Editors of *International Legal Materials* from the Italian text provided by the Italian Embassy in Washington, D.C.

As of April 30, 1968, the agreement had not yet entered into force.

Points	*Italian coordinates on chart number 170*	*Yugoslav coordinates on chart number 101*
06	45° 11′ .1 13° 00′ .5	45° 11′ .0 13° 00′ .1
07	44° 58′ .5 13° 04′ .7	44° 58′ .4 13° 04′ .3
08	44° 46′ .1 13° 06′ .4	44° 46′ .3 13° 06′ .1
09	44° 44′ .3 13° 06′ .8	44° 44′ .1 13° 06′ .6
10	44° 30′ .0 13° 08′ .1	44° 30′ .3 13° 07′ .7
11	44° 28′ .6 13° 11′ .0	44° 28′ .5 13° 10′ .7
12	44° 27′ .9 13° 11′ .7	44° 28′ .1 13° 11′ .7
13	44° 17′ .8 13° 28′ .3	44° 17′ .7 13° 27′ .8
14	44° 12′ .5 13° 37′ .9	44° 12′ .7 13° 38′ .1
15	44° 10′ .8 13° 40′ .0	44° 10′ .7 13° 40′ .3
16	44° 00′ .5 14° 00′ .9	44° 00′ .7 14° 01′ .2
17	43° 57′ .5 14° 05′ .0	43° 57′ .7 14° 04′ .9
18	43° 54′ .0 14° 10′ .3	43° 54′ .3 14° 10′ .2
19	43° 43′ .0 14° 21′ .4	43° 43′ .0 14° 21′ .4
20	43° 40′ .3 14° 23′ .5	43° 40′ .2 14° 23′ .8
21	43° 38′ .4 14° 24′ .5	43° 38′ .6 14° 24′ .9
22	43° 36′ .0 14° 26′ .4	43° 35′ .9 14° 26′ .4
23	43° 31′ .6 14° 30′ .4	43° 32′ .2 14° 30′ .1
24	43° 29′ .7 14° 32′ .0	43° 30′ .1 14° 31′ .9
25	43° 25′ .2 14° 34′ .9	43° 25′ .4 14° 35′ .6
26	43° 13′ .0 14° 46′ .0	43° 12′ .7 14° 46′ .3
27	43° 10′ .6 14° 47′ .9	43° 10′ .3 14° 48′ .1

Points	*Italian coordinates on chart number 170*	*Yugoslav coordinates on chart number 101*
28	43° 03′ .8 14° 54′ .5	43° 03′ .7 14° 55′ .1
29	43° 00′ .8 14° 57′ .9	43° 00′ .9 14° 58′ .0
30	42° 59′ .2 15° 00′ .7	42° 59′ .3 15° 00′ .8
31	42° 47′ .9 15° 09′ .5	42° 47′ .7 15° 09′ .7
32	42° 36′ .8 15° 21′ .8	42° 36′ .7 15° 22′ .0
33	42° 29′ .5 15° 44′ .8	42° 29′ .6 15° 45′ .0
34	It is located 12 miles from the lighthouse on the Island of Pelagosa on a 103° bearing of said lighthouse (true bearing taken at sea). The line of delimitation from point 34 to point 35 follows the circle of a 12-mile radius from the lighthouse on the Island of Pelagosa.	
35	It is located 12 miles from the lighthouse on the Island of Pelagosa on a straight line running from the lighthouse on the Island of Pelagosa to the lighthouse of Vieste. The line of delimitation from point 35 to point 36 follows the circle of a 12-mile radius from the Island of Caiola.	
36	It is located 12 miles from the Island of Caiola on a straight line running from the Island of Pelagosa to point 37.	
37	42° 16′ .0 16° 37′ .1	42° 15′ .9 16° 37′ .3
38	42° 07′ .0 16° 56′ .8	42° 07′ .0 16° 56′ .7
39	41° 59′ .5 17° 13′ .0	41° 59′ .4 17° 13′ .1
40	41° 54′ .8 17° 18′ .7	41° 54′ .6 N.B. These coordinates also 17° 19′ .0 appear on chart number 102.
41	41° 50′ .2 17° 37′ .0	41° 49′ .9 17° 37′ .4
42	41° 38′ .5 18° 00′ .0	41° 38′ .1 18° 00′ .0
43	41° 30′ .0 18° 13′ .0	41° 30′ .0 18° 12′ .9

Article 2

In the event that natural resources of the seabed or beneath the seabed extend from the line of delimitation to both sides of the continental shelf, so that the resources on the continental shelf of one of the Contracting Parties can, in all or in part, be exploited from the continental shelf belonging to the other Con-

tracting Party, the competent Authorities of the Contracting Parties will meet with the intent of reaching an agreement to determine the manner in which said resources will be exploited, after having first consulted with the holders of any concessions in that area.

Article 3

If a dispute arises over the position of any installation or equipment in reference to the line of delimitation defined in Article 1 of this Agreement, the competent Authorities of the Contracting Parties shall determine, by mutual consent, in which part of the continental shelf such installations or equipment are located.

Article 4

The present Agreement does not affect the juridical status of the seas and air space above the continental shelf.

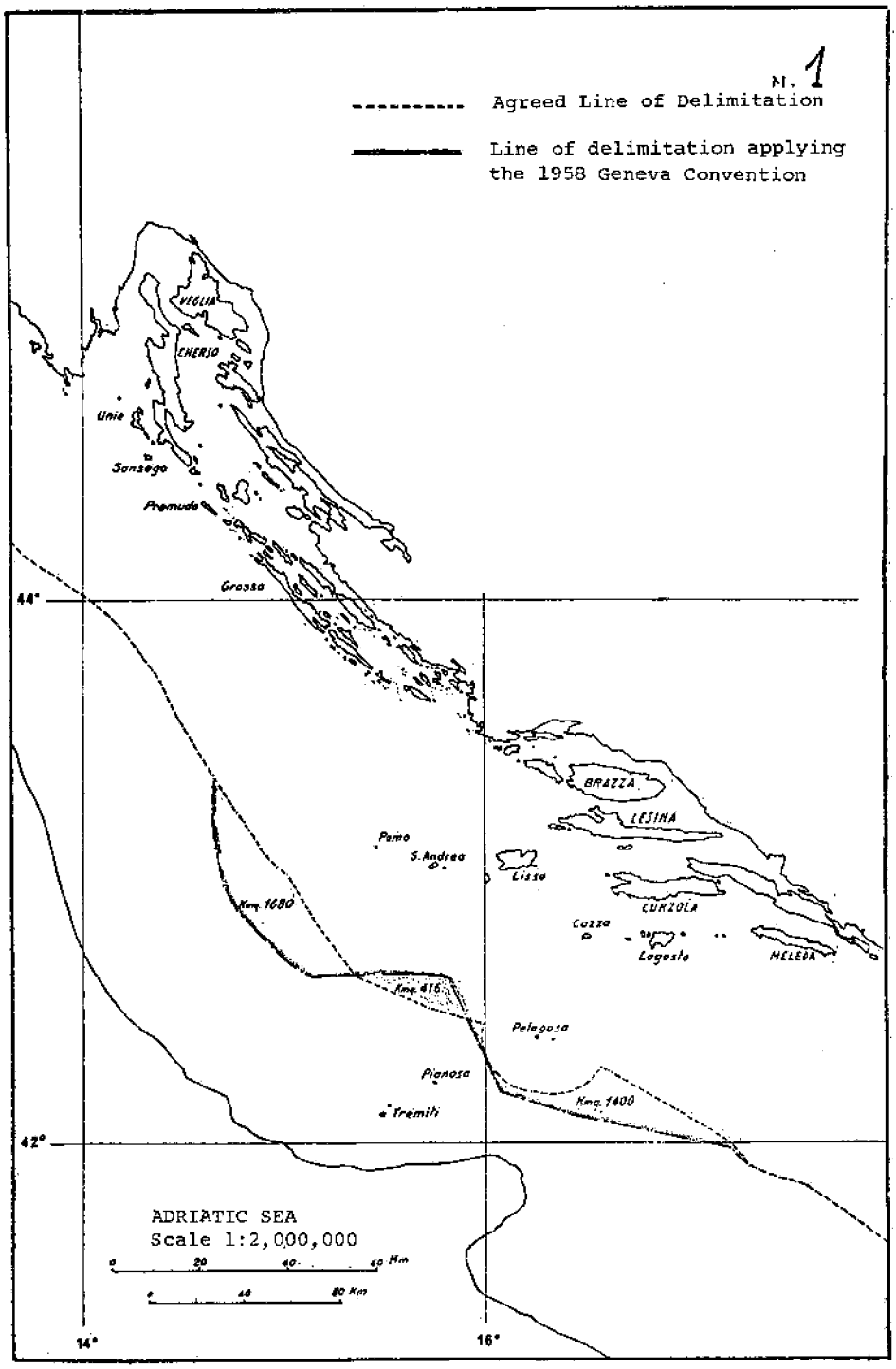
Article 5

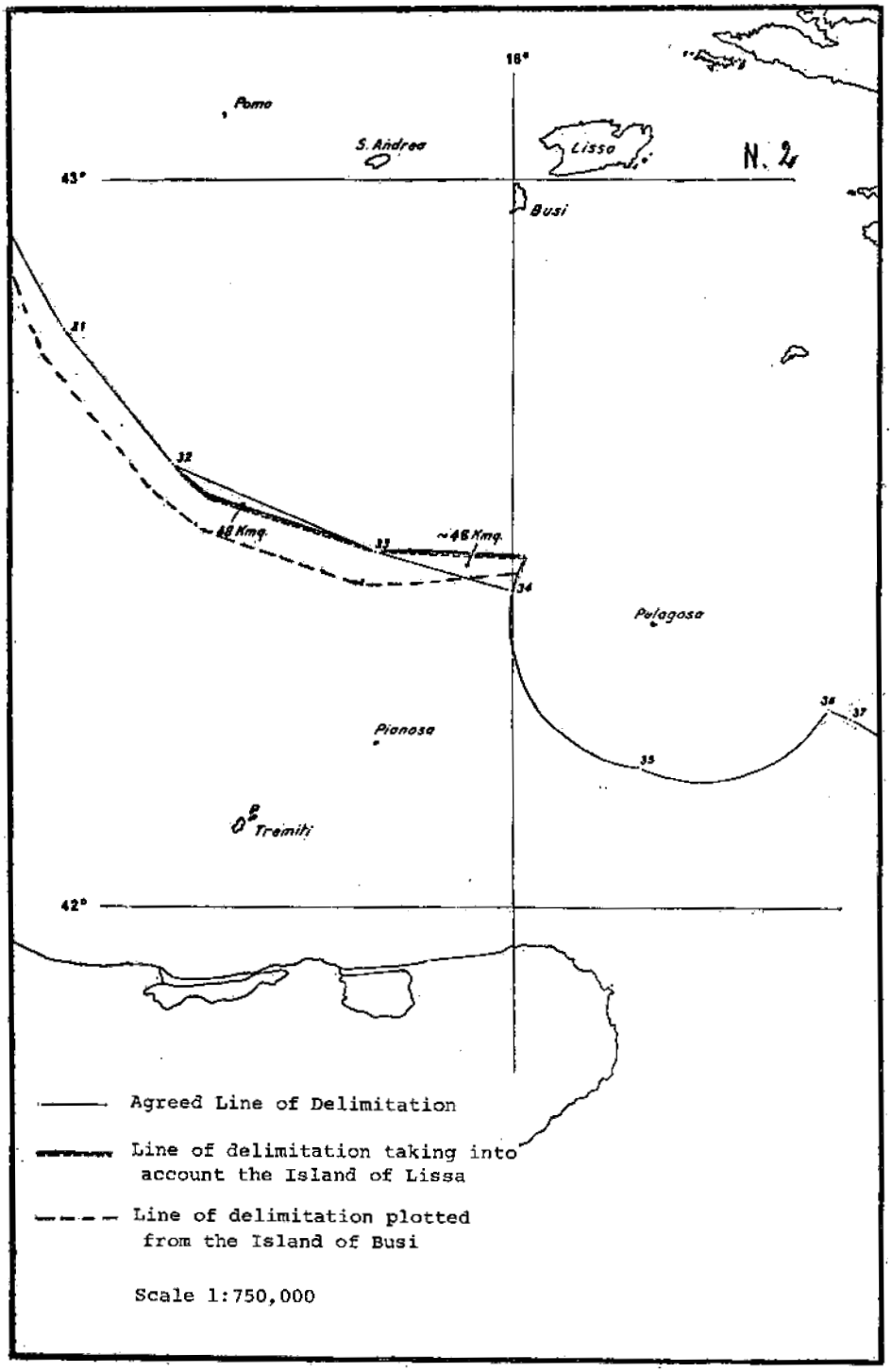
The present Agreement shall be ratified according to the constitutional processes of the Contracting Parties and shall enter into force on the date of the exchange of instruments of ratification, which will take place in Belgrade as soon as possible.

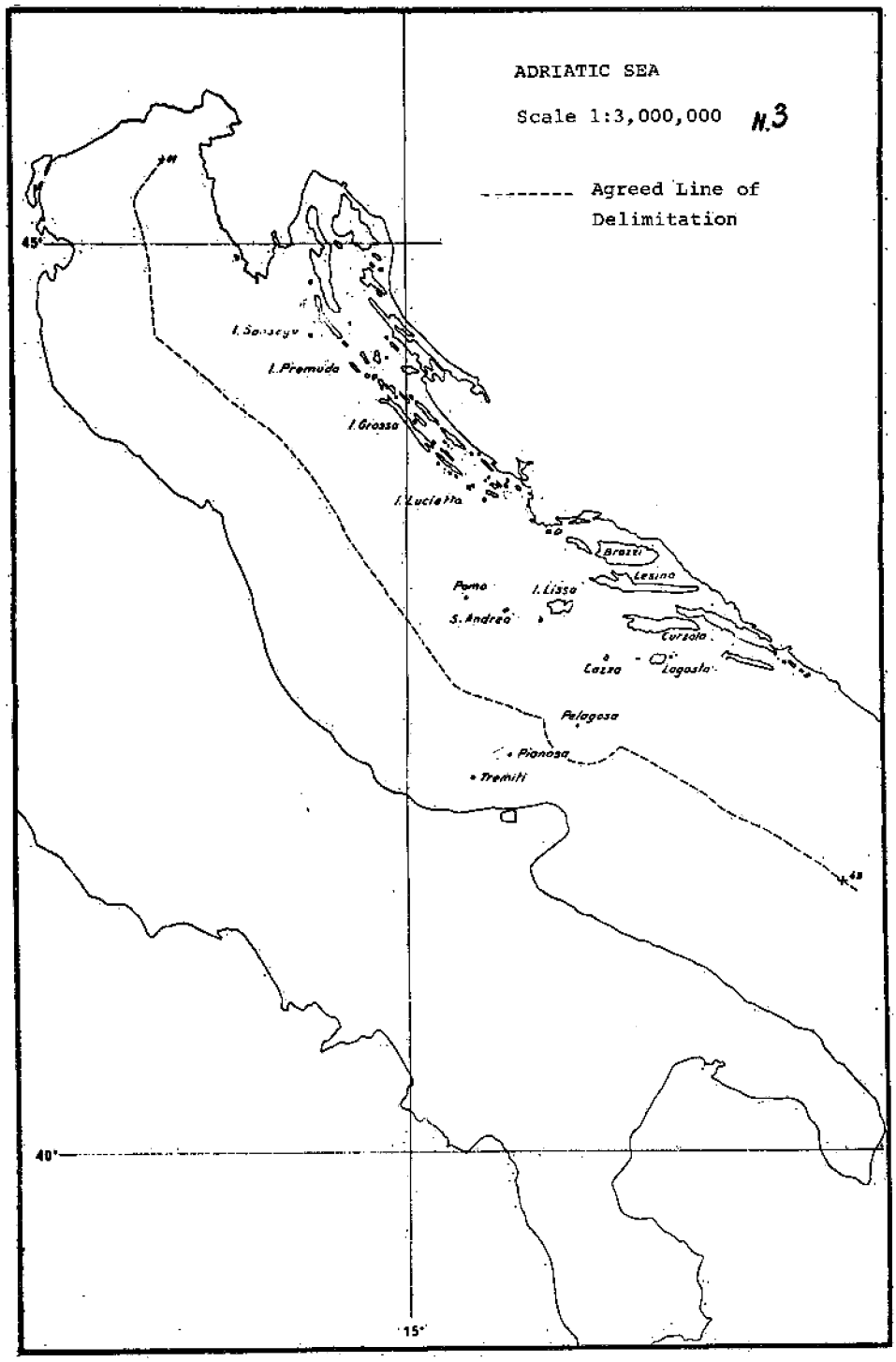
Done in Rome, January 8, 1968, in two copies, each in Italian and Serbo-Croation, both texts being equally authentic.

For the Government of the
Italian Republic
(FANFANI)

For the Government of the
Socialist Federal Republic of Yugoslavia
(NIKEZIĆ)


N. 1
Agreed Line of Delimitation
Line of delimitation applying the 1958 Geneva Convention
VEGLIA
CHERSO
Unie
Sansego
Premuda
Grossa
44°
BRAZZA
LESINA
Pomo
S. Andrea
Lissa
CURZOLA
Cazza
Lagosta
MELEDA
Kmq. 1680
Kmq. 415
Pelagosa
Pianosa
Tremiti
Kmq. 1400
42°
ADRIATIC SEA
Scale 1:2,000,000
0 20 40 60 Km
0 40 80 Km
14°
16°


16°
Pomo
S. Andrea
Lisso
N. 24
43°
Busi
31
32
~48 Kmq.
33
~46 Kmq.
34
Pelagosa
36
37
35
Pianosa
Tremiti
42°
Agreed Line of Delimitation
Line of delimitation taking into account the Island of Lissa
Line of delimitation plotted from the Island of Busi
Scale 1:750,000


ADRIATIC SEA
Scale 1:3,000,000
N.3
Agreed Line of Delimitation
45°
I. Premuda
I. Grossa
I. Lucietta
Grossi
Lesina
I. Lissa
Pomo
S. Andrea
Cursola
Lagosta
Pelagosa
Pianosa
Tremiti
40°
15°

Annex 8

THE COMMONWEALTH OF AUSTRALIA

Under point 14 of the Annex to the Reply (pp. 440-449, *supra*) the Federal Republic reproduced the full text of the Second Schedule to the Australian Petroleum (Submerged Lands) Act 1967. The said Schedule delimits certain areas of the Australian territorial waters and of superjacent waters of the Australian continental shelf (taking these two categories of waters together) and specifies each of these areas to be administered by a particular State or Territory of the Commonwealth.

Apparently the Federal Republic attaches much importance to the delimitation of these areas. It gives, on a full eight pages of the Reply, an impressive list of geographical points, defined by co-ordinates, and without adducing any reasoning or illustration jumps to the twofold conclusion:

(a) that the delimitation of the areas, as between individual Australian States the individual States of a federation" (Reply, p. 440, *supra*; italics added); and

(b) that the boundary lines "differ largely from equidistance" *(ibid)*.

Denmark and the Netherlands draw attention, in the following paragraphs, to different aspects of the "example" adduced by the Reply. The map reproduced as figure C on page 499, *supra*, together with some other maps, giving details of separate areas, had been prepared by the Division of National Mapping of the Commonwealth Ministry for National Development and belonged to the material made available to Parliament for the occasion of the second reading of the Petroleum (Submerged Lands) Bill.

A. Internal Delimitations

Firstly attention has to be paid to the alleged example only in so far as the Schedule to the Australian Act fixes *internal* boundaries, i.e., boundaries *between* maritime areas alloted to *the component parts* of the Australian Commonwealth.

It has to be remarked that the relations between the States members of the Commonwealth of Australia, or the relations between such a member State and the Commonwealth, are not governed by international law. These relations are governed by the constitutional law of the Australian Commonwealth. Consequently, the determination of maritime boundaries between the Australian States and Territories, specified by the Petroleum (Submerged Lands) Act 1967, cannot be held up as an "example" of the application of international law, whatever general interest it may have with regard to the matter in question.

This conclusion is clearly illustrated by the fact that, also in the opinion of the Australian Government, under international law not the member States or Territories but only the Commonwealth has a "continental shelf" in the legal sense of the word, i.e., certain "sovereign rights" over the seabed and subsoil of submarine areas adjacent to its coasts. Already the Proclamation by the Governor-General concerning the continental shelf dated 11 September 1953 (text in United Nations *Legislative Series*, doc. ST/LEG/SER.B/8, p. 3) declared:

"that Australia has sovereign rights over the seabed and sub-soil of:

(a) the continental shelf contiguous to any part of its coasts; and

(b) the continental shelf contiguous to any part of the coasts of territories under its authority . . ."

The Petroleum (Submerged Lands) Act 1967, too, confirms that under international law it is the Australian Commonwealth in which the "sovereign rights" are vested. The Preamble to the Act starts with the statement:

> "WHEREAS in accordance with international law Australia as a coastal state has sovereign rights over the continental shelf beyond the limits of Australian territorial waters for the purpose of exploring it and exploiting its natural resources."

Further, two of the definitions contained in subsection (1) of section 5 of the Act are of importance in this context:

> "5 (1). In this Act, unless the contrary intention appears—
>
> . . . . . .
>
> 'the continental shelf' means the continental shelf, within the meaning of the Convention, adjacent to the coast of Australia or of a Territory not forming part of the Commonwealth;
>
> 'the Convention' means the Convention entitled 'Convention on the Continental Shelf' signed at Geneva on the twenty-ninth day of April, One thousand nine hundred and fifty-eight, being the Convention a copy of which in the English language is set out in the First Schedule to this Act;
>
> . . . . . ."

The position, resulting from the Act, of the States and Territories in relation to the areas allotted to them by the Act, can best be described with the words used by the Australian Minister for National Development on 18 October 1967, when introducing the Petroleum (Submerged Lands) Bill in second reading to the Commonwealth Parliament (p. 1944 of the *Australian Hansard*):

> "the areas over which the respective States and Territories will have administrative jurisdiction".

When delimiting internal boundaries in water areas, i.e., when fixing the boundaries between water areas pertaining to the individual municipalities, provinces, counties or member States within one State, a predominant role is played by a factor wholly absent in the process of an international delimitation. This factor is the central Government of that State. Apart from the possibility that the central Government imposes its will on the component parts of the State, this central Government may have an interest—and not least a fiscal interest—of its own in the areas to be delimited. There are, so to speak, not two interested parties to a bilateral internal delimitation, but three.

Nevertheless some remarks in respect of the Australian internal shelf delimitation may be added.

As to the internal Australian shelf boundaries, in some if not all cases historical reasons have influenced the delimitation. For instance, the shelf boundary between Western Australia and South Australia, following the *meridian of Longitude 129° East* southerly to its intersection by the parallel of Latitude 44° South, clearly shows a confirmation (for approximately 175 sea-miles) and further prolongation of what might be called a "historic boundary". The boundaries of the former Colony of Western Australia and its Dependencies have been determined by Letters Patent, dated 29 October 1900, passed under the Great Seal of the United Kingdom:

"And further know ye that We do by these presents constitute, order, and declare that there shall be a Governor in and over Our State of Western Australia and its Dependencies, extending from the parallel of thirteen degrees thirty minutes south latitude, to West Cape Howe in the parallel of thirty-five degrees eight minutes south latitude, and from the Hartogs Island, on the Western Coast, in longitude one hundred and twelve degrees fifty-two minutes to *one hundred and twenty-nine degrees of east longitude*, reckoning from the meridian of Greenwich, including all the islands adjacent in the Indian and Southern Oceans within the latitudes aforesaid of thirteen degrees thirty minutes south, and thirty-five degrees eight minutes south, and within the longitudes aforesaid of one hundred and twelve degrees fifty-two minutes, and *one hundred and twenty-nine degrees east* from the said meridian of Greenwich . . ." (Italics added.)

B. Delimitations towards West Irian and the Aru Islands

The only parts of the continental shelf, i.e., of the seabed to a depth of not more than 200 metres, contiguous to the coasts of Australia or of an Australian-administered Territory, that are also contiguous to the coasts of another State, are to be found where the shelf extends to the coasts of Indonesian-administered West Irian and the Indonesian Aru Islands. By the above-mentioned Petroleum (Submerged Lands) Act 1967 the Government of Australia has, unilaterally, also defined the boundaries on these parts of the shelf. When doing so the Government made express reference to the applicable rules of international law. In addition to the passages quoted above, reference may be made to the second preambular paragraph of the Act:

"AND WHEREAS Australia is a party to the Convention on the Continental Shelf signed at Geneva on the twenty-ninth day of April, One thousand nine hundred and fifty-eight, in which those rights are defined."

The areas of the continental shelf adjacent to Australia that are contiguous to the coasts of West Irian and the Aru Islands are, in the order of succession of the boundary descriptions in the Second Schedule to the Act, the areas bordering on:

1. the State of Queensland,
2. the Northern Territory of Australia,
3. the Territory of Papua, and
4. the Territory of New Guinea.

Apart from the indications, quoted above, that the Australian Act has been based upon the rules of the Geneva Convention, the Act itself does not specify the method of delimitation followed in these four cases. Nevertheless the conclusion can be drawn, that in all four cases *the equidistance principle has been applied.* Denmark and the Netherlands do not base this conclusion only on a study of the charts showing the lines between the relevant boundary points (see Appendix 1 to the present Annex), to be mentioned below, but also on commentaries from Australian sources, which will be cited below:

1. Queensland-West Irian (opposite coasts).
   (Boundary description in the Reply, pp. 441 and 442.)

Relevant part of the boundary: between a point of Latitude 10° 51′ South, Longitude 139° 12′ 30″ East, and a point of Latitude 9° 52′ 30″ South, Longitude 140° 30′ 30″.

2. North Australia-Aru Islands and West Irian (opposite coasts).
   (Boundary description in the Reply, pp. 444 and 445.)

Relevant part of the boundary: between a point of Latitude 8° 52′ 15″ South, Longitude 133° 24′ 15″ East, and a point of Latitude 10° 51′ South, Longitude 139° 12′ 30″ East.

Commentary on 1 and 2: R. D. Lumb, LL.M. (Melbourne), D. Phil. (Oxon.), Reader in Law, University of Queensland, commenting on the "outer boundaries of the adjacent areas" writes:

> "However the drawing of the outer limits in the case of the northern adjacent areas had to take account of the median line principle embodied in Art. 6 (in footnote: text of Art. 6) of the Convention on the Continental Shelf and therefore these limits are demarcated in the light of Indonesian jurisdiction over the shelf pertaining to West Irian (footnote: 'There is no break in the Shelf between Western Irian and the Northern Territory.')." ("The Off-Shore Petroleum Agreement and Legislation", in 41 *The Australian Law Journal* (29 Feb. 1968), p. 457.)

The same author had already in 1966 illuminated the situation on this part of the shelf:

> "Off the North Queensland coastline the shelf also extends across Torres Strait to Papuan and West Irian coastlines. The demarcation of these continental shelf boundaries where the physical features of adjacency or contiguity are present calls for the application of the median or equidistant line principle (in the absence of agreement), subject to the qualification that the islands straddling Torres Strait (which are part of Queensland) may call for a modification of this principle." (*The Law of the Sea and Australian Off-shore Areas*, University of Queensland Press.)

3. Papua-West Irian (adjacent coasts).
(Boundary description in the Reply, pp. 446 and 447.)

Relevant part of the boundary: between a point of Latitude 9° 52′ 30″ South, Longitude 140° 30′ 30″ East, and the point of intersection of the outer limit of the territorial waters.

4. New Guinea-West Irian (adjacent coasts).
(Boundary description in the Reply, pp. 447 and 448.)

Relevant part of the boundary: first part of the boundary from its point of commencement on the point of intersection of the frontier between New Guinea and West Irian and the outer limit of the territorial waters.

Commentary on 3 and 4: Reference is made to the Notes of 19 June 1967 and 18 March 1968, respectively, from the Australian Department of External Affairs to the Danish Embassy at Canberra reading as follows:

> "The Department of External Affairs presents its compliments to the Royal Danish Embassy, and has the honour to refer to the Embassy's Note of 9th March, 1967, concerning the proceedings instituted in the International Court of Justice for the delimitation of the continental shelf as between the Netherlands and the Federal Republic of Germany, on the one hand, and Denmark and the Federal Republic of Germany on the other.
>
> The Embassy has observed that in all probability the proceedings will give rise to the consideration by the Court of the rules of International Law applicable to the delimitation of the continental shelf as between states that are adjacent to one another. In this regard the Embassy referred to the provisions of Article 6 (2.) of the 1958 Convention on the Con-

tinental Shelf, and sought information as to the practice that has been followed in the case of Australia.

Australia is a party to the Convention on the Continental Shelf, but Article 6 (2.) is relevant, so far as Australia is concerned, only in relation to the boundary between Indonesian-administered West Irian and the Australian Territory of Papua and the boundary between West Irian and the Trust Territory of New Guinea.

For the purposes of proposed legislation to regulate off-shore petroleum exploration and exploitation it will be necessary to define the continental shelf boundaries between the abovementioned Territories and West Irian. It is expected that the principle of equidistance mentioned in Article 6 (2.) of the Convention on the Continental Shelf will be applied in the areas in question.

In 1953 boundaries were adopted in the abovementioned areas for the purposes of the Pearl Fisheries Act. Those boundaries simply followed the line of extension of the land boundary. At that time, of course, the Convention on the Continental Shelf had not yet been formulated. No pearling has taken place in those areas for some years and, from a practical standpoint, the Pearl Fisheries boundaries no longer have any significance. Probably, however, the boundaries will be revised in accordance with the principles of equidistance so as to bring them into line with the contemplated off-shore petroleum boundaries.

The Embassy also sought information on the practice followed in the delimitation of 'sea boundaries, lakes (and) territorial waters' as between Australia and adjacent countries. Again, this question is relevant only in relation to the boundaries referred to in paragraph 3 above. The proposed Australian legislation mentioned in paragraph 4 will apply to the sea-bed beneath the territorial sea as well as to the continental shelf strictly so-called. It is expected that the principle of equidistance will be applied both within and beyond territorial limits.

The Department of External Affairs avails itself of this opportunity to renew to the Royal Danish Embassy the assurances of its highest consideration.

CANBERRA. A.C.T.
19th June, 1967."

"The Department of External Affairs presents its compliments to the Royal Danish Embassy and has the honour to refer to the Embassy's Note No. 42 of 13th December, 1967, concerning the Australian off-shore petroleum legislation.

The principle of equidistance mentioned in Article 6 (2.) of the Convention on the Continental Shelf has been applied for the purpose of defining the boundaries between West Irian and the Territories of Papua and New Guinea.

The Department of External Affairs avails itself of this opportunity to renew to the Royal Danish Embassy the assurances of its hightest consideration.

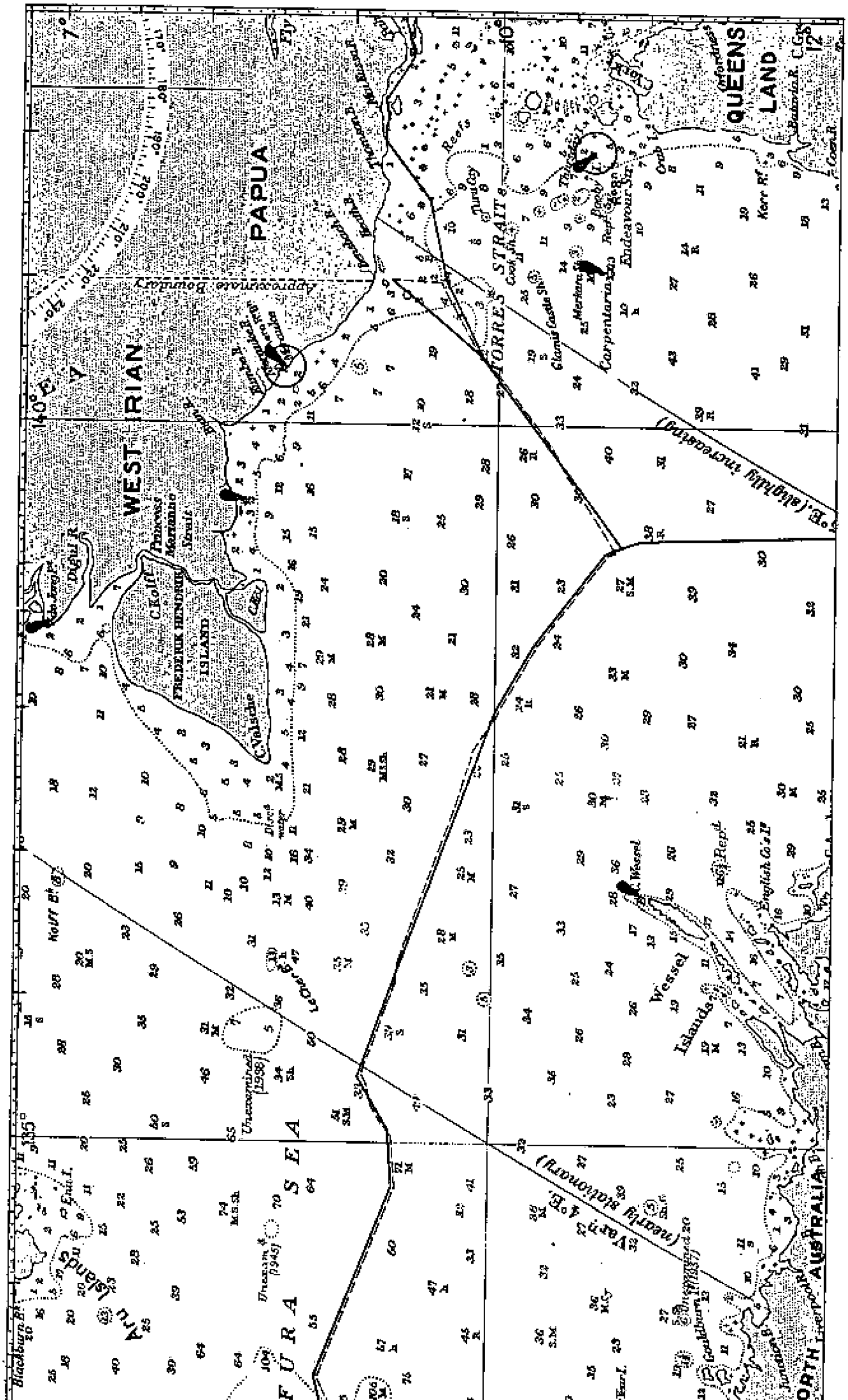
CANBERRA. A.C.T.
18th March, 1968."

C. Equidistance-Special Circumstances in the Agreement Between Queensland and Papua

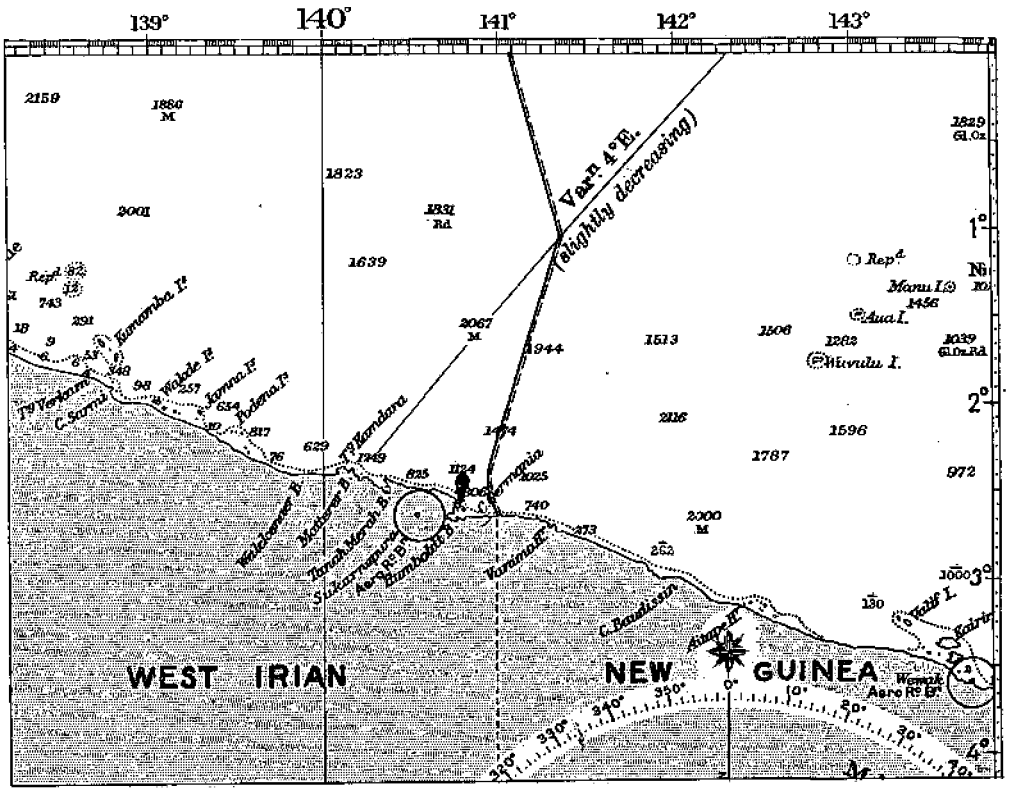
Papua is an Australian-administered Territory which the Australian Government is developing towards self-government. Already the Australian Government has applied to the shelf delimitation between the Territory of Papua and the nearest Australian State, Queensland, the standards of international law: the equidistance principle of Article 6 of the Geneva Convention, modified by the special circumstances clause. The Australian Minister for National Development, introducing the Petroleum (Submerged Lands) Bill 1967 in second reading to the Commonwealth Parliament, stated on 18 October 1967 (p. 1945 of the *Australian Hansard*):

> "While dealing with adjacent areas I should make brief mention of certain agreements which have been reached in relation to the adjacent areas of Queensland and Papua . . . Prior to the commencement of these negotiations between the Commonwealth and the States, Queensland and Papua had issued adjoining exploration permits with boundaries conforming to the boundary between Queensland and Papua. These permits have been accepted by the companies in good faith and work has been going on in the areas concerned. When it became necessary to consider these boundaries from the point of view of this joint legislation it was found that *the application as between Australia and Papua of the median line principle* would have resulted in part of one permit and something like half of another permit which has been issued by Papua being brought under the jurisdiction of Queensland, thus resulting in a reduction of the area of continental shelf under the authority of the Territory.
>
> The Government considered that any transfer of part of these titles back to Australia—no matter how justifiable in terms of logic—might be misunderstood in Papua and New Guinea, and in any case that such action would be inconsistent with the high sense of responsibility which Australia displays in working to bring this Territory towards self-government." (Italics added.)

Appendix 1 to Annex 8



Appendix 1 to Annex 8 (continued)



Delimitations towards West-Irian and the Aru Islands.

Above and opposite are reproduced two pieces of British Admiralty Chart No. 2759 a (Ed: Large Corrections, 3 March 1967).

———— boundary, as defined in Schedule II of the Australian Petroleum (Submerged Lands) Act 1967.

– – – – – – the international parts of the equidistance line, as reconstructed by the Hydrographic Department, The Hague, on largest scale charts available.

. . . . . depth-contours indicating resp. 6 and 100 fathom.

Annex 9

PERSIAN GULF

A. Iraq

On 23 November 1957 the Government of Iraq issued an "Official Statement" (published in the *Official Gazette* No. 4069 of 27 November 1957 and reproduced as Appendix 1 to this Annex) in which it declared that "all the natural resources lying in the seabed and beneath the seabed in the sea area seaward from, but contiguous to Iraq's territorial waters, are the property of Iraq". The area embodied by the Statement was however not at the time of the Statement specified in detail.

On 10 April 1958 the Statement was followed by another Statement (reproduced as Appendix 2) in which the equidistance principle was explicitly mentioned.

In the same year, by a Republican Decree dated 4 November 1958 (reproduced as Appendix 3) Iraq extended its territorial waters to 12 nautical miles. In order to determine precisely the Iraqi boundaries of the territorial sea and the continental shelf the Iraqi Government asked a Norwegian expert, Commander Coucheron-Aamot, to measure the territorial sea and the continental shelf area which Iraq considered as appertaining to her.

In connection with an announcement of August 1960 from the Iraq Ministry of Oil (Appendix 4) the Danish Embassy in Baghdad asked for and received with a note of 22 August 1960 from the Iraqi Foreign Ministry an official chart, reproduced in Chapter 2 as figure D (p. 502, *supra*), showing the areas claimed by Iraq based on the survey of Commander Aamot.

From the chart it can be ascertained that Iraq—which was neither a signatory nor had become a party to the Geneva Convention on the Continental Shelf—has based the delimitation of its territorial sea and its continental shelf in the Persian Gulf on the *strict application of the equidistance principle*.

Only a base point on the Iranian coast (named L4 on the chart) has been disregarded, presumably because there were some doubts whether the base point—a low tide elevation—could be used as a true base point. Instead a more easterly base point ($L4^1$) was chosen for the delimitation of the shelf.

B. Kuwait

Kuwait has not concluded any agreements with her neighbours concerning the delimitation of the continental shelf. But there is an indication of its appurtenant continental shelf area in the Kuwait-Kuwait Shell Oil Concession Agreement of 15 January 1961 which states (through co-ordinates) "the approximate boundaries of the seabed to which Kuwait is entitled".

The relevant article is reproduced in the Reply, pages 438-439, *supra*, and the Reply comments on the Agreement as follows:

> "The dividing line follows the general direction of the land frontier and does not reflect the principle of equidistance."

Firstly, it should be noted that the "dividing line" in question, as shown in the chart prepared by the Danish Hydrographic Institute (reproduced as Appendix 5), is a delimitation related to the adjacent State, Iraq, to the opposite

State, Iran, and to the adjacent Neutral Zone. The Federal Republic, however, only mentions the general direction of *the* land frontier and Denmark and the Netherlands are not aware whether the Federal Republic means a continuation of the general direction of the land frontier between Kuwait and Iraq or between Kuwait and the Neutral Zone, or both of them. However, the dividing line is certainly not based on such a continuation.

(1) Border Relations Kuwait-Iraq

As already stated in Chapter 2, paragraph 71, above, the northern boundary of the Kuwait-Kuwait Shell Agreement is a strict equidistance line *as it coincides with the southern territorial water and continental shelf boundary which Iraq has unilaterally claimed!*

(2) Border Relations Kuwait-Iran

Under the Kuwait-Kuwait Shell Agreement, the line of division towards Iran is definitely not a continuation of the land frontier; in all probability it is based on a modified equidistance line leaving out of account the following islands in front of the Kuwait and Iranian coasts, Kubr, Qaru, Umm al Maradim, Khark and Kharku.

(3) Border Relations Kuwait-Neutral Zone

Again the line of division in the Kuwait-Kuwait Shell Agreement towards the Neutral Zone is not a continuation of the general direction of the land frontier, which a glance at Appendix 5 clearly shows.

Here again a modified equidistance line disregarding the same islands as mentioned under (2) *in fine* seems to have been the basis for the drawing of the line.

C. Saudi Arabia-Bahrein

See paragraph 70 in Chapter 2 above.

Appendix 1 to Annex 9

OFFICIAL STATEMENT OF THE GOVERNMENT OF IRAQ
DATED 23 NOVEMBER 1957

The Government of Iraq being most desirous to exploit the natural resources of Iraq to the utmost possible limit, and because of its belief that a considerable part of these resources are lying in the sea bed extending along the Iraqi territorial sea, feels confident that the exploitation of the resources of this area in a proper way will be in the interest of the Iraqi people and is now possible in view of the development of modern science.

Therefore, it declares that all the natural resources lying in the sea bed and beneath the sea bed in the sea area seaward from, but contiguous to Iraq's territorial waters, are the property of Iraq, and that Iraq alone has full jurisdiction right on these resources and to safeguard and exploit them. It has also the sole right to take all necessary measures to survey these resources and exploit them in a way deemed suitable. It has also the right to take all necessary legislative and administrative measures to safeguard all the equipment required for the survey and exploitation works.

The Government of Iraq wishes to confirm that the purpose for issuing this statement is only to exercise the right according to internationally agreed procedure. It also confirms that this statement does not affect the rules set up regarding freedom of navigation and fishing in the aforementioned sea zone.

(Published in the *Official Gazette* No. 4069 dated 27.11.1957.)

Appendix 2 to Annex 9

STATEMENT OF THE GOVERNMENT OF IRAQ
PUBLISHED 10 APRIL 1958

In confirmation of the contents of the statement issued by the Government of Iraq on November 23, 1957, establishing the right of the Government of Iraq in the waters beyond the territorial waters of Iraq.

The Government of Iraq declares that its full sovereignty extends to the territorial water zones of Iraq, the air space over them, the sea bed and the sub-soil area, declaring that all works and installations, already completed or to be completed, in this area or in the area of contiguous waters, fall under the sovereignty of the Iraqi State, and it is not permitted to carry them out except by the Iraqi authorities or by other parties authorized by the Iraqi authorities. The Iraqi Government, while declaring this in establishment of its rights, announces its abiding with the international procedure in this regard, and the principle of equidistance ensuring for Iraq transit freedom from and to the high seas.

While stating this, the Iraqi Government declares at the same time that it does not recognize any statement, notification, legislation or planning concerning territorial waters or contiguous waters issued by any neighbouring country contravening the contents of this statement.

(Signed) Prime Minister.

(Published in the *Official Gazette* No. 4128 dated 10.4.1958.)

Appendix 3 to Annex 9

REPUBLICAN DECREE
DATED 4 NOVEMBER 1958
No. (435)

Pursuant to the proposal of the Minister of Foreign Affairs and the approval of the Council of Ministers, we have decreed the following:

1. The territorial sea of Iraq, the air space above it, the sea bed and the sub-soil area are under the full sovereignty of the Iraqi Republic with due regard to the principles under international law regarding peaceful passage of foreign ships.

2. The Iraqi territorial sea shall extend to a distance of 12 nautical miles (1,852 metres) seaward, measured from the lowest mark of the flow back of sea water from the Iraqi coastline.

3. In case the territorial sea of another state overlaps that of Iraq, the boundaries of the two territorial seas shall be fixed by an agreement with the state concerned according to principles established by international law or by mutual understanding.

4. This Decree does not prejudice the internationally established rights of Iraq in its contiguous zone and continental shelf which lie beyond the Iraqi territorial sea towards high sea. It does not prejudice official communiqués previously issued by the Iraqi Government in this regard.

The Minister of Foreign Affairs is charged with the execution of this Decree.

Written in Baghdad this 4th day of November, 1958.

(Published in the *Official Gazette* No. 74 dated 15.11.1958.)

Appendix 4 to Annex 9

ANNOUNCEMENT FROM THE IRAQI MINISTRY OF OIL
DATED AUGUST 1960

The Government of Iraqi Republic is ready to accept offers from companies, firms and individuals who are interested in obtaining exploitation rights for oil and its derivatives (Exploration and Development) in wide areas of Iraq Territorial Waters and its contiguous zone.

Offers must be submitted to Ministry of Oil in Baghdad as from the date of this announcement, and not later than six months therefrom.

Applicants must satisfy the Ministry of Oil of their adequate financial and technical abilities.

The Government of Iraq will reserve their right to refuse any or all offers without obligations.

Note:

The detailed maps of this zone can be obtained from the Ministry of Oil, Baghdad.

(Signed) Minister of Oil.

Appendix 5 to Annex 9