

NORTH SEA CONTINENTAL SHELF CASES

Judgment of 20 February 1969

The Court delivered judgment, by 11 votes to 6, in the North Sea Continental Shelf cases.

The dispute, which was submitted to the Court on 20 February 1967, related to the delimitation of the continental shelf between the Federal Republic of Germany and Denmark on the one hand, and between the Federal Republic of Germany and the Netherlands on the other. The Parties asked the Court to state the principles and rules of international law applicable, and undertook thereafter to carry out the delimitations on that basis.

The Court rejected the contention of Denmark and the Netherlands to the effect that the delimitations in question had to be carried out in accordance with the principle of equidistance as defined in Article 6 of the 1958 Geneva Convention on the Continental Shelf, holding:

- that the Federal Republic, which had not ratified the Convention, was not legally bound by the provisions of Article 6;
- that the equidistance principle was not a necessary consequence of the general concept of continental shelf rights, and was not a rule of customary international law.

The Court also rejected the contentions of the Federal Republic in so far as these sought acceptance of the principle of an apportionment of the continental shelf into just and equitable shares. It held that each Party had an original right to those areas of the continental shelf which constituted the natural prolongation of its land territory into and under the sea. It was not a question of apportioning or sharing out those areas, but of delimiting them.

The Court found that the boundary lines in question were to be drawn by agreement between the Parties and in accordance with equitable principles, and it indicated certain factors to be taken into consideration for that purpose. It was now for the Parties to negotiate on the basis of such principles, as they have agreed to do.

The proceedings, relating to the delimitation as between the Parties of the areas of the North Sea continental shelf appertaining to each of them, were instituted on 20 February 1967 by the communication to the Registry of the Court of two Special Agreements, between Denmark and the Federal Republic and the Federal Republic and the Netherlands respectively. By an Order of 26 April 1968, the Court joined the proceedings in the two cases.

The Court decided the two cases in a single Judgment, which it adopted by eleven votes to six. Amongst the Members of the Court concurring in the Judgment, Judge Sir Muhammad Zafrulla Khan appended a declaration; and President Bustamante y Rivero and Judges Jessup, Padilla Nervo and Ammoun appended separate opinions. In the case of the non-concurring Judges, a declaration of his dissent was appended by Judge Bengzon; and Vice-President Koretsky, together with Judges Tanaka, Morelli and Lachs, and Judge *ad hoc* Sorensen, appended dissenting opinions.

In its Judgment, the Court examined in the context of the delimitations concerned the problems relating to the legal regime of the continental shelf raised by the contentions of the Parties.

The Facts and the Contentions of the Parties (paras. 1-17 of the Judgment)

The two Special Agreements had asked the Court to declare the principles and rules of international law applicable to the delimitation as between the Parties of the areas of the North Sea continental shelf appertaining to each of them beyond the partial boundaries in the immediate vicinity of the coast already determined between the Federal Republic and the Netherlands by an agreement of 1 December 1964 and between the Federal Republic and Denmark by an agreement of 9 June 1965. The Court was not asked actually to delimit the further boundaries involved, the Parties undertaking in their respective Special Agreements to effect such delimitation by agreement in pursuance of the Court's decision.

The waters of the North Sea were shallow, the whole seabed, except for the Norwegian Trough, consisting of continental shelf at a depth of less than 200 metres. Most of it had already been delimited between the coastal States concerned. The Federal Republic and Denmark and the Netherlands, respectively, had, however, been unable to agree on the prolongation of the partial boundaries referred to above, mainly because Denmark and the Netherlands had wished this prolongation to be effected on the basis of the equidistance principle, whereas the Federal Republic had considered that it would unduly curtail what the Federal Republic believed should be its proper share of continental shelf area, on the basis of proportionality to the length of its North Sea coastline. Neither of the boundaries in question would by itself produce this effect, but only both of them together - an element regarded by Denmark and the Netherlands as irrelevant to what they viewed as being two separate delimitations, to be carried out without reference to the other.

A boundary based on the equidistance principle, i.e., an "equidistance line", left to each of the Parties concerned all those portions of the continental shelf that were nearer to a point on its own coast than they were to any point on the coast of the other Party. In the case of a concave or recessing coast such as that of the Federal Republic on the North Sea, the effect of the equidistance method was to pull the line of the boundary inwards, in the direction of the concavity. Consequently, where two equidistance lines were drawn, they would, if the curvature were pronounced, inevitably meet at a relatively short distance from the coast, thus "cutting off" the coastal State from the area of the continental shelf outside. In contrast, the effect of convex or outwardly curving coasts, such as were, to a moderate extent, those of Denmark and the Netherlands, was to cause the equidistance lines to leave the coasts on divergent courses, thus having a widening tendency on the area of continental shelf off that coast.

It had been contended on behalf of Denmark and the Netherlands that the whole matter was governed by a mandatory rule of law which, reflecting the language of Article 6 of the Geneva Convention on the Continental Shelf of 29 April 1958, was designated by them as the "equidistance-special circumstances" rule. That rule was to the effect that in the absence of agreement by the parties to employ another method, all continental shelf boundaries had to be drawn by means of an equidistance line unless "special circumstances" were recognized to exist.

According to Denmark and the Netherlands, the configuration of the German North Sea coast did not of itself constitute, for either of the two boundary lines concerned, a special circumstance.

The Federal Republic, for its part, had contended that the correct rule, at any rate in such circumstances as those of the North Sea, was one according to which each of the States concerned should have a "just and equitable share" of the available continental shelf, in proportion to the length of its sea-frontage. It had also contended that in a sea shaped as is the North Sea, each of the States concerned was entitled to a continental shelf area extending up to the central point of that sea, or at least extending to its median line. Alternatively, the Federal Republic had claimed that if the equidistance method were held to be applicable, the configuration of the German North Sea coast constituted a special circumstance such as to justify a departure from that method of delimitation in this particular case.

The Apportionment Theory Rejected (paras. 18-20 of the Judgment)

The Court felt unable to accept, in the particular form it had taken, the first contention put forward on behalf of the Federal Republic. Its task was to delimit, not to apportion the areas concerned. The process of delimitation involved establishing the boundaries of an area already, in principle, appertaining to the coastal State and not the determination *de novo* of such an area. The doctrine of the just and equitable share was wholly at variance with the most fundamental of all the rules of law relating to the continental shelf, namely, that the rights of the coastal State in respect of the area of continental shelf constituting a natural prolongation of its land territory under the sea existed *ipso facto* and *ab initio*, by virtue of its sovereignty over the land. That right was inherent. In order to exercise it, no special legal acts had to be performed. It followed that the notion of apportioning an as yet undelimited area considered as a whole (which underlay the doctrine of the just and equitable share) was inconsistent with the basic concept of continental shelf entitlement.

Non-Applicability of Article 6 of the 1958 Continental Shelf Convention (paras. 21-36 of the Judgment)

The Court then turned to the question whether in delimiting those areas the Federal Republic was under a legal obligation to accept the application of the equidistance principle. While it was probably true that no other method of delimitation had the same combination of practical convenience and certainty of application, those factors did not suffice of themselves to convert what was a method into a rule of law. Such a method would have to draw its legal force from other factors than the existence of those advantages.

The first question to be considered was whether the 1958 Geneva Convention on the Continental Shelf was binding for all the Parties in the case. Under the formal provisions of the Convention, it was in force for any individual State that had signed it within the time-limit provided, only if that State had also subsequently ratified it. Denmark and the Netherlands had both signed and ratified the Convention and were parties to it, but the Federal Republic, although one of the signatories of the Convention, had never ratified it, and was consequently not a party. It was admitted on behalf of Denmark and the Netherlands that in the circumstances the Convention could not, as such, be binding on the Federal Republic. But it was contended that the regime of

Article 6 of the Convention had become binding on the Federal Republic, because, by conduct, by public statements and proclamations, and in other ways, the Republic had assumed the obligations of the Convention.

It was clear that only a very definite, very consistent course of conduct on the part of a State in the situation of the Federal Republic could justify upholding those contentions. When a number of States drew up a convention specifically providing for a particular method by which the intention to become bound by the regime of the convention was to be manifested, it was not lightly to be presumed that a State which had not carried out those formalities had nevertheless somehow become bound in another way. Furthermore, had the Federal Republic ratified the Geneva Convention, it could have entered a reservation to Article 6, by reason of the faculty to do so conferred by Article 12 of the Convention.

Only the existence of a situation of estoppel could lend substance to the contention of Denmark and the Netherlands - i.e., if the Federal Republic were now precluded from denying the applicability of the conventional regime, by reason of past conduct, declarations, etc., which not only clearly and consistently evinced acceptance of that regime, but also had caused Denmark or the Netherlands, in reliance on such conduct, detrimentally to change position or suffer some prejudice. Of this there was no evidence. Accordingly, Article 6 of the Geneva Convention was not, as such, applicable to the delimitations involved in the present proceedings.

The Equidistance Principle Not Inherent in the Basic Doctrine of the Continental Shelf
(paras. 37-59 of the Judgment)

It had been maintained by Denmark and the Netherlands that the Federal Republic was in any event, and quite apart from the Geneva Convention, bound to accept delimitation on an equidistance basis, since the use of that method was a rule of general or customary international law, automatically binding on the Federal Republic.

One argument advanced by them in support of this contention, which might be termed the *a priori* argument, started from the position that the rights of the coastal State to its continental shelf areas were based on its sovereignty over the land domain, of which the shelf area was the natural prolongation under the sea. From this notion of appurtenance was derived the view, which the Court accepted, that the coastal State's rights existed *ipso facto* and *ab initio*. Denmark and the Netherlands claimed that the test of appurtenance must be "proximity": all those parts of the shelf being considered as appurtenant to a particular coastal State which were closer to it than they were to any point on the coast of another State. Hence, delimitation had to be effected by a method which would leave to each one of the States concerned all those areas that were nearest to its own coast. As only an equidistance line would do this, only such a line could be valid, it was contended.

This view had much force; the greater part of a State's continental shelf areas would normally in fact be nearer to its coasts than to any other. But the real issue was whether it followed that every part of the area concerned must be placed in that way. The Court did not consider this to follow from the notion of proximity, which was a somewhat fluid one. More fundamental was the concept of the continental shelf as being the natural prolongation of the land domain. Even if

proximity might afford one of the tests to be applied, and an important one in the right conditions, it might not necessarily be the only, nor in all circumstances the most appropriate, one. Submarine areas did not appertain to the coastal State merely because they were near it, nor did their appurtenance depend on any certainty of delimitation as to their boundaries. What conferred the *ipso jure* title was the fact that the submarine areas concerned might be deemed to be actually part of its territory in the sense that they were a prolongation of its land territory under the sea. Equidistance clearly could not be identified with the notion of natural prolongation, since the use of the equidistance method would frequently cause areas which were the natural prolongation of the territory of one State to be attributed to another. Hence, the notion of equidistance was not an inescapable *a priori* accompaniment of basic continental shelf doctrine.

A review of the genesis of the equidistance method of delimitation confirmed the foregoing conclusion. The "Truman Proclamation" issued by the Government of the United States on 28 September 1945 could be regarded as a starting point of the positive law on the subject, and the chief doctrine it enunciated, that the coastal State had an original, natural and exclusive right to the continental shelf off its shores, had come to prevail over all others and was now reflected in the 1958 Geneva Convention. With regard to the delimitation of boundaries between the continental shelves of adjacent States, the Truman Proclamation had stated that such boundaries "shall be determined by the United States and the State concerned in accordance with equitable principles". These two concepts, of delimitation by mutual agreement and delimitation in accordance with equitable principles, had underlain all the subsequent history of the subject. It had been largely on the recommendation of a committee of experts that the principle of equidistance for the delimitation of continental shelf boundaries had been accepted by the United Nations International Law Commission in the text it had laid before the Geneva Conference of 1958 on the Law of the Sea which had adopted the Continental Shelf Convention. It could legitimately be assumed that the experts had been actuated by considerations not of legal theory but of practical convenience and cartography. Moreover, the article adopted by the Commission had given priority to delimitation by agreement and had contained an exception in favour of "special circumstances".

The Court consequently considered that Denmark and the Netherlands inverted the true order of things and that, far from an equidistance rule having been generated by an antecedent principle of proximity inherent in the whole concept of continental shelf appurtenance, the latter was rather a rationalization of the former

The Equidistance Principle Not a Rule of Customary International Law (paras. 60-82 of the Judgment)

The question remained whether through positive law processes the equidistance principle must now be regarded as a rule of customary international law.

Rejecting the contentions of Denmark and the Netherlands, the Court considered that the principle of equidistance, as it figured in Article 6 of the Geneva Convention, had not been proposed by the International Law Commission as an emerging rule of customary international law. This Article could not be said to have reflected or crystallized such a rule. This was

confirmed by the fact that any State might make reservations in respect of Article 6, unlike Articles 1, 2 and 3, on signing, ratifying or acceding to the Convention. While certain other provisions of the Convention, although relating to matters that lay within the field of received customary law, were also not excluded from the faculty of reservation, they all related to rules of general maritime law very considerably antedating the Convention which were only incidental to continental shelf rights as such, and had been mentioned in the Convention simply to ensure that they were not prejudiced by the exercise of continental shelf rights. Article 6, however, related directly to continental shelf rights as such, and since it was not excluded from the faculty of reservation, it was a legitimate inference that it was not considered to reflect emergent customary law.

It had been argued on behalf of Denmark and the Netherlands that even if at the date of the Geneva Convention no rule of customary international law existed in favour of the equidistance principle, such a rule had nevertheless come into being since the Convention, partly because of its own impact, and partly on the basis of subsequent State practice. In order for this process to occur it was necessary that Article 6 of the Convention should, at all events potentially, be of a norm-creating character. Article 6 was so framed, however, as to put the obligation to make use of the equidistance method after a primary obligation to effect delimitation by agreement. Furthermore, the part played by the notion of special circumstances in relation to the principle of equidistance, the controversies as to the exact meaning and scope of that notion, and the faculty of making reservations to Article 6 must all raise doubts as to the potentially norm-creating character of that Article.

Furthermore, while a very widespread and representative participation in a convention might show that a conventional rule had become a general rule of international law, in the present case the number of ratifications and accessions so far was hardly sufficient. As regards the time element, although the passage of only a short period of time was not necessarily a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule, it was indispensable that State practice during that period, including that of States whose interests were specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked and should have occurred in such a way as to show a general recognition that a rule of law was involved. Some 15 cases had been cited in which the States concerned had agreed to draw or had drawn the boundaries concerned according to the principle of equidistance, but there was no evidence that they had so acted because they had felt legally compelled to draw them in that way by reason of a rule of customary law. The cases cited were inconclusive and insufficient evidence of a settled practice.

The Court consequently concluded that the Geneva Convention was not in its origins or inception declaratory of a mandatory rule of customary international law enjoining the use of the equidistance principle, its subsequent effect had not been constitutive of such a rule, and State practice up to date had equally been insufficient for the purpose.

The Principles and Rules of Law Applicable (paras. 83-101 of the Judgment)

The legal situation was that the Parties were under no obligation to apply the equidistance principle either under the 1958 Convention or as a rule of general or customary international law.

It consequently became unnecessary for the Court to consider whether or not the configuration of the German North Sea coast constituted a "special circumstance". It remained for the Court, however, to indicate to the Parties the principles and rules of law in the light of which delimitation was to be effected.

The basic principles in the matter of delimitation, deriving from the Truman Proclamation, were that it must be the object of agreement between the States concerned and that such agreement must be arrived at in accordance with equitable principles. The Parties were under an obligation to enter into negotiations with a view to arriving at an agreement and not merely to go through a formal process of negotiation as a sort of prior condition for the automatic application of a certain method of delimitation in the absence of agreement; they were so to conduct themselves that the negotiations were meaningful, which would not be the case when one of them insisted upon its own position without contemplating any modification of it. This obligation was merely a special application of a principle underlying all international relations, which was moreover recognized in Article 33 of the Charter of the United Nations as one of the methods for the peaceful settlement of international disputes.

The Parties were under an obligation to act in such a way that in the particular case, and taking all the circumstances into account, equitable principles were applied. There was no question of the Court's decision being *ex aequo et bono*. It was precisely a rule of law that called for the application of equitable principles, and in such cases as the present ones the equidistance method could unquestionably lead to inequity. Other methods existed and might be employed, alone or in combination, according to the areas involved. Although the Parties intended themselves to apply the principles and rules laid down by the Court some indication was called for of the possible ways in which they might apply them.

For all the foregoing reasons, the Court found in each case that the use of the equidistance method of delimitation was not obligatory as between the Parties; that no other single method of delimitation was in all circumstances obligatory; that delimitation was to be effected by agreement in accordance with equitable principles and taking account of all relevant circumstances, in such a way as to leave as much as possible to each Party all those parts of the continental shelf that constituted a natural prolongation of its land territory, without encroachment on the natural prolongation of the land territory of the other; and that, if such delimitation produced overlapping areas, they were to be divided between the Parties in agreed proportions, or, failing agreement, equally, unless they decided on a regime of joint jurisdiction, user, or exploitation.

In the course of negotiations, the factors to be taken into account were to include: the general configuration of the coasts of the Parties, as well as the presence of any special or unusual features; so far as known or readily ascertainable, the physical and geological structure and natural resources of the continental shelf areas involved, the element of a reasonable degree of proportionality between the extent of the continental shelf areas appertaining to each State and the length of its coast measured in the general direction of the coastline, taking into account the effects, actual or prospective, of any other continental shelf delimitations in the same region.