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North Sea Continental Shelf Cases



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Synonyms

[Federal Republic of Germany v. Denmark](#); [Federal Republic of Germany v. Netherlands](#)

Definition

North Sea Continental Shelf Cases is a 1969 judgment of the International Court of Justice regarding the international law principles applicable to delimitation of the North Sea continental shelf between three adjacent States – Denmark, the Federal Republic of Germany (West Germany), and the Netherlands. The Court held coastal States have an inherent right to the area of the continental shelf that constitutes the natural prolongation of their land territory and States should delimit the shelf by agreement in accordance with equitable principles, aiming to avoid encroachment on the natural prolongation of other States' territories.

Description

The land dominates the sea.

– *International Court of Justice*, North Sea Continental Shelf Cases

Introduction

Rich in fish and oil and an important shipping route, the North Sea is a semi-enclosed sea of the Atlantic Ocean sitting between the United Kingdom, Norway, Sweden, Denmark, Germany, the Netherlands, Belgium, and France (Walday and Kroglund 2008, 4, 7). Its waters are relatively shallow – less than 200 meters deep – with the exception of a formation sometimes referred to as the “Norwegian Trough,” “a belt of water ... fringing the southern and south-western coasts of Norway” (NSCS Judgment, 14). Except for this formation, “the whole seabed consists of continental shelf” (NSCS Judgment, 14; *see also* Friedmann 1970, 229) – in geological terms, “that part of the continental margin which is between the shoreline and the shelf break or, where there is no noticeable slope, between the shoreline and the point where the depth of the superjacent water is approximately between 100 and 200 metres” (U.N. Division for Ocean Affairs and the Law of the Sea 2012). That the North Sea consists almost entirely of continental shelf is central to the dispute that broke out between Denmark, the Netherlands, and the

Federal Republic of Germany (West Germany) in the 1960s. As will be discussed below, the International Court of Justice (“ICJ”) considered the continental shelf an extension of the land over which a coastal state’s territorial sovereignty naturally extends, unlike the high seas. But which State controls which part of the shelf?

Territorial rights to the continental shelf under international law had a short history before the North Sea dispute arrived at the ICJ in 1967. The 1945 Truman Proclamation, in which US President Truman declared that the continental shelf contiguous to the US coast was subject to its jurisdiction and control, and the 1958 Geneva Convention on the Continental Shelf presented opposing approaches to delimitation and coastal States’ entitlement to the continental shelf. The ICJ ultimately followed the Truman Proclamation in these respects, relying on States to reach agreements in accordance with equitable principles and declaring States to have an inherent territorial right to the continental shelf. In the latter respect, the Court offered this piece’s enigmatic epigraph, “The land dominates the sea” (NSCS Judgment, 52).

The remainder of this entry traces the *North Sea Continental Shelf Cases* in further detail. Part 2 outlines the continental shelf doctrine up to the 1960s when the dispute between Denmark, the Netherlands, and West Germany arose. Part 3 describes that dispute before and after it was brought to the ICJ. Part 4 lays out the ICJ’s judgment and orients it between the Truman Proclamation and the Geneva Convention on the Continental Shelf. Part 5 summarizes key criticisms of the judgment. Part 6 concludes and discusses the judgment’s lasting impact.

Continental Shelf Doctrine Before the North Sea Continental Shelf Cases

When the dispute between West Germany, the Netherlands, and Denmark arose, the idea of delimiting the continental shelf was a novel concept. The traditional rule governing the law of the sea was freedom of the seas (Friedmann 1970, 229, 237). As of the early 1900s, international

law recognized state sovereignty over only three nautical miles “extend[ing] outward from the limits of the inland water/shore line of a coastal state” (Florsheim 1970, 74; Bastida et al. 2007, 364; see also Baty 1928; Kent 1954). Although the three-mile limit would gradually expand, even by the mid-1960s, no court had yet heard a continental shelf delimitation case (Hight 1989, 89).

What accounts for increased interest in the continental shelf and national jurisdiction thereafter? As Shigeru Oda explained in 1968, “recent evidence indicates the existence of deposited wealth, invaluable beyond imagination, in the continental slope or even beyond” (3). Thus, in the 1940s and 1950s, “[c]oastal states became interested in gaining control over an extended area of the sea and its resources,” which in turn put pressure “on the legal structure that had recognized only the three mile territorial sea limit” (Bastida et al. 2007, 364; see also Lachs 1969a, 219–20). The first germane multilateral treaty, the 1958 Geneva Convention on the Continental Shelf, highlighted the stakes, providing coastal States with “sovereign rights” over the continental shelf “for the purpose of exploring it and exploiting its natural resources” (Geneva Convention 1958, Art. 2(1)).

Given the value of the resources involved – fisheries and mineral resources in particular – States have “advanced exaggerated claims for the purpose of furthering their own national interests and extending national jurisdiction” (Gormley 1995, 350). But competing claims and uncertainty impede resource exploitation (see Grisel 1970, 593).

The 1945 Truman Proclamation

Enter US President Truman’s Proclamation of 1945, announcing the continental shelf contiguous to the US coast was subject to its jurisdiction and control.

Many attribute the idea that nation States have territorial sovereignty over the continental shelf along their coasts to this document (see, e.g., Grisel 1970, 565; Krueger 1970, 464; Murray 1970, 91–92; Willheim 1989, 826; Kim 2014, 375). “Within five years of the Truman Proclamation, some 30 states had made one or another type

of claim to jurisdiction and control over submarine areas adjacent to their coasts” (Murray 1970, 92). In this sense, US unilateral action “catalyzed [a] decentralized process for making international law” (Hakimi 2014, 124).

Beyond this, the Truman Proclamation introduced three key elements of territorial rights to the continental shelf: grounds of entitlement, status of entitlement, and grounds of delimitation. On the grounds of entitlement, the Truman Proclamation based the US claim on a geological assertion – namely, the shelf in question was “beneath the high seas but contiguous to the coasts of the United States” and “an extension of the land-mass of the coastal nation” (para. 4; see Kim 2014, 375). Rather than argue the coastal shelf *ought* to be incorporated into US territory, the proclamation asserted the continental shelf was *already* part of that territory and simply required boundary delimitation. Finally, the proclamation indicated delimitation should be determined by agreement between the States concerned “in accordance with equitable principles” (para. 6).

The 1958 Geneva Convention on the Continental Shelf

Five years after the Truman Proclamation, the International Law Commission of the United Nations (“ILC”) began discussions that ultimately became the 1958 Geneva Conventions on the Law of the Sea – among them, the Geneva Convention on the Continental Shelf (“Geneva Convention”). Although following soon after, the Convention abandoned all three key elements from the Truman Proclamation.

First, rather than describing the continental shelf as an extension of States’ land, and therefore already part of their territory, the Convention relied on formal and instrumental criteria. Article 1 defines “continental shelf” as:

the seabed and subsoil of the submarine areas adjacent to the coast 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 the said areas.

Accordingly, some have argued the Convention relied on artificial criteria (see, e.g., Kim 2014,

376). The depth criterion is formal – indeed the UNESCO Secretariat detailed at the time that the 200-meter depth had little relation to actual continental shelf formations (UNESCO Secretariat 1957, 40–42) – although the ILC justified the measurement’s role as “coincid[ing] with that [depth] at which the continental shelf in the geological sense generally comes to an end” (ILC 1956, 296). Complementing this formal criterion is an instrumental criterion of exploitability, which is reinforced in the ILC’s 1956 commentary to its draft articles:

The Commission accepted the idea that the coastal State may exercise control and jurisdiction over the continental shelf, with the proviso that such control and jurisdiction shall be exercised solely for the purpose of exploiting its resources. (ILC 1956, 295)

Thus, the grounds for entitlement to the continental shelf were couched in terms of States’ ability and entitlement to exploit, not territorial continuity.

The Geneva Convention departed on the status of entitlement along similar lines. Some have argued that, because the Convention did not require States to make an explicit claim in order to exercise sovereignty over the continental shelf, the Convention took a position analogous to the Truman Proclamation (see, e.g., Brown 1994, 494). However, *ipso facto* and *ipso jure* sovereignty meaningfully differ. The Truman Proclamation asserted the appertaining continental shelf had always belonged to the United States (*ipso facto*); the Geneva Convention gave States sovereignty over the continental shelf by virtue of the Convention (*ipso jure*). The Convention’s focus on exploitability reinforces this point; if entitlement itself requires exploitability and exploitability depends on technological developments, then entitlement is contingent, not inherent.

Finally, the Geneva Convention adopted a mechanical approach to delimitation. While it retained the Truman Proclamation’s preference for agreement, the Convention added a default to be used in the absence of agreement. Distinguishing between median lines – that is, boundaries between opposite States – and lateral lines – that is, boundaries between adjacent States – Article 6 provided similar rules of

delimitation for each type in paragraphs (1) and (2). For lateral lines, Article 6(2) provides, “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.” As the ICJ would later describe, “an equidistance line is . . . a line every point on which is the same distance away from whatever point is nearest to it on the coast of each of the countries concerned” (NSCS Judgment, 21). Thus equity was no longer central, and the equidistance principle for delimitation came to the fore (*see* Bastida et al. 2007, 365), provided States Parties did not enter a reservation to Article 6, as they were permitted to do (Geneva Convention Art. 12(1)).

By the time of the ICJ judgment in this case, 46 States had signed the Geneva Convention, and 39 had ratified or acceded to it. Denmark and the Netherlands were both parties, having signed and ratified the Convention; West Germany, by contrast, signed but never ratified it (NSCS Judgment, 26).

Failed Negotiations and the Parties’ Positions

In 1964 and 1965, West Germany concluded separate agreements with its neighbors, delimiting the States’ respective claims over their territorial waters immediately off the coast. These partial delimitations were “drawn mainly by application of the principle of equidistance.” However, the three States could not agree on delimitation past their territorial waters, either in separate negotiations or in a tripartite negotiation that began in February 1966. Denmark and the Netherlands preferred, given the shapes of their respective coastlines, to continue to apply the equidistance principle. West Germany rejected this approach because, with its concave coastline, the lateral equidistance lines would draw toward each other, creating a disproportionately small German area of the continental shelf as compared to its coastline (NSCS Judgment, 14–19).

Figure 1 roughly illustrates the relevant agreements in solid lines and the parties’ positions in

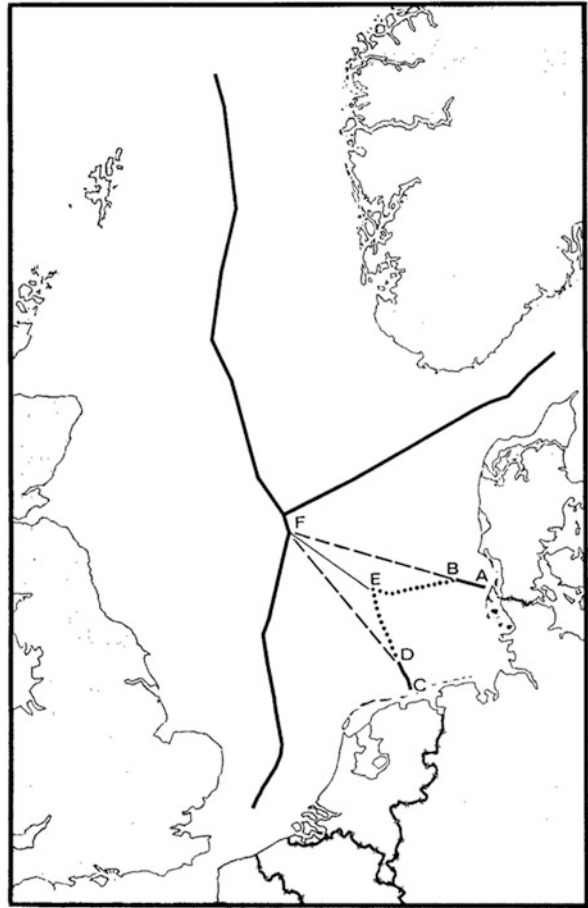
dotted lines. Lines A–B and C–D represent the separate 1964 and 1965 agreements. Lines B–E and D–E represent continuations of A–B and C–D according to the equidistance principle; these lines represent Denmark and the Netherlands’ position. By contrast, lines B–F and D–F, which would recognize West Germany’s sovereignty over an area of the continental shelf extending out to the delimitations drawn between the United Kingdom and others, represent West Germany’s position.

Interestingly, line E–F also represents an existing agreement. In the midst of tripartite negotiations with West Germany, Denmark and the Netherlands entered into a side agreement delimitating the continental shelf between themselves along this line. Such delimitation required an assumption that West Germany’s continental shelf extended only to point E, a contention which West Germany refused to accept, insisting the side agreement “could not ‘have any effect on the question of the delimitation of the German-Netherlands or the German-Danish parts of the continental shelf in the North Sea’” (NSCS Judgment, 19).

Unable to reach agreement on entitlement and delimitation, the parties instead agreed to submit the disputes to the ICJ. They did not ask the Court to specify the relevant boundaries, however; they asked the Court to determine “[w]hat principles and rules of international law [were] applicable to the delimitation” (NSCS Judgment, 6–7, 51). Since the legal arguments in the two cases – the Federal Republic of Germany versus the Kingdom of Denmark, and the Federal Republic of Germany versus the Kingdom of the Netherlands – were “substantially identical” and “involve[d] – indeed actually g[a]ve rise to – a single situation,” the Court treated them as a single case (NSCS Judgment, 20). They are generally referred to as such here and elsewhere.

At the Court, the parties essentially repeated their negotiating positions. Denmark and the Netherlands continued to advocate for delimitation according to the equidistance principle, arguing the Court should find delimitation governed by the Geneva Convention’s Article 6(2) or, alternatively, “the principle that the boundary is to leave to each Party every point of the continental

North Sea Continental Shelf Cases, Fig. 1 Map from the *North Sea Continental Shelf Cases* judgment (NSCS Judgment, 17) illustrating the parties' positions in relation to then-existing delimitations between the United Kingdom, Norway, Denmark, and the Netherlands. Reproduced in unedited form with permission from the ICJ.



shelf which lies nearer to its coast than to the coast of the other Party” (NSCS Judgment, 11–12). West Germany argued against the equidistance principle, including its Geneva Convention instantiation. Instead, West Germany advocated for delimitation to be “governed by the principle that each coastal State is entitled to a just and equitable share” (NSCS Judgment, 9–10), a position contemporary observers described as “bold” (Friedmann 1970, 234) and oriented toward distributive justice (e.g., Goldie 1970, 330). West Germany argued, however, that “just and equitable share” was one of the “general principles of law recognized by civilized nations” set out as a source of international law in the ICJ’s founding document (ICJ Statute 1945, Art. 38(1)(c)).

The ICJ Judgment

The Court’s judgment in the *North Sea Continental Shelf Cases* is among its most famous. It has had a lasting impact on maritime delimitation, particularly regarding the continental shelf, and is still taught as a foundational contribution to customary international law (“CIL”) doctrine. However, the Court’s decision was contentious even among its members, with the majority opinion garnering 11 out of 17 votes but being accompanied by two declarations, four separate opinions, and five dissenting opinions (see Murray 1970, 88).

Entitlement

Ultimately, as others have noted, the judgment substantially followed the Truman Proclamation

(see, e.g., Bastida et al. 2007, 365) – namely, in the three key elements described above. First, the Court grounded coastal States’ entitlement in the physical fact of “natural prolongation” of land continuing under the water (see Kim 2014, 376–77). In the Court’s words, “the land dominates the sea” (NSCS Judgment, 52). The Court also described entitlement as existing *ipso facto* and *ab initio*:

[T]he rights of the coastal State in respect of the area of continental shelf that constitutes a natural prolongation of its land territory into and under the sea exist *ipso facto* and *ab initio*, by virtue of its sovereignty over the land, and as an extension of it in an exercise of sovereign rights for the purpose of exploring the seabed and exploiting its natural resources. In short, there is an inherent right. (NSCS Judgment, 23)

Thus, the Court declared delimitation a matter of recognizing existing sovereignty over the continental shelf, rather than expanding States’ territory, and centered the issue of entitlement on the concept of “natural prolongation” (Kim 2014, 377).

While all parties in this case agreed the principle of natural prolongation was fundamental (NSCS Judgment, 32), it certainly would have come as a surprise to those considering the interplay of sovereignty and freedom in the law of the sea only a couple decades prior. At that time, few would have argued States had any sovereignty over the continental shelf, let alone such clearly delimited sovereignty whose boundaries could be ascertained simply by applying legal principles. Indeed, as L. D. M. Nelson has noted, the *North Sea Continental Shelf* judgment introduced the phrase “natural prolongation” to the law of the sea (Nelson 1990, 846); it had no purchase previously.

Delimitation

Next, tasked with applying natural prolongation to delimitation, the Court viewed this endeavor as particularly challenging in the case of adjacent States – the circumstances here – because artificial delimitation was almost certain to be required (NSCS Judgment, 38). With opposite States, by contrast, the Court assumed natural prolongations

would be less likely to overlap or conflict. Thus, although some have described natural prolongation as the Court’s criteria for delimitation (see, e.g., Colson 2003, 99), this concept alone could not resolve delimitation between the parties (see Hight 1989, 90). On which principles should delimitation be made, then?

The Court quickly rejected West Germany’s preferred position of giving each coastal State a “just and equitable share,” finding this approach assumed the area was “as yet undelimited” and accordingly contradictory to coastal States’ *ipso facto* entitlement (NSCS Judgment, 23). The Court dedicated substantially more consideration to the equidistance principle, as embodied in the Geneva Convention, however.

It is undeniable, the Court noted, that the equidistance principle offers convenience and certainty in many cases. Even West Germany acknowledged the “utility of equidistance as a method of delimitation” (NSCS Judgment, 21). However, the principle is not unfailingly convenient and certain. Equidistance “can under certain circumstances produce results that appear on the face of them to be extraordinary, unnatural or unreasonable” (NSCS Judgment, 21, 24). As Etienne Grisel wrote shortly after the Court’s decision, there are a number of practical obstacles to applying the equidistance principle – most notably, how to measure points along a coastline when coastlines shift with the tide and over time (Grisel 1970, 574–75). Moreover, convenience and certainty do not themselves make a rule mandatory.

Accordingly, the Court considered three ways the equidistance principle might be a mandatory rule of international law applying to West Germany: by virtue of a treaty to which West Germany bound itself; by virtue of a fundamental or *a priori* character; or by virtue of being a CIL rule. On treaty law, the Court agreed that West Germany was not bound as a Geneva Convention party because it never ratified the Convention. And even if West Germany were a party, this would not necessarily make it bound by Article 6 since parties were permitted to enter reservations to this article. Denmark and the Netherlands argued that West Germany should nevertheless be

bound by the Convention, or at least Article 6, because it had bound itself by its conduct. Yet the Court similarly rejected this argument. The Court did not find the “very consistent course of conduct” that would be required for West Germany to bind itself to a Convention to which it was not a party, nor did the Court find the detrimental reliance on the part of Denmark or the Netherlands that would be required to support an estoppel claim (NSCS Judgment, 26–27).

The Court further rejected Denmark and the Netherlands’ contention that the equidistance principle had a fundamental or *a priori* character in international law. Equidistance is grounded in the notion of proximity, which does not always cohere with natural prolongation, the core of State dominion over the continental shelf:

[W]henever a given submarine area does not constitute a natural – or the most natural – extension of the land territory of a coastal State, even though that area may be closer to it than it is to the territory of any other State, it cannot be regarded as appertaining to that State; – or at least it cannot be so regarded in the face of a competing claim by a State of whose land territory the submarine area concerned is to be regarded as a natural extension, even if it is less close to it. (NSCS Judgment, 32)

A prime example of the tension between proximity and natural prolongation is the Norwegian Trough, which is proximate to the Norwegian coastline but, by virtue of its depth “cannot in any physical sense be said to be . . . [the] natural prolongation [of Norway’s land territory]” (NSCS Judgment, 33). Thus, “[t]he issue of natural prolongation brought to the legal concept of the continental shelf an emphasis on physical features beneath superjacent waters” (Kim 2014, 376–77), which received expression in “a passionate search for troughs and faults and rift zones in subsequent cases” (Hight 1989, 89). The Court also reasoned that, if the principle of natural prolongation were necessarily realized through proximity, and accordingly the equidistance principle, one would expect the ILC members to have advanced this position when considering delimitation between adjacent States. Yet the Court found no evidence of members having done so, and in fact noted the members did not seem to have given the equidistance

principle any sort of priority over other methods of delimitation until a committee of hydrographical experts suggested it as the best available default method (NSCS Judgment, 34–35).

The final manner, then, in which the equidistance principle might have been mandatory for West Germany was as a CIL rule. As outlined in the ICJ Statute, CIL requires “a general [State] practice accepted as law” (ICJ Statute 1945, Art. 38(1)(b)) – in other words, State practice and *opinio juris sive necessitatis*. To find a rule of CIL, the Court sought “State practice, including that of States whose interests are specially affected, [that has] been extensive and virtually uniform . . . [and that] occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved” (NSCS Judgment, 44). Given the principle in question had been incorporated into a treaty, the Court also articulated three modes of interaction between treaties and CIL: a treaty may record an existing rule of CIL; a treaty may crystallize an emerging rule of CIL; or a treaty rule may subsequently become a rule of CIL (NSCS Judgment, 38). It is for this tripartite structure – the three ways a treaty rule can also be a CIL rule – and its guidance on identifying CIL more generally that the *North Sea Continental Shelf* judgment is perhaps best known among international lawyers today (see, e.g., Wood 2015).

The Court found that the equidistance principle, as expressed in Article 6(2), was neither an existing nor an emerging CIL rule when the Geneva Convention was drafted. First, there was no evidence the ILC members considered the equidistance principle mandatory and in fact they included it “with considerable hesitation, somewhat on an experimental basis.” Second, little State practice on the issue of sea boundaries between adjacent coastal States existed when the ILC took up the issue from 1950 to 1956. Third, the Convention permitted reservations to Article 6 and its delimitation method (NSCS Judgment, 34–42).

The Court also found that neither Denmark nor the Netherlands had provided sufficient evidence to show that the equidistance principle became a

CIL rule after the Convention came into force. Its judgment expressed doubts that the equidistance principle in Article 6 had the norm-creating character necessary to produce a CIL rule. Among these doubts was the fact that the equidistance principle in Article 6 was doubly limited – by the preference for agreement and by the allowance for special circumstances to dictate deviation. Setting this aside, however, the Court nevertheless deemed insufficient the evidence Denmark and the Netherlands provided to assert “extensive and virtually uniform” State practice. Some instances were considered inapplicable because they involved the parties to the case or non-international boundaries. Of the 15 remaining instances, “over half the States concerned . . . were or shortly became parties to the Geneva Convention, and were therefore presumably . . . acting actually or potentially in the application of the Convention” (NSCS Judgment, 44). The Court could then only speculate as to the motivations of the States that were not parties to the Convention, and ultimately the Court found speculation on a handful of instances inadequate to demonstrate *opinio juris*. Moreover, almost all of the 15 cases involved median lines, rather than lateral lines, which the Court regarded as interacting differently with the principle of natural prolongation (NSCS Judgment, 43–46).

While rejecting both sides’ preferred grounds for delimitation, the Court did not apply some other mandatory rule, nor did it leave a gap where unfettered discretion could be exercised (NSCS Judgment, 47). Instead, the Court held the “principles and rules of international law applicable to the delimitation as between the Parties” were:

(1) Delimitation is to be effected by agreement in accordance with equitable principles, and taking account of all the relevant circumstances, in such a way as to leave as much as possible to each Party all those parts of the continental shelf that constitute a natural prolongation of its land territory into and under the sea, without encroachment on the natural prolongation of the land territory of the other.

(2) If . . . the delimitation leaves to the Parties areas that overlap, these are to be divided between them in agreed proportions or, failing agreement, equally, unless they decide on a régime of joint jurisdiction, use, or exploitation for the zones of overlap or any part of them (NSCS Judgment, 54).

It also identified three “basic legal notions” as “reflect[ing] the *opinio juris* in the matter of delimitation.” First, parties must negotiate in good faith; they must “enter into negotiations with a view to arriving at an agreement.” Second, parties must apply equitable principles, by which the Court seemed to mean treating like cases – including the coastlines of the Netherlands, West Germany, and Denmark – alike (NSCS Judgment, 48). The Court offered four considerations that might be taken into account to arrive at an equitable delimitation: geology, geography, unity of deposits, and proportionality of coastline to continental shelf claim (NSCS Judgment, 51–53). Finally, delimitation must conform with natural prolongation, avoiding encroachment on “the natural prolongation of the territory of another State” (NSCS Judgment, 48).

Thus, as Table 1 illustrates, the ICJ judgment in the *North Sea Continental Shelf Cases* reclaimed the Truman Proclamation’s principles, favoring those over the principles laid out in the more recent Geneva Convention.

Criticism

As the first case on the continental shelf and a cornerstone decision in international law, the *North Sea Continental Shelf Cases* judgment has drawn substantial criticism over the years. Some scholars quickly identified that relying on State agreements might not be realistic. Indeed, this case and resulting decision only came about because States failed to reach an agreement regarding delimitation. Circumstances would have been even more challenging if the relevant States did not recognize each other or were otherwise impeded from entering into negotiations (*see* Grisel 1970, 592). This case was possible,

North Sea Continental Shelf Cases, Table 1 Key elements of the Truman Proclamation, Geneva Convention, and *North Sea Continental Shelf Cases* judgment regarding continental shelf entitlement and delimitation

	Truman Proclamation (1945)	Geneva Convention (1958)	<i>North Sea Continental Shelf Cases</i> (1969)
Entitlement Grounds	physical extension of land mass (para. 4)	formality and exploitability (Art. 1)	physical extension of land mass (“natural prolongation,” p. 23)
Entitlement Status	<i>ipso facto, ab initio</i> (para. 6)	<i>ipso jure</i> (Art. 2)	<i>ipso facto, ab initio</i> (p. 23)
Delimitation Grounds	by agreement in accordance with equitable principles (para. 6)	by agreement or, absent agreement, according to equidistance principle, unless special circumstances justify another boundary (Art. 6)	by agreement in accordance with equitable principles (pp. 48, 54)

however, because the parties at least agreed to submit the dispute to the ICJ. In 1968, Shigeru Oda asked what would happen if parties could not even agree on dispute resolution and argued that “third-party determination . . . as when there is compulsory resort to an impartial body” would be necessary (29). Ultimately, the *North Sea Continental Shelf Cases* decision did not resolve this problem, and it was not until a 1982 treaty that the international community – or at least parties to that treaty – developed compulsory dispute resolution for this issue (*see* UNCLOS 1982, Art. 83). Even still, Grisel has argued courts and tribunals would be inclined to assume that “any settlement reached is in accordance with ‘equitable principles,’” leaving the party denying an agreement’s validity to “bear the burden of showing, for instance, that undue pressure was exercised or that circumstances have changed” (1970, 592).

Commentators have also broadly objected that the decision contravenes justice, entrenching powerful and wealthy interests. Wolfgang Friedmann pointedly noted “[i]t cannot even be said that the correction of this particular accident of nature [the coastline formation] was a kind of Robin Hood justice. For the Court’s delimitation benefited, as it happened, the biggest and wealthiest of the three states concerned” (Friedmann 1970, 240).

B.S. Chimni has also argued the decision legitimized efforts of western scholars aiming “to salvage the doctrine of CIL from its historical condition – of being associated with . . . colonial and neocolonial projects” and, in so doing, helped

solidify the interests of western, capitalist States in the international system (Chimni 2018, 44). More broadly, the decision may be read as benefitting a relatively small group of coastal States to the detriment of the international community writ large, which was formerly viewed as holding the seas as common property (Osherenko 2006, 328–29). Indeed, the extension of recognized national sovereignty into the sea, a process in which this decision participated, represented an encroachment on the deep seabed that lies beyond national jurisdiction (*see* Heller 2018, 222).

Finally, the decision has been criticized for using without adequately defining the concept of specially affected States. Recall that in examining whether the equidistance principle represented a CIL rule the Court considered the relevance of State practice examples offered by the parties. The Court asserted it was reviewing State practice, including but not limited to “that of States whose interests are specially affected” (NSCS Judgment, 44). However, by rejecting examples of State practice that did not involve lateral delimitations between coastal States, the Court seemed actually to limit relevant practice to that of specially affected States and define specially affected States as those similarly situated to the dispute’s parties. Some have taken aim at this element of the judgment, arguing the concept of specially affected States is insufficiently clear and open to abuse by powerful states (Danilenko 1993, 96; Heller 2018, 241). Moreover, in this posture, the doctrine of specially affected States may undermine the principles of sovereign

equality. Diré Tladi has advocated against taking “the practice of ‘specially affected States’ . . . to mean the practice of ‘powerful States’ . . . as that could have implications for the principle of the sovereign equality of States” (see, e.g., ILC 2014, 5). However, Kevin Jon Heller has argued that, if properly construed, the concept may be employed to promote sovereign equality (Heller 2018, 242).

Consequences

These contested elements aside, the decision has undeniably had lasting effects on the concept of territorial rights, even if those effects are limited by subsequent cases and the clarification of continental shelf delimitation for cases where the Geneva Convention does not apply in the 1982 UN Convention on the Law of the Sea (“UNCLOS”). The Court may not have intended in the *North Sea Continental Shelf Cases* to use natural prolongation as a functional attribute for finding a boundary, but this is how the precedent “came to be used in the subsequent cases” (Hight 1989, 90; see also Grisel 1970, 589). Indeed, as Hyun Jung Kim puts it, since the judgment, “natural prolongation has been regarded as a semisacred expression,” even though subsequent cases eroded the legal doctrine (2014, 374, 381–83).

The judgment also marked the end of the equidistance principle (see Nelson 1990, 843; Gormley 1995, 351; Legault and Hankey 1993). UNCLOS could have followed the Geneva Convention’s example by incorporating the principle but instead followed this judgment, relying primarily on coastal States to reach delimitation agreements among themselves (UNCLOS 1982, Art. 83). Moreover, the UNCLOS *travaux préparatoires* suggest the treaty drafters picked up the concept of natural prolongation from this decision – specifically, the notion that “the land dominates the sea” (Kim 2014, 381; see also Nelson 1990, 844).

Between these residues and the holdings on CIL, this 1969 judgment remains a dominant presence in the international regime of territorial rights.

Cross-References

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