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ANALYZING INTRICACIES OF THE NORTH SEA CONTINENTAL SHELF CASE

AUTHORED BY - K. SOHANA SRIYA VARMA & UMESH RATHOD N

“NORTH SEA CONTINENTAL SHELF SEA CASE (1969)”

***(“Federal Republic of Germany/ Denmark Clubbed with Federal Republic of Germany/
Netherlands”)***

- Institution of Proceedings: 20th February, 1967
- Judgment Delivered on: 20th February, 1969
- The court delivered the present judgment, by a vote ratio of 11 is to 6 in the Northern Sea Continental Shelf Case.
- Citation: (1969) ICJ Rep 3

INTRODUCTION

The North Sea a treasure of rich resources hosting a route of immense strategic, economic and political essence has been a point of disputes since medieval periods. Encompassing continental shelf claims of six powerful states including France, Belgium, United Kingdom, Netherlands, Norway and Germany it is the water body located off the coast of Northern and Western Europe. With the development of the conceptual idea of maritime boundary providing division of marine natural resources, such as oil and fish, delimitation disputes have started becoming relatively common. Each state is motivated to claim to control a larger part of continental shelf vesting exclusive rights as to resource extraction to its state stretching up to 350 nautical miles from the baseline¹. Occurrence of inter-state disputes apportioning maritime boundaries, supranational bodies like the “International Court of Justice” (ICJ) would have the authority to balance treaty obligations, precedent, and equity.

The North Sea Continental Shelf Case had laid a landmark judgment in deciding disputes entailing delamination process. The dispute of the instant case was brought before the

¹ *Preamble to the United Nations Convention on the law of the sea* (no date) *United Nations*. Available at: https://www.un.org/depts/los/convention_agreements/texts/unclos/part6.htm.

court on February 20th, 1967 concerning the boundaries of the continental shelf in the North Sea present between Netherlands, Germany and Denmark respectively. Parties to this case had duly requested the ICJ to constructively assess the rules and principles of international law thereby agreeing to implement the delimitations thus stated. The dispute makes its inception from the disagreement towards sea boundary limitations that were previously decided between the party nations. This non alignment necessitated the Court to determine as to whether the parties were bound by the treaty or customary international law to uphold the ideals that they had espoused.

FACTS AND CONTENTIONS

The present dispute involves claim over a North Sea continental shelf by three states Netherlands, Denmark and Germany with both Netherlands and Denmark instituting individual cases against Germany before the ICJ. This act was based of two individual special agreements entered on 1st December, 1964 between Germany and Netherlands, and another on 9th June, 1965 between the Federal Republic and Denmark² in order to decide the applicability of international provisions in case of any dispute. However, the ICJ decided to club both the claims thereby issuing a single ruling. It was also corresponded by the parties to the case that the ICJ would not physically assign claims, but to only prescribe a delimitation method for the parties to follow.

At the heart of this dispute lie the diverse geographical locations of the three states in the shallow North Sea's waters with less than 200 meters of continental shelf making up the whole seabed aside from the Norwegian Trough, with majority of it had already been agreed upon by the relevant coastal states³. Denmark and the Netherlands entail convex borders opposed to concave boarder of Germany. The duo party nations proposed to abide by the “equidistant” principle meaning that a line would be drawn thereby dividing equal distance to all the states closest to them claiming that it was a, general norm of conventional practicality, besides being a priori and customary international rule of law under ‘Article 6’ of Geneva Convention on Continental Shelf.⁴

²International Court of Justice (ICJ), Analysis of North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands), -, 20 February 1969, <https://www.refworld.org/jurisprudence/caselawcomp/icj/1969/en/15093>.

³ Hoagland, P. (2019) *Territorial sea, Territorial Sea - an overview* / ScienceDirect Topics. Available at: <https://www.sciencedirect.com/topics/earth-and-planetary-sciences/territorial-sea>.

⁴ 1958) *Convention on the Continental Shelf*, 1958. Available at: https://legal.un.org/ilc/texts/instruments/english/conventions/8_1_1958_continental_shelf.pdf.

The researchers with the aid of the diagram would like to showcase the earlier and onboard issues that resulted in the case as follows. Based upon the equidistant principle, Denmark and Netherlands had drawn partial boundary lines jotted as A-B and C-D respectively. Further prolongation of these boundaries (B-E and D-E) were posing challenges since there was no consensus being arrived at by the three states with Germany opposing the equidistance principle addressing its contentions of inequitable outcomes⁵.

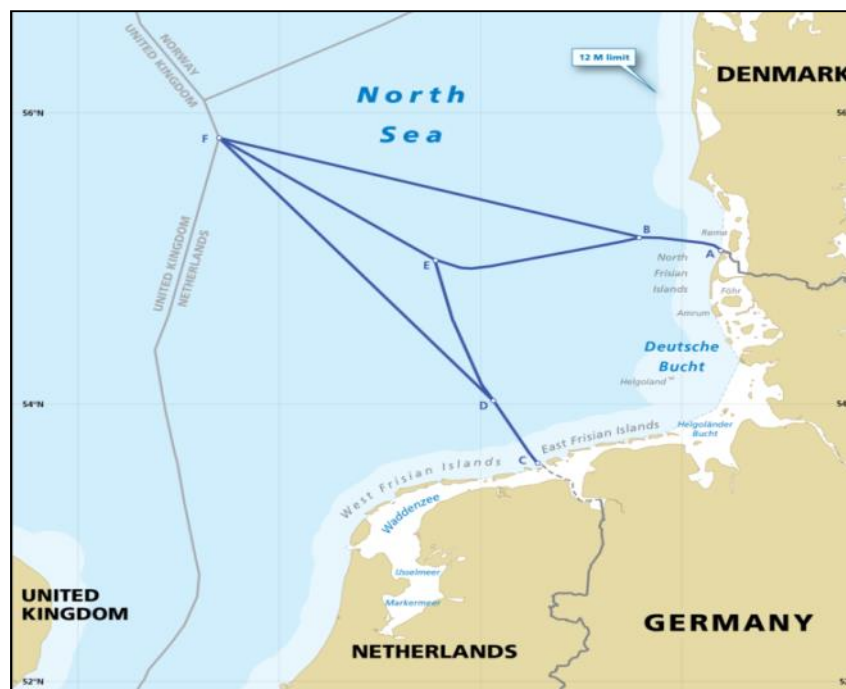


Figure displaying the earlier and onboard issue regarding prolonged continental zone

⁵ Gunaratne, D.R. (2020) *North Sea Continental Shelf Cases (summary)*, *Public International law*. Available at: <https://ruwanthikagunaratne.wordpress.com/2014/02/28/north-sea-continental-shelf-cases-summary/>.

ISSUE IDENTIFICATION

Legal issues presented before the International Court of Justice in the instant case are as follows:

1. Whether Germany is legally obligated to accept equidistant principle under ‘Article 6’ of the ‘Geneva Convention on the Continental Shelf, 1958’ law as a customary international rule?
2. What aspects lay the basis for construction of an international customary rule of law?
3. Whether Geneva Convention is enforceable against a state that has not ratified it?
4. Whether the rule of Equidistance is recognized and enforceable by the international law?
5. What principles and rules are applicable to the delimitation dispute of continental shelf that shall ensure equitable and justified division under international law?

RULE STATEMENT

The court primarily examined the concept of “continental shelf” thereby further progressing towards analyzing the justified method of delimitation rule to be adopted. The court examined ‘Article 6’ of the ‘Geneva Continental Shelf Convention, 1958’ encapsulating the Principle of Equidistance⁶ besides analyzing Articles 1 to 3 addressing the foundational concept of ta continental shelf. Additionally, the court has relied on the 1945 Truman Proclamation which is the first decision passed attributing a continental shelf legal jurisdiction. In order to critically examine various rules and principles under international law judges Sorensen and Tanaka have relied on ‘Article 38’ of the International Court of Justice⁷. The method of equidistance outlined in “Article 6 of the Geneva Convention”, applies to continental shelf delimitation unless parties agree otherwise or special circumstances exist. It has also been analyzed by the court that Customary International Law can create obligations for states, even if they haven't signed relevant treaties. To be considered customary law, a rule requires:

- *Generality*: Widespread and representative participation by states, particularly those with a specific interest (coastal states in this case).
- *Uniformity*: Consistent and uniform state practice over time.
- *Opinio Juris*: A general recognition by states that the practice is obligatory under law.

⁶ (1969) ICJ Rep 3, pp. 1.

⁷ Conventions on the Continental Shelf, art.6, 1958.

With the aim to critically analyze the relevant principles under customary international law, a few judges, including Justice Tanaka and Justice Sorensen, specifically referenced Article 38 of the International Court of Justice.

ANALYSIS

The researchers shall proceed with critical analysis of the present case by drawing correlation between the legal rules as well as provisions with the pertinent facts of the case.

❖ Emergence of Legal Concept of a Continental Shelf

The section of a continental landmass that is immersed in a relatively shallow layer of water is called a “continental shelf. The. Abundance of wealth in the continental shelf’s reserves encapsulating vast fishing grounds and oil and gas resources became apparent, the necessity for a legal status for these areas was acknowledged.⁸ The first attempt to establish jurisdiction over continental shelves was the Truman Proclamation of 1945, which acknowledged American exclusive jurisdiction over its assets on the continental shelf.⁹ The ICJ issued a judgement in the North Sea Continental Shelf case, a dispute amidst “Germany, Denmark, and the Netherlands” regarding the continental shelf’s delamination in the North Sea. This analysis will focus on the legal principles applied by the Court and their applicability to the case. The Court first examined whether ‘Geneva Convention on the Continental Shelf’ the would be applicable to the present delimitation. It was determined that the state of Germany had failed to ratified the convention, thereby rendering it not bound by the convention’s provisions, specifically “Article 6” outlining the equidistance principle for delimitation.

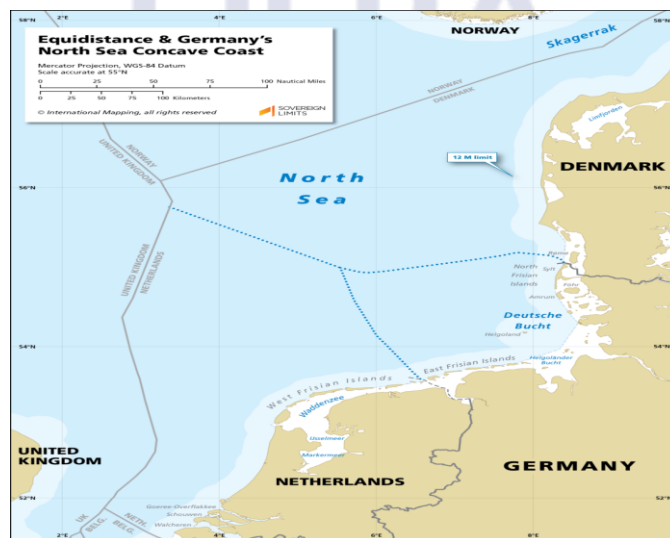


Figure 1 - Provisional equidistance lines in the North Sea.

⁸ MALCOLM SHAW, INTERNATIONAL LAW, 584 (6th ed. 2008).

⁹ Truman Proclamation, 10 Fed. Reg. 12,305 (1945).

The Court further deliberated that whether or not all states were required to abide by the equidistance standard as a customary international law rule. States, "Denmark and the Netherlands" contended that the notion was ingrained in the idea of the continent's shelf and had evolved into official state policy. The Court disagreed. It found that the equidistance principle was not universally accepted nor consistently practiced by states, and "Article 6 of the Convention" allowed for reservations, suggesting it wasn't seen as a pre-existing customary rule.

❖ **Applicable Law and Delimitation Process**

Since neither the Convention nor customary law mandated the equidistance principle, the Court turned to the broader legal framework for delimitation. It found the core principles stemmed from the Truman Proclamation of 1945, which established the rights of a coastal state with regards to the continental shelf and emphasized delimitation by agreement based on equitable principles. The Proclamation further specified that delimitation would be decided "in accordance with equitable principles" in situations where neighboring states disagreed about the continental shelf. Due to the numerous issues raised by this declaration, the "Geneva Convention on the Continental Shelf" was created in 1958.¹⁰

❖ **Position of "Article 6 as a Customary Law" during the Convention's formation**

The nations of Netherlands and Denmark additionally contended that the Convention's establishment or the following actions of the member states have given rise to the equidistance concept of equidistance as a general rule of customary law. In response, the Court noted that insufficient admissions and ratifications to the Convention suggested that the principle was not widely acknowledged or widely practiced¹¹. Regarding the temporal component, the Court decided that, given the development of customary law, a shorter period would not be inadmissible; however, the rule in question should be applied broadly and consistently.¹² The few states who did not ratify the Convention did not demonstrate that they were abiding by any rule established by customary international law; rather, their intentions were wholly hypothetical. As a result, there was no clear opinion "*juris sive necessitatis*", which is the conviction that an activity is carried out as a legal obligation that is established in response to the satisfaction of two requirements.¹³ The first requirement is that the state's actions must

¹⁰ Supra note.

¹¹ Truman Proclamation, 10 Fed. Reg. 12,305 (1945).

¹² *Id.*

¹³ Cambodia v. Thailand, Merits, 1962 I.C.J. Reports.

amount to a "settled practice," and the second is that the states must think they are abiding by the law and not doing so out of courtesy, custom, habit, or convenience. The Court emphasized the concept of "*opinion juris*" by citing the seminal decision of S. S. Lotus case¹⁴. The Court determined that during the period of drafting the convention, customary international law was not in existence and did not include the equidistance norm found in Article 6. The International Law Commission (hereinafter referred to as ILC), that had drafted the Convention, indicated reluctance to include Article 6 additionally, permitting reservations to Article 6. These arguments were used by the Court to support its conclusion.

❖ Applicability of Customary International Laws on Equidistance Principle

Despite the Court's ruling that Germany's failure to ratify the CCS rendered Article 6 of the Convention unenforceable, Netherlands and Denmark asserted that the principle of equidistance would remain valid due to its reflection of customary international law, making it automatically binding on all states, regardless of the Convention. The Court made clear that the goal of delimitation was to recognize each state's natural extension of its land area beneath the sea, not to assign regions. Though practical, the equidistance approach could result in territory being assigned to a state that was not a natural extension of its landmass, which could lead to unfair outcomes. Germany argued it was not bound by Article 6 as it had not ratified the Convention. The Court agreed. It rejected arguments that Germany had assumed obligations through unilateral actions or was bound by estoppel. The Court reasoned that a state's conduct would only be binding if it demonstrated a "very definite very consistent course of conduct" indicating an intention to be bound by a treaty it had not formally ratified.

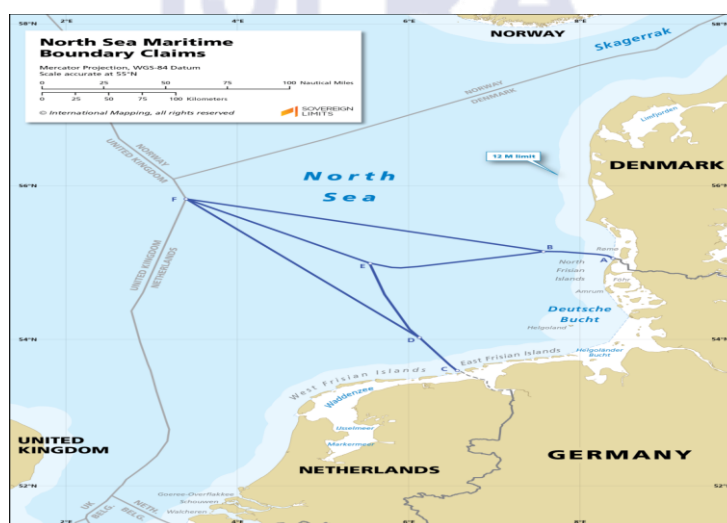


Figure 2 - Claim lines of Germany, Netherlands and Denmark

¹⁴ France v/s Turkey, 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7)

Further, the court also asserted that the principle of equidistance did not meet the criteria for customary international law since, as per *Generality*: The Convention had a limited number of ratifications at the time. Secondly the aspect of *Uniformity*: While some states used the equidistance method, practice was not universally consistent and lastly *Opinio Juris*: The Court concluded there was not enough proof that states that used the equidistance method did so because they were obligated by law.

❖ Customary International Law and Treaties

The individual actions against Germany launched by the Netherlands and Denmark were consolidated by ICJ wherein each nation possessed claims to the continental shelf in the north sea. However, the 1958 Convention was not ratified by Germany, which included a specific method (equidistance) for dividing these underwater territories. The Court ruled that Germany wasn't obligated to follow this method since they weren't part of the agreement. Denmark and the Netherlands couldn't force Germany to use it. The Court explained that for an unsigned treaty provision to become widely accepted in international law, there needs to be broad participation by many countries, and they must act as if following the rule is a legal requirement. In this case, not enough countries had signed the Convention that had not been in effect for long enough 11 years to meet this standard. An additional wrinkle was the shape of Germany's coastline. If a simple equidistance method were used, it could give them an unfair advantage. The Court encouraged all sides to consider this when negotiating a new boundary.

❖ The Impact / Influence

The Court in its conclusion had determined that the equidistance principle was not 'priori' meaning a customary rule of international law as had been claimed. Instead, it was to be viewed as one delimitation choice among several for the establishment of just maritime borders. Germany argued that states should not be allowed to claim "the natural prolongation of their continental shelf" if apportionment was not done in a way that made the size of a claim proportionate to a state's coastline. However, this argument was also rejected by the court. Rather, the Court suggested that delimitation be carried out using "equitable principles," which would take into consideration a number of variables to guarantee that each state received an equitable share of the disputed claim. On January 28, 1971, Germany signed agreements with Denmark and the Netherlands to settle the dispute over North Sea continental shelf in response

to the ruling of the court¹⁵. Since the UK's existing borders were based on the endpoints of the previous equidistance-based boundaries between Denmark and the Netherlands, these agreements forced the UK to modify the endpoints of its continental shelf boundaries with Netherlands and Denmark thereby creating a completely new continental shelf boundary with Germany.

❖ Key Findings and Applicable Law

- The 'Geneva Convention on the Continental Shelf, 1958' would not apply to Germany as the state had not ratified it.
- The principle of equidistance enriched under 'article 6' is not a obligatory customary international rule.
- Delimitation of continental shelf must be on the basis of an agreement between states based on equitable principles.
- Primary goal is to leave each state with the areas that institute the natural prolongation of its territory.
- Factors to consider during negotiations include:
 - Coastline configuration and presence of special features
 - Geological and physical arrangement of the continental shelf
 - Proportionality between shelf area and coastline length
 - The region's current delimitations of the continental shelf

CONCLUSION

Conclusively, the researchers agree with Justice Tanaka's assessment that the Court erred in concluding that customary international law does not apply to the equal-distance standards that have been detailed in 'Article 6' of the convention. The 'Truman Proclamation' in 1945 had established the continental shelf's concept. Further, the 1958 international treaty that embraced it, was signed just fifteen months later, with both barely being mentioned by the Court.¹⁶ The Court ought to have adopted a less formalistic and more expansive viewpoint in light of society's dynamic nature, particularly in the late 20th century. Although the Court made progress in eliminating the period of time that custom emerged, they were unable to see the necessity of establishing unambiguous legal principles as opposed to equitable or grounds-

¹⁵ I.C.J. 1969 I.C.J. 3.

¹⁶ Friedmann, Wolfgang. "The North Sea Continental Shelf Cases--A Critique." *The American Journal of International Law* 64, no. 2 (1970): 229–40. <https://doi.org/10.2307/2198663>.

based principles. Since then, the methodology used in this decision has been changed.¹⁷ An analogous principle to the equidistance principle established in ‘Article 6’ of the 1958 convention was later enriched under Article 15 of the 1982 Convention.¹⁸ The case of “Bahrain v. Qatar” decision, decided in 2001, recognized that, generally speaking, customary international law recognizes Article 15 as the special circumstances concept¹⁹.

The Court further stressed that equality should only be used as a guide for implementing delimitation, not as a means of doing so. A similar ruling was made in the 2006 arbitration case of “Barbados v. Trinidad and Tobago”, where the court determined that the delimitation should be implemented through a two-step procedure. Initially, a provisional demarcation based on the equidistance principle should be carried out, and then this line should be adjusted in accordance with the pertinent circumstances that are case-specific so as to achieve an equitable outcome.²⁰ All aspects being critically considered, the ICJ’s decision in the present case remains a landmark decision in the sphere of international law as it effectively addresses the manner in which treaties and agreements become part of the body of international law. The Court’s decision of upholding equidistance delimitation practice which was not always customary in international law was equally significant. Although equidistance delimitation is still frequently used, the Court’s preference for equity over equidistance established a new standard for boundary negotiations starting in 1969. This case established important precedents for future continental shelf delimitation disputes. It clarified that the equidistance principle is not a universally applicable rule and emphasized the importance of equitable principles and natural prolongation in determining boundaries. The factors outlined by the Court continue to be used in negotiations and arbitrations on continental shelf delimitation. The specific findings concerning the convention and customary law apply directly to the present case involving Netherlands, Denmark, and Germany. However, the broader principles of equitable delimitation and natural prolongation have become influential in subsequent cases dealing with continental shelf boundaries.

¹⁷ Colombia v Peru [1950] ICJ 6.

¹⁸ *Id.*

¹⁹ Qatar v. Bahrain, ICJ Reports, 2001.

²⁰ Award of 11 April 2006, pp. 230.

REVERSED JUDGMENT

The judgment delivered by the ICJ in the present North Sea Continental Shelf Case is determined to be a landmark order that dealt with the concept of supranational delimitation for the very first time. However, aligning with the requisite guidelines mentioned, the researchers have critically analyzed few ounces including potential counter arguments and interpretation of relevant facts and rules thereby asserting the prospective of an alternate judgment favoring the other party that had succumbed to the judgment passed. The original judgment upheld the equidistance principle enriched under 'Article 6' of the Geneva Convention on Continental Shelf while addressing necessary adjustments for Germany's specific concave coastline.

The equidistance principle though emphasized as the main technique for delimitation in the ILC commentary on the Geneva Convention of Continental Shelf, asserts deviations to be made only in "special circumstances²¹." According to UNCLOS Article 76, the existence of islands might lead to unique situations when defining maritime boundaries. The International Court of Justice (ICJ) took into account the geographical features, such as islands, when establishing maritime borders in "Qatar v. Bahrain²²" maritime delimitation case. Additionally in case of "Libya v. Malta²³" Continental Shelf decision recognizing the limitations of the equidistance concept the court stressed the significance of taking into account pertinent topographical, geological, and geomorphological criteria in addition to equitable considerations.

The geographical aspects including the presence of Shetland, Frisian, Orkney Islands and archipelagos restrict fair division of continental shelf due to the concave shape of the territorial boarder of Germany opposed to the common convex shape of Netherlands and Denmark. This geographical difference halts the Federal Republic nation from exercising equal rights thereby rendering very less area of continental shelf as opposed to other nations thereby falling under the ambit of special circumstances justifying a departure from equidistance as held in "Cameroon v. Nigeria Case²⁴". Additionally, counterarguments against the original case could include arguments for a boundary that reflects their coastline projection by invoking the equitable principles outlined under 'Article 5' of the Geneva Convention. As per 'Article 6' of

²¹Dhanapal, Kiruthika. Equidistance and equitable principle under the law of the sea. https://www.legalservicesindia.com/article/1686/Equidistance-and-Equitable-Principle-under-the-law-of-the-Sea.html#google_vignette.

²² Qatar v Bahrain, [1994] ICJ Rep 112.

²³ Libya v. Malta, [1985] ICJ Rep 13.

²⁴ Cameroon v Nigeria, [1998] ICJ Rep 275.

the Geneva Convention on Continental Shelf, in cases where two or more States have coastlines that face each other and their continental shelf is adjacent to their territories, the states shall agree on a boundary line or other special circumstance before determining the extent of their respective continental shelf²⁵.

‘Article 6’ of the Continental Shelf Convention stated to be a non-customary law is not compoundable as addressed in the case of “Nicaragua v. United States²⁶”, by the ICJ itself it was asserted that in order to create customary international law, states use “opinio juris” and “state practice” as the basic aspects for evaluation. Additionally, it was stated that customary international law can arise from state practices that are uniform and consistent and from the perception that such practices are mandated by law (opinio juris). The practice of equitable distance and division of maritime rights were adhered to as a regular state practice since decades in all cases prior to the present decision falling under the nature of an established norm and standard practicable by all the nations. ‘Article 38(1)(b)’ of the Statute of the International Court of Justice recognizes treaties and fundamental principles of law as secondary sources of international law, in addition to customary international law. The court citing Customary International Law, argued that equidistance was not customary law during the period of the instant case. This argument was supported by notable state practice that before the 1969 ruling. Even though it hasn't been approved by every party, the 1958 Geneva Convention on the Continental Shelf was supported by a number of rulings that codify equitable principles and reflect customary international law.

In 1964, Denmark, United Kingdom and Norway signed a tripartite agreement pertaining to the North Sea Continental Shelf, with the delimitation based on equal distance. Furthermore, the accords that were widely ratified following the North Sea cases demonstrate the growing popularity of equidistance as customary law. According to the decisions in the present case, the rights of impacted communities and indigenous peoples have also not been adequately taken into account during the delimitation process, particularly in relation to access to traditional fishing grounds and cultural heritage sites. While they might not specifically address the delimitation of maritime rights, international human rights accord like the ‘Universal Declaration of Human Rights’ emphasize the protection of the rights of all individuals and groups. The Court ought to have been more accommodating in its decision-

²⁵ Conventions on the Continental Shelf, art.6, 1958.

²⁶ Nicaragua v. United States, ICJ GL No 70, [1984] ICJ Rep 392.

making process in the North Sea Continental Shelf case. The Court may have reached a more equitable resolution to the conflict between Germany and the Netherlands by considering changing circumstances and viewpoints on equity relying on the maritime boundaries' outcome of 2009 Black Sea "Ukraine v. Romania"²⁷ case. The ICJ in this case that defining maritime borders in the Black Sea requires some wiggle room. As an example of its flexible approach to dispute resolution, the Court took into account past usage, geographical arrangements, and the equitable interests of both parties.

In conclusion, although the rulings in the present Continental Shelf Case are recognized by many as authoritative applications of international law, there is still room for criticism. The decision of overlooking equitable principle thereby giving prominence to equidistant principle under customary international law aligning with pertinent circumstances are called into question by a by the researchers through the stated counterarguments and alternative conclusions. The researchers are of the opinion that the adjudicating bodies must go further by delineating maritime boundaries in a more comprehensive and context-specific manner, accounting for all pertinent variables and interests. In this way, maritime boundary conflicts can be settled in a just and fair manner, advancing international law and preserving peace and fidelity within the international community.

²⁷ Ukraine v. Romania, ICJ GL No. 132.