North Sea Continental Shelf Case: An Analysis of Negotiations

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Abstract

The main purpose of this paper is to understand the reasons for the failure of the negotiations between the three states i.e. Denmark, Netherlands and the Federal Republic of Germany, not only from the perspective of the International Court of Justice but also by applying the general characteristics and requirements of a negotiation proceeding. The paper begins by stating the facts of the North Sea Continental Shelf case with respect to the issue and the principle the parties wanted to be applied. It understands the decision of the court with respect to the delimitation issue and then states the reasons given by the court for failed negotiations. The paper then analyses whether the issue was a dispute between the parties and therefore could be resolved by alternative dispute resolution methods and further understands the lack of behavior of the parties that led to unsuccessful negotiations. The paper finally concludes by stating another alternate dispute resolution method that would have been best suited for solving the delimitation issue.

Keywords: North Sea Continental Shelf case, International Court of Justice, alternative dispute resolution, negotiation.

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Introduction – Facts of the Case

The North Sea Continental Shelf case was brought before the International Court of Justice by the Kingdom of Denmark, Federal Republic of Germany and Kingdom of Netherlands. This case has arisen due to differences concerning the delimitation of the areas of the continental shelf between the Parties. The areas in issue in this case excluded the areas that had already been an issue of dispute and decided upon by the parties in lieu of the two agreements dated 1 December 1964 (between Federal Republic and the Kingdom of the Netherlands) and 9 June 1965 (between Federal Republic and the Kingdom of Denmark) which were a result of the negotiations.

The court tried to understand the rules and principles of international law that were applied in the two agreements between the three parties. The rule of ‘equidistance’ was applied. A line known as the ‘equidistance line’ is drawn which leaves each party with those areas of the continental shelf that are closer to a specific point on their coast and not the point on the coasts of the other parties as their territory.

Denmark and the Netherlands wanted to adopt this rule in order to delimit the areas beyond the partial boundaries already created, however the Federal Republic of Germany was against this because it believed it will be curtailed of the share of the continental shelf which was in proportion to its North Sea coastline. This belief was based on the fact that the coastline of Federal Republic was concave and the two equidistance lines that were being drawn were pulling the continental shelf inwards, thereby reducing the amount of area that Federal Republic should have received. The equidistance lines were widening the scope of area that could be taken in by the convex shape coast lines which belonged to Denmark and the Netherlands. This had led to Denmark and the Netherlands on one side and Federal Republic of Germany on the opposite side.

The two countries (Denmark and Netherlands) contended that the equidistance rule was a mandatory rule of law which was reflected in Article 6 of the Geneva Convention of the Continental Shelf of 29 April 1958. The rule in this Article stated that if the parties have not agreed to any other method being employed for the delimitation of the continental shelf, all boundaries had to be drawn by applying this rule. An exception, however, was also carved out for the existence of any ‘special circumstances’ where this rule couldn’t apply.

All the facts of the case are taken from the North Sea Continental Shelf cases, Federal Republic of Germany/ Denmark; Federal Republic of Germany/ Netherlands, 1969.
Federal Republic, on the other hand, contended that the rule of delimitation should be such that leads to ‘just and equitable share’ for all the parties and the application of this rule was leading to proportionate shares of the continental shelf for the two countries but not for itself and hence it was against the employment of the rule of equidistance. Furthermore, the Federal Republic has a concave shape coastline which does act as a special circumstance for the exception of Article 6 to be applicable.

**Objectives of the Study**

1. To understand the facts of the case as well as the contentions of all the three parties i.e. Federal Republic of Germany, Denmark and the Netherlands.
2. To understand why their negotiations failed and what could have been done in order to make the same successful.
3. Whether negotiation was the best alternate resolution method, or another resolution method was better suited for the case at hand.

**Methodology**

The paper is a qualitative paper that relies extensively on the contentions and disclosures of the three countries when they became a part of the North Sea Continental Shelf case in the International Court of Justice. Since the negotiations are private party hearings, the information about these meetings is only gathered from the contentions of the parties during the trial. The paper is also an application-based paper because the knowledge of alternative dispute resolution methods is being applied on the facts of this case to understand the problem with the negotiations and suggest a new method or process for the same.

**Judgment of the International Court of Justice**

To understand whether the rule of equidistance was applicable, the court looked at whether the 1958 Geneva Convention was binding on the parties. The articles of the Geneva Convention stated that if a party signed and later ratified the convention, the parties were bound by it. Denmark and Netherlands had signed and ratified the convention; however, Federal Republic of Germany was merely a signatory of the convention and had not ratified the same. Furthermore, had the Federal Republic ratified the convention, it could enter into a reservations

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3 All the judgment points are taken from the North Sea Continental Shelf cases, Federal Republic of Germany/ Denmark; Federal Republic of Germany/ Netherlands, 1969.
clause which was allowed by the convention and therefore Article 6 of the convention is not an absolute Article.

The court also decided that the rule of equidistance was neither an emerging rule of customary international law nor was it a rule that had been concretized by Article 6 of the Geneva Convention. The first basis for this conclusion was the allowance for reserving the right by the parties to be bound by this Article when ratifying the convention. Secondly, the existence of the ‘special circumstances’ as an exception to Article 6 with no specific scope did not allow the rule of equidistance to become a rule of customary international law even after taking a concrete form. Thirdly, there was no opinion juris or state conduct that could show that the states felt compelled to act the way they did because of the convention in place.

**Discussion of the Negotiations**

Article I(1) of the UN Charter lays down that one of the purposes of the United Nations is ‘to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.’ Negotiations, also known as consultations are referred to in the treaties as an obligation in order to resort to consultations before an action is taken. In other words, a treaty or convention that the parties are a part of may make the negotiations or any form of it obligatory in nature, for example, in the 1958 Geneva Convention.

In the present case, the parties began the negotiations where they entered into two agreements on 1 December 1964 and 9 June 1965 to decide the lines of demarcation for the continental shelf. There was a third agreement that took place between Denmark and Netherlands on 31 March 1966 which allowed both the countries to claim certain additional areas leaving the Federal Republic of Germany with areas beyond the partial boundaries decided. The Federal Republic of Germany communicated the approximate boundary lines that it wished to obtain in the course of the negotiations. The further negotiations also didn’t prove to be successful because Denmark and the Netherlands didn’t want to accept non-application of the equidistance rule to determine the prolongation of the partial boundaries and the Federal Republic of Germany didn’t want to submit to the equidistance rule because of its concave shaped coastline as explained in the facts. Denmark and Netherlands had now come on one side while the Federal Republic of Germany was on the other side.

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5 Supra.
The court identified the problems with the negotiations by stating that the parties were under an obligation to enter into negotiations with the intention to arrive at an agreement, however, the parties only went through the formal process of negotiations for allowing automatic application of a certain rule of delimitation if the parties couldn’t come to an agreement. The court further stated that the negotiations conducted should be meaningful which cannot be possible if both the sides are pushing their own stance without even trying to come to a middle ground and compromise. 7

The court listed down three points that should be taken into consideration when the negotiations with respect to the continental shelves are taking place between the parties. The first is the general characteristics of the coasts of the countries which are a part of these negotiations along with the any special or unusual features in the same. The second is the physical and geological features of the continental shelf areas in question. Finally, a reasonable degree of proportionality should be the main aim when the negotiations are entered into between the parties keeping in mind the first two points as well as the length of the coasts of each party involved and actual and prospective effects of the shelf for all the parties. 8

**Analysis of the Negotiations**

To understand whether negotiations as a method of alternative dispute resolutions is applicable to this case, it needs to be established whether the present case is a dispute between the parties. Disputes can be defined as disagreement between two or more parties on the subject of rights and interests that could be attempted to be resolved by “claims, counter-claims, denials and further on.” 9 They could be defined as the specific subject matter that involves no agreement between the parties. The resolution of such disputes leads to either assertion of the old rules of law or replacement and beginning of a new rule of international law. 10

Widely there are three lessons that are seen to be prevalent in the international law structure when the resolution of disputes is discussed. Firstly, the parties are not bound to take the legal recourse. Rather if the dispute is such that it can be solved between the parties, they could adopt the request, refusal and negotiation method and keep it to that level if the dispute is resolved. Secondly, if the parties collectively or either of the parties decide to take the legal recourse, change in mere language is sufficient to display this intention. Thirdly, if the decision

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7 Supra.
8 Supra.
9 Collier and Lowe, The Settlement of Disputes in International Law, Oxford University Press, Chapter 1, 1.
10 Supra, 2.
for legal recourse is a single party decision, the co-operation of the other parties involved is not necessary. For example, when Iraq had invaded Kuwait in 1990, it attempted to defend its actions in the Security Council by using the moral and historical arguments. The states taking Kuwait’s side employed the language of law by stating the violation of the latter’s sovereignty and frontiers, breach of the UN Charter etc. Kuwait won the argument in the Security Council because the language of law cannot be debated with historical and moral language.

The North Sea Continental shelf case can be said to involve a dispute between Denmark and Netherlands on one side and Federal Republic of Germany on the other because the issue of delimitation was a specific subject matter that the parties had to negotiate upon. Further, it could only be resolved through claims, counter claims and denials given by each party to the others to establish their stances. The dispute could have been solved through negotiations and the intention to adopt legal recourse was not displayed by any of the parties in the beginning of the negotiations. However, when Federal Republic of Germany was not notified of delimitation method used in one of the areas and raised its concerns, the other two countries stated that the equidistance rule was a rule of customary international law and formed part of Article 6 of the Geneva Convention, thereby it had to compulsorily be applicable. The two countries invoked the language of the law displaying their intention to adopt the legal recourse further on and the parties approached the International Court of Justice to resolve the issue.

To be able to present the case before the International Court of Justice, the dispute had to be suitable for judicial settlement and a requisite for this is that the dispute must be justiciable. There are two essentials for this requisite to be satisfied, firstly, there should be an existence of a specific disagreement and secondly, this disagreement can be resolved by application of rules of law by judicial processes. The first case to give the definition of a dispute was the Permanent Court of Justice in the Mavrommatis case. The court stated that ‘a dispute is a disagreement on the point of law or fact, a conflict of legal views or of interests between two persons.’

An existence of dispute can be denied by one of the parties to it. This was decided by the next set of cases. The Peace Treaties case was a case wherein the United Kingdom and United States of America had claimed that Hungary, Bulgaria and Romania had violated certain provisions of the human rights obligations whereas these three countries denied agreement on

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11 Supra, 4.
violation of any provisions of the human rights obligations. In other words, they denied the acceptance of existence of a dispute. Since the parties were not in agreement as to whether a dispute exists, the court could not decide the matter. The composition of a dispute was however clarified in the *South West Africa* case\(^{14}\) where the court stated that ‘a mere assertion is not sufficient to prove the existence of a dispute any more than a mere denial of the existence of the dispute proves its non-existence. It must be shown that the claim of one party is positively opposed by the other.’\(^{15}\)

The final decision with respect to the discussion of disputes was given in *Tunisia-Libya Continental Shelf (Revision)* case\(^{16}\) and the *Headquarters Agreement* case. The latter case was a result of the threatened closure of the PLO mission to the UN in New York. The interpretation of a specific provision of the Headquarters Agreement had caused a dispute between the UN and the USA. The N suggested an arbitration proceeding however USA rejected the same stating that it is not the appropriate time. When the case went to the court, the International Court of Justice took the view that the there is a dispute in existence in this case. ‘Where one party to a treaty protests against the behavior or decisions of another party, and claims that such behavior or decision constitutes a breach of the treaty, the mere fact that the party accused does not advance any arguments to justify its conduct under international law does not prevent the opposing attitude of the parties from giving rise to a dispute concerning the application of the treaty.’\(^{17}\)

The North Sea Continental Shelf case is a dispute because it fits into all the definitions and clarifications decided by the cases mentioned above. The dispute is justiciable because it has a specific disagreement and that disagreement can only be solved if rules of international law are applied. There is an agreement between the parties that a dispute exists between them and the claim of Denmark and Netherlands is being positively opposed by the Federal Republic of Germany. Thirdly, Denmark and Netherlands believe that the Geneva Convention is being violated by the Federal Republic of Germany if the equidistance rule is not applied to determine the prolonged delimitation of the continental shelf.

Since it has been established that a dispute exists, the procedures to solve the same can be discussed. There are several procedures to solve disputes between parties but one of the simplest and commonly used methods is negotiations. It can be defined as a process which

\(^{14}\) ICJ Rep. 1962, 319, at 328.
\(^{15}\) Supra.
\(^{16}\) ICJ Rep. 1985, 192.
\(^{17}\) Supra.
includes discussions and communications between the parties concerned with the intention to understand the different positions of the parties and work towards coming to a common point.\textsuperscript{18} The negotiations take place only between the parties and there is no involvement of a third party. The main reason for the failure of the negotiations is lack of a certain degree of mutual goodwill, sensitivity and flexibility.\textsuperscript{19} The \textit{Lac Lanoux} arbitration stated that the consultations and negotiations should compulsorily comply with the rules of good faith and shouldn’t be conducted as a formality.\textsuperscript{20}

Apart from the lack of sensitivity, goodwill, flexibility and rules of good faith in the negotiation proceedings between the three parties, a major issue due to which negotiations were a failure is the adoption of hard positions mainly by Denmark and Netherlands. It can be argued for Federal Republic of Germany to take the firm stance of non-application of the equidistance rule was justified because it was at a huge disadvantage. The objective of negotiations is to produce wise agreements that meets the legitimate interests of all the parties to the maximum extent and resolve the conflicting interests fairly. Since the goal of these negotiation meetings was agreement, the parties should have maintained softer positions which could be done by making concessions to cultivate trust and friendship between them and make offers in order to incorporate the interests of the listening parties as well.

To make the negotiations successful, the parties should have first understood the best alternative to negotiated agreement (BATNA), worst alternative to negotiated agreement (WATNA), zone of possible agreement which would ideally be between your upper and lower limit of agreement (ZOPA) and reservation point of each other. The BATNA for all the three parties would have been to get the maximum area of the continental shelf in their territory while their WATNA would have been to get the lowest amount of area of the continental shelf in their territory in comparison to the other countries. Therefore, their zone of possible agreement would have been to have a fair division of the continental shelf where one party doesn’t get the maximum or minimum area of the shelf. The Federal Republic had agreed to application of equidistance rule in the first two agreements because it was within the range of its possible agreement, however, it could not accept the application of this rule of international law in the prolonged delimitation because it would be then agreeing to its WATNA and it was aware that an agreement could be decided upon where it didn’t have to go with its WATNA as the sole option. If Denmark and Netherlands had understood the negotiations from this perspective, the

\textsuperscript{18} Malcom Shaw, Chapter 18, Settlement of Disputes, 1014-1015.
\textsuperscript{19} Supra.
\textsuperscript{20} 24 ILR, 101, 119.
Federal Republic of Germany would have agreed to the third agreement that was more considerate as well. The strategy that was adopted by Netherlands and Denmark was of competition and collaboration wherein they collaboratively wanted to overpower the Federal Republic of Germany and get their desired agreement. They should have rather adopted the strategy of compromise and accommodation wherein they understood the coastal issue of Federal Republic of Germany and decide upon an agreement in those terms.

If the parties were still unable to come to an agreement through negotiations, the parties should have used inquiry and fact finding as a method to resolve the disputes between them. This method does not involve the application or understanding of rules of law. However, if the dispute is a factual one, an inquiry can settle the same and even if it a legal one, the inquiry can help to do so. According to Article 9 of the Hague Convention, “to facilitate a solutions of … disputes by elucidating the facts by means of an impartial and conscientious investigation.”

This form of dispute settlement method involves a third party inquiring about the issue, however, the dispute can also be settled by finding and understanding of the true facts of the case by one party and acceptance of the same by the other.

The parties directly approached the court and opted out of arbitration. There could be two possible reasons for the same. Firstly, the parties believed that the path of arbitration is not obligatory in nature because Article 33 of the UN Charter allows for multiple remedies for dispute resolution. Secondly, the parties did not believe on the fundamental point of the dispute i.e. the applicable rule for the delimitation of the continental shelf. The dispute between the parties arose because Netherlands and Denmark argued that the equidistance rule of binding on Germany because of it being a signatory of the Geneva convention and because the rule formed part of customary international law. An arbitral tribunal would not have been able to determine this issue because it involved understanding of such issues in previous judgments and the concept of customary international law as a whole.

Applying this method to the present scenario, this inquiry and fact-finding method would have allowed the parties to understand and accept the true facts of the coast lines of all the three states. In other words, Denmark and Netherlands would have had the opportunity to accept the true fact that the Federal Republic of Germany’s coastline is a concave shape coastline and it would have been unfair for the latter to use the rule of equidistance for the

22 Supra.
delimitation process. This would have been a better opportunity because these set of facts would have been laid down by an impartial, unbiased and independent third party.

**Similar Cases**

There have been other cases wherein the parties have not referred their dispute to arbitration but have directly approached the International Court of Justice for a decision. The *Fisheries Jurisdiction* case\(^{23}\) is one such example. The parties were in dispute about the fishing rights each had, and which right would prevail over the other. Iceland had certain “preferential rights” in specific maritime areas whereas the Great Britain had certain “traditional finishing rights” in an identical maritime area. The parties could not have solved this substantive matter through arbitration because the arbitral tribunal might not have had the understanding of which right is absolute and should prevail. The Court agreed that the best way to decide the matter was through negotiation but since the parties couldn’t come to the conclusion during the negotiation meetings, the court was approached.

Another example that could be looked at is *Bolivia v. Chile*\(^{24}\) wherein the parties attempted at all times to solve their dispute over the Pacific Ocean through negotiations, but the parties could not come to a conclusion even after a cycle of negotiation agreements between them. They finally approached the court for a decision on the issue and settle the matter.

**Conclusion**

It can thus be concluded that the negotiations involved North Sea Continental Shelf case were problematic because all the three parties involved were playing hardball on their stances and none of the parties was ready to diverge towards the other. They did not consider the best and worst alternatives of the other parties while deciding upon the agreement which resulted in unsuccessful negotiations. Furthermore, there was no sense of sensitivity, flexibility or good faith when the parties were negotiating which led to failed negotiations and the parties had to go to court to get their issue resolved. The parties should have adopted compromise and accommodation as their strategy to solve the issue at hand and if the negotiation were still unsuccessful gone for inquiry and fact finding before approaching the International Court of Justice for a solution.

\(^{23}\) 1974 I.C.J at 3.
References


