A Geometric Variable Scope of Delimitations: The Impact of a Geological and Geomorphologic Title to the Outer Continental Shelf

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I. Introduction

Equity as a legal concept is an emanation of the idea of justice and the concept of equity. It is reflected in the United Nations Convention on the Law of the Sea (hereafter “Convention” or “UNCLOS”) under which the obligation to find an equitable solution in continental shelf disputes is a “fundamental norm” of the law of delimitation. Hence, it is a truism to say that any delimitation must be equitable; “rather is the problem above all one of defining the means whereby the delimitation can be carried out in such a way as to be recognized as equitable.”

At the outset emphasis should be put on the plain understanding that equitable solution does not mean equidistance. It is only in the absence of special circumstances in delimitations within 200 nautical miles (hereafter “nm”) that equidistance is considered an equitable solution. The International Court of Justice (hereafter “ICJ” or

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1 The relevant provision of Article 83(1) UNCLOS provides:

“The delimitation of the continental shelf between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.”


4 International law imposes also an obligation on States parties to a dispute to enter into negotiations and pursue them as far as possible with a view to conclude an agreement. See a locus classicus in that regard in: Railway Traffic between Lithuania and Poland, Advisory Opinion of 15 October 1931, 1931, PCIJ (Ser A/B) No. 42, at 116.

5 North Sea Continental Shelf (Germany v. Denmark and Germany v. The Netherlands), Judgment of 20 February (hereafter North Sea) 1969 ICJ Rep. 3, at 50, para. 92.
“Court”) and various arbitral tribunals have established a case law of equitable criteria and methods which were in disarray but now constitute an embryonic corpus iuris of normative equitable criteria and methods of the law of delimitation. Notwithstanding the above-mentioned evolutionary case law with regard to equitable criteria and methods in order to establish an equitable solution in delimitations, the Court and arbitral tribunals have consistently ruled that delimitation is linked to title. By the same token, the applicable criteria and methods to find an equitable solution must be consistent with the basis of the title to the continental shelf. In Tunisia v. Libya the Court held that “[i]t is only the legal basis of the title to continental shelf rights – the mere distance from the coast – which can be taken into account as possibly having consequences for the claims of the Parties”.\(^6\) Put in other words, and to paraphrase Prosper Weil, title commands delimitation by which “délimitation est fille du titre”\(^7\).

Every coastal State has inherent and sovereign rights to the continental shelf to a distance equivalent to 200 nm from the baselines from which the breadth of the territorial sea is measured. The title to that area of the continental shelf is solely based on the distance criterion and exists ab initio and ipso facto by virtue of the coastline. It follows of the same that the equitable criteria and methods, albeit not traditionally coherent, that govern the operation of the determination of an equitable solution in delimitations have been based on geographical features. By contrast to the title to the area within 200 nm, the entitlement to the continental shelf beyond 200 nm is based on geological and geomorphologic criteria by which geography has no independent role in limiting the extent to which the outer continental shelf may be delineated.

As a consequence, geographical features such as coastal length and coastal shape, which the ICJ and arbitral tribunals repeatedly held to constitute equitable criteria to determine an equitable solution in continental shelf disputes within 200 nm,\(^8\) have no such relevance in outer continental shelf delimitations. The criteria and methods to establish an equitable solution for these must be consistent with the legal basis of the title and geography plays no distinct role. Accordingly, equity has a limited scope in disputes in which the title is based on geography, where it serves as an appropriate

\(^{6}\) Continental Shelf (Tunisia v. Libyan Arab Jamahiriya), Judgment of 24 February (hereafter Tunisia v. Libya), 1982 ICJ Rep. 18, 48, para. 48 (emphasis added).


\(^{8}\) Because the title to the area within 200 nm is generated by the coastline and is based thereon the Court and arbitral tribunals have ruled that the coastal geography is a relevant criterion on which the finding of the equitable solution shall be based, see Tunisia v. Libya, _supra_ note 6, at 61, paras. 73-74; Gulf of Maine, _supra_ note 3, para. 205.