

# THE EVOLUTION OF THE DELIMITATION OF THE CONTINENTAL SHELF IN INTERNATIONAL LAW AND THE CASE OF THE DELIMITATION OF THE WESTERN POLYGON BETWEEN MEXICO AND THE UNITED STATES OF AMERICA

SUSANA HERNÁNDEZ PACHECO\*

## C O N T E N T S

- I. Introduction
- II. Definition
- III. Legal Title
- IV. Extension
- V. Concept of Maritime Delimitation
- VI. The Legal Scheme of the Delimitation of the Continental Shelf
- VII. The Case of Mexico and the United States of America

## I. INTRODUCTION

The importance of organizing this round table lies in the strategic and fundamental nature of the topic. It is strategic due to the existence of important natural resources found on the Continental Shelf of the Gulf of Mexico, whose soil is covered with plant and animal resources, while its subsoil protects oil deposits and other important minerals.

Although what motivated both Mexico and the United States of America to execute the Treaty on the Delimitation of the Continental Shelf in the Western Region of the Gulf of Mexico, beyond 200 nautical miles, was the suspicion that there was a great oil potential in the region, the Continental Shelf of the Gulf of Mexico has also other resources (for example, pearls) that increase its economic importance.

---

\* Professor of international law of the Law School of the National Autonomous University of Mexico (UNAM).

The study of this topic is also fundamental due to its economic and legal implications. In effect, it is not as in the case of the delimitation of land borders, which with instruments clearly acknowledged by international law the area of the territory of a State is determined, but in the case of the Continental Shelf, from its definition to its delimitation, legal problems are posed and their solution is difficult. Thus, suffice it to mention that the concept of Continental Shelf may not coincide at all with its physical existence. On the other hand, the determination of the outer limit of the Continental Shelf involves not only neighboring states but also the international community. In addition, given that the powers of the coastal State over its Continental Shelf are limited to exploration and exploitation, the linear delimitation does not seem to be determinant in cases where there are transboundary mineral or oil deposits that cause adjustments that “dilute”, so to speak, the delimitation line.

## II. DEFINITION

The Continental Shelf can be defined from two aspects, one geophysical and one legal. Both concepts take into account the physical appearance of the Continental Shelf, but because they pursue different ends, they do not necessarily coincide.

Scientists define the Continental Shelf as a slope of variable inclination that ends in a sharp fall towards the bottom of the sea. From the geophysical point of view, the Continental Shelf is irregularly distributed in islands and continents. In some places the Continental Shelf will reach great distances, while in others it will be practically non-existent.

In its legal meaning, the notion of Continental Shelf has evolved in response to the need to regulate state claims, with which it is intended on the one hand to legally limit the possibility of exploration and exploitation of the Continental Shelf by States, and on the other hand, to grant to every State a Continental Shelf regardless of its geological or geophysical characteristics.

The origin of the legal notion of Continental Shelf goes back to the proclamation of President Truman, published by the government of the United States of America on September 28, 1945, whose principles served as the basis for the works that would culminate with the Geneva Convention (IV) on Continental Shelf.

In this way, conventional law defined the Continental Shelf taking into consideration first the criteria of depth and exploitability. In terms of the Article 1 of the Convention of 1958:

The Continental Shelf is formed by the bed and the subsoil of the underwater regions adjacent to the coasts, but located outside the territorial sea, to a depth of 200 meters, or beyond this limit to the point where the depth of the overlying waters allows the exploitation of the natural resources of these regions.

This implied that any State with a greater capacity of technological exploitation, would have greater extension of Continental Shelf.

In accordance with the judgment of the International Court of Justice of February 20, 1969, issued with respect to North Sea Affairs<sup>1</sup>, the court defined the Continental Shelf as *the natural extension of the territory of the State*, a notion that would be the basis of the title that the international law recognizes as the foundation of the law of the States on its Continental Shelf.

Now, if the notion of 1958 favored countries industrially developed because of the technological development they could achieve, conceptualize the Continental Shelf as the natural extension of the territory of a State posed the difficult problem of determining how far was the natural extension of a State in relation to the natural extension of another State, and what to do if a Continental Shelf is the natural extension of two or more States. In any case, international jurisprudence has not fully recognized the effects of this definition. Thus, although the conceptual basis of the Continental Shelf is still the natural extension of the territory of a State under the sea, international law imposes a limit to said extension.

The development of technologies that made it possible to exploit more important marine resources, caused a change in the concept. It changed from the idea of depth and exploitability to the idea of distance. Without abandoning the whole concept of natural extension, the Convention of the United Nations on the Law of the Sea in its Article 76 establishes the following:

1. The Continental Shelf of a coastal State comprises the bed and the subsoil of the underwater areas that extend beyond its territorial sea and throughout the natural extension of its territory until the outer edge of the continental margin, or up to a distance of 200 nautical miles from the baselines, from which the width of the territorial sea is measured, in cases where the outer edge of the continental margin does not reach that distance... 3. The continental margin includes the submerged extension of the continental mass of the coast State and is formed by the bed and the subsoil of the shelf, the slope and continental emersion. It does not include the deep ocean bottom with its oceanic crests or its subsoil.

### III. LEGAL TITLE

As pointed out by the International Court of Justice in its judgment of February 20, 1969, the legal title that international law recognizes to the State on its Continental Shelf does not stem from the proximity of this, but of the notion of *natural extension* of the territory of the State. The court expressed the following under these terms:

<sup>1</sup> Cfr. Matters of the Continental Shelf of the North Sea (Federal Republic of Germany/Denmark and the Federal Republic of Germany/Netherlands), ICJ, *Recueil des Arrêts, Avis Consultatifs et Ordennances*, judgment of February 20, 1969, p. 32.



The title that international law *ipso jure* attributes to the coastal State on its Continental Shelf comes from the fact that the submarine zones in question can be considered as being truly part of the territory, over which the coastal State already exercises its authority: it can be said that, even when covered with water, these areas are an extension, a continuation, a prolongation of said territory under the sea.<sup>2</sup>

According to this notion, it does not matter that the Continental Shelf of a State is closer to the border of another State, if it constitutes the natural extension of its territory, it may validly claim it.

However, the evolution of the Continental Shelf concept has led to establish a distance criterion, so it is this and not the idea of natural extension the basis of the legal title, at least until the 200 nautical miles.<sup>3</sup>

## IV. EXTENSION

The Convention of 1958, regulated the extension of the Continental Shelf according to factors of depth and capacity of exploitation by the States. This is, up to a 200- meter depth, or up to the place where the overlying waters allow their exploitation.

The accelerated technological development achieved by certain States, as well as the fact that the 1958 Geneva Convention is only mandatory for States parties to it, led to the preparation of a jurisprudential definition that considered it as the natural prolongation of the territory that allowed claims based on aspects predominantly physical and non-legal. This situation led to the fact that in the Third United Nations Conference on the Law of the Sea this conception was modified and the extension of the Continental Shelf was limited to 200 nautical miles, regardless of its physical structure, with the possibility of extending it to a maximum of 350 marine miles, when the Continental Shelf reaches that distance.

In accordance with the Montego Bay Convention, if the extension of the Continental Shelf reaches up to 350 nautical miles, in order for that delimitation that is made based on this extension to be opposable to others States, the Boundary Commission that their own convention provides should be informed. When the States are adjacent or are one opposite to the other, the delimitation must be made by agreement between the parties, in accordance with international law, in order to reach an equitable solution. In some of these cases the extension of the Continental Shelf might not even reach 200 miles, as in the case of the Continental

---

<sup>2</sup> *Idem.*

<sup>3</sup> Cfr. Issue of the Continental Shelf (Libyan Arab Jamahiriya/Malta), ICJ, *Recueil des Arrêts, Avis Consultatifs et Ordennances*, judgment of June 3, 1985, p. 35.

Shelf between Libya and Malta,<sup>4</sup> or extend further beyond that distance, as in the case of the United States of America and Mexico in the Gulf of Mexico.

## V. CONCEPT OF MARITIME DELIMITATION

The delimitation, said the court in 1969, consists in determining the limits of a zone already dependent on the coastal State, and not in an operation that intended to define the zone *de novo*.<sup>5</sup> That is, it is about a distribution of the region in question but strictly a delimitation.

The delimitation of the Continental Shelf may be carried out unilaterally only when the State in question has no neighbors in front of it or adjacent to it, but in order for this delimitation to be opposable to the other States, this should be done in accordance with international law. It is about, as Michel Virally states, a delimitation between a State and the international community.<sup>6</sup>

In the case of adjacent States or that are located one opposite to the other, conventional law has established the obligation that said delimitation is made by agreement between the parties based on the international law, with the aim of reaching an equitable solution.

## VI. THE LEGAL SCHEME OF DELIMITATION OF THE CONTINENTAL SHELF

Any maritime delimitation must be done in accordance with international law. However, to know what the rules of law that regulate the delimitation of the Continental Shelf between States are is a problem that has not been solved satisfactorily.

The International Court of Justice and the arbitral courts that have issued judgments in this matter have determined that each case is a *unicum*, and, therefore, there are no general principles; the problem, as the court states in 1984, is that "a type of rules that does not exist is being sought in general international law".<sup>7</sup>

Consequently, each delimitation of the Continental Shelf is a unique case and must be solved according to the circumstances of the case.<sup>8</sup>

<sup>4</sup> Cfr. *idem*.

<sup>5</sup> *Ibidem*, p. 23.

<sup>6</sup> Virally, Michel, "L'Équité dans le droit. A propos des problèmes de delimitation maritime", *Le droit international à l'heure de sa codification. Etudes en l'honneur de Roberto Ago*, vol. II, Milán-Dott. A. Giuffrè editore, 1987, p. 531.

<sup>7</sup> Case of the Delimitation of the Maritime Border in the Gulf of Maine Region (Canada/United States of America), ICJ, *Recueil des Arrêts, Avis Consultatifs et Ordennances*, judgment of October 12, 1984, p. 290.

<sup>8</sup> Cfr. *idem*.



Both conventional law and customary law have intended to regulate the delimitation of the Continental Shelf. However, its content does not allow knowing the manner in which said delimitation must be made. There is, in effect, a tendency towards abstraction that avoids the elaboration of substantive rules that guide jurists that, as judges or arbitrators, or as negotiators, should perform that task.

The norms of international law that regulate the delimitation of the Continental Shelf are the Convention of 1958 on Continental Shelf, the United Nations Convention on the Law of the Sea of 1982 and the customary law, which has been acknowledged through International jurisprudence on the matter.

The Geneva Convention of 1958 in its Article 6 established the criterion according to which, in the absence of an agreement between the parties, the method of equidistance<sup>9</sup> for the states that are one opposite to the other, and the center line for the adjacent States, must be applied, unless special circumstances prevented its application.

However, when in 1969 the first issue to be solved by the International Court of Justice was presented, and in which it was requested to determine what was the applicable law for the delimitation of the Continental Shelf in the North Sea, it became evident that not necessarily it was an appropriate method in all circumstances and, above all, the court, after a reasoning about the formation of the international custom, concluded that it did not have the characteristics of a customary norm, and, therefore, it had no general application; this conclusion was also reached by the Arbitral Court incorporated to settle the issue of the delimitation of the Continental Shelf in the Iroise Sea.<sup>10</sup>

To know what the general principles applicable in this matter are, it is necessary to go to the auxiliary sources of international law, among which jurisprudence has had a fundamental significance, to the point of being considered by some doctrinaires, not as an auxiliary source but as a principal source of international law.<sup>11</sup>

The International Court of Justice, in its judgment of 1969, making an analysis of the formation of customary law and taking as basis the conduct of the States regarding the delimitation of their Continental Shelf, established that:

Such delimitation must operate by agreement in accordance with equitable principles, taking into account all relevant circumstances, so that it is attributed, as far as possible, to each party all of the Continental Shelf areas that are part of the

<sup>9</sup> The equidistance is obtained through drawing a line, whose points are at an equal distance from the reference points taken from the baseline from which the width of the territorial sea of both States is measured.

<sup>10</sup> Issue on the Delimitation of the Continental Shelf (United Kingdom of Great Britain and Northern Ireland/ French Republic), ICJ, *Recueil des Sentences Arbitrales*, vol. XVIII, United Nations, paragraph 75.

<sup>11</sup> Cahier, Philippe, "Les sources du droit relatif à la delimitation du plateau continental", en *Le droit au service de la paix, de la justice et du développement*, Paris, Pedone, 1991, p. 181.

natural extension of its territory under the sea and the sea and not overlapping on the natural extension of the territory of another.<sup>12</sup>

This reasoning based on the free appreciation of the relevant circumstances was confirmed by the arbitral court that decided the dispute over the maritime boundary between Guinea and Guinea Bissau in its judgment of February 14, 1985, which determined that: "In the case of factors, the court must make an inventory and value them... These circumstances will be taken into account by the court, only when the court judge them relevant in the specific case".<sup>13</sup>

That is, the singularity or particularity of a circumstance that can exclude the equidistant delimitation, is passed to the application of equitable principles, having to take the appropriate circumstances, that is, only those that deserve to be taken into account. Thus, a special circumstance may not be considered relevant.<sup>14</sup>

In this manner, the contents of the rule that establishes as delimitation method an agreement between the parties or, in the absence thereof, the method of equidistance-special circumstances, are not applicable, when the relevant equitable principle-special circumstances formula is established, above all, considering, as did the court room in 1984 in the matter of the Maritime Delimitation of the Gulf of Maine that such equitable principles "are not in themselves rules of law".<sup>15</sup> These equitable principles would regulate both the delimitation and the choice of the practical method to do it. That is, it is at the discretion of the judge the determination of the applicable method<sup>16</sup> "on the basis of the fundamental rule which prescribes that the delimitation be in accordance with equitable principles".<sup>17</sup> Now, if the choice of the practical method of delimitation should be carried out on the basis of non-binding equitable principles, taking into consideration only the relevant circumstances, the final objective that is the delimitation, must reach an equitable result. Thus, the agreement-equitable principles-relevant circumstances formula, is completed by a last element: the equitable result: "The application of equitable principles must achieve an equitable result... since the equitable adjective is qualifying at the same time the result that tends to be achieved, and the

<sup>12</sup> ICJ, *Recueil des Arrêts...*, *cit.*, note 1, p. 53.

<sup>13</sup> Arbitral Court for the Delimitation of the Maritime Border (Guinea/Guinea Bissau), *Recueil des Sentences Arbitrales*, judgment of February 14, 1985, paragraph 89.

<sup>14</sup> See, for example, economic factors in the Matter of the Continental Shelf (Arabic Jamahiriya Libya/Malta), ICJ, *Recueil des Arrêts...*, *cit.*, note 3, p. 4.

<sup>15</sup> ICJ, *Recueil des Arrêts...*, *cit.*, note 7, p. 292.

<sup>16</sup> These practical methods can be the line perpendicular to the coast, the line following the general direction of the coast, the equidistance line, and so on.

<sup>17</sup> ICJ, *Recueil des Sentences Arbitrales*, Arbitration on the Delimitation of the Continental Shelf in the Iroise Sea, paragraph 99.



means by which it is intended to reach that end. The equity of a principle must be assessed according to the usefulness it represents to achieve an equitable result".<sup>18</sup>

Later it goes from the fundamentality of equitable principles to the discernment of the criteria. Thus, in 1984, the International Court of Justice stated the following terms: "International law only sets out that the delimitation must be done by the application of *equitable criteria* and by the use of practical methods suitable for ensuring, taking into account the geographical configuration of the region and other relevant circumstances in the case, an equitable result".<sup>19</sup>

### *The Path to Abstraction Is therefore Evident*

For the court, what international law provided for was only to be inspired in each specific case, by the criterion or the balance of different criteria, that seemed more appropriate to the concrete situation. This reasoning was confirmed in the Malta-Libya Case,<sup>20</sup> where the court re-establishes that the delimitation of the Continental Shelf must be carried out in accordance with equitable principles and taking into account all relevant circumstances, in order to achieve an equitable result.

To achieve that equitable solution, equitable principles, that had stopped being mandatory, will be qualified according to its usefulness to reach the expected equitable solution: "The equity of a principle must be assessed according to the usefulness it presents to reach an equitable result. All the principles are not in themselves equitable: it is the equity of their solution that gives them this quality".<sup>21</sup>

It will be necessary to distinguish then, between non-binding equitable principles or criteria and "that cannot be the subject matter of a systematic definition *a priori*";<sup>22</sup> from the relevant factors or circumstances that address geographical situations of the region. Although "there are really no legal limits for the considerations that States may examine in order to ensure they are going to apply equitable procedures".<sup>23</sup>

There is, therefore, no legal norm that establishes which are the equitable principles based on which the delimitation must be carried out, nor which practi-

<sup>18</sup> Issue of the Continental Shelf (Tunisia/Libyan Arab Jamahiriya), ICJ, *Recueil des Arrêts, Avis Consultatifs et Ordenances*, judgment of February 24, 1982, p. 59.

<sup>19</sup> ICJ, *Recueil des Arrêts...*, *cit.*, note 7, p. 300.

<sup>20</sup> Cfr. ICJ, *Recueil des Arrêts...*, *cit.*, note 3.

<sup>21</sup> ICJ, *Recueil des Arrêts...*, *cit.*, note 18, p. 45.

<sup>22</sup> ICJ, *Recueil des Arrêts...*, *cit.*, note 7, p. 33.

<sup>23</sup> ICJ, *Recueil des Arrêts...*, *cit.*, note 1, p. 93.



cal method should be applied for the same purpose, what is important is to reach an equitable solution.

Finally, the United Nations Convention on the Law of Sea of 1982, no longer refers to equitable principles, but rather it emphasizes on the equitable result that must be reached in any delimitation of the Continental Shelf. Indeed, Article 83, section 1 provides: "The delimitation of the Continental Shelf between States with adjacent or opposite coasts will be made by agreement between them on the basis of international law, which is referred to in Article 38 of the Statute of the International Court of Justice, in order to reach an equitable solution."

This rule has been considered as a reflection of customary law on the matter. This was determined by the International Court of Justice in 1993, by stating: "The indication of an 'equitable solution' as the end of any delimitation operation reflects the requirements of customary law with regard to the delimitation of the Continental Shelf".<sup>24</sup>

Consequently, the only applicable general principle is the one that establishes that the delimitation of the Continental Shelf between States should be made by agreement between the parties, and in the absence thereof through the resolution of a judicial instance, in order to reach an equitable result, which has allowed some authors to express that the norm of the law that obliges us to reach an equitable solution, is actually an empty norm, in the sense that it does not indicate the path to follow to obtain that result.

On the other hand, reference to international law does not help at all in the delimitation operations of the Continental Shelf, either by the negotiating States or by the judges and arbitrators called to carry them out, since, as we have seen, these legal norms do not provide substantive rules. This situation has been highlighted by the International Court of Justice, who stated that conventional texts "give a definition of the rule of international law on delimitation",<sup>25</sup> reminding also about the precarious material content of these articles.<sup>26</sup>

Therefore, it is a legal norm that refers to equity, although the court has clarified that "it is not about applying equity simply as a representation of justice in the abstract, but to apply a rule of law that states to resort to equitable principles according to the ideas that have always inspired the development of the legal scheme of the Continental Shelf".<sup>27</sup> The procedure established by the international jurisprudence is as follows: specify the area whose delimitation will be carried out; list the circumstances that should be taken into account to then assess them, and

<sup>24</sup> Issue on the Maritime Delimitation in the Region between Greenland and Jan Mayen (Denmark/Norway), ICJ, *Recueil des Arrêts, Avis Consultatifs et Ordennances*, judgment of June 14, 1993, p. 25.

<sup>25</sup> ICJ, *Recueil des Arrêts, Avis Consultatifs et Ordennances*, p. 294.

<sup>26</sup> ICJ, *Recueil des Arrêts...*, *cit.*, note 18, p. 49 ; ICJ, *Recueil des Arrêts...*, *cit.*, note 7, p. 30.

<sup>27</sup> ICJ, *Recueil des Arrêts...*, *cit.*, note 1, p. 47.



define what the weight that should be given to each of them is; then draw a provisional line, whose equitable result is verified at the end of the procedure.

However, knowing which is that equitable result is still an unresolved question.

## VII. THE CASE OF MEXICO AND THE UNITED STATES OF AMERICA

The delimitation of the Continental Shelf in the Gulf of Mexico involves three States: Mexico, the United States of America and Cuba. The international law establishes the right of States to a Continental Shelf of 200 miles from the baselines from which the width of the territorial sea is measured, regardless of the geological conformation of said shelf. In the case of the Gulf of Mexico, the Continental Shelf extends to more than 400 miles, therefore the delimitation of said shelf does not compromise the 200 miles of each of the States.

The delimitation of the Continental Platform up to 200 miles between Mexico and the United States of America was made by agreement, through the Treaty on Maritime Boundaries of 1978, pending to delimit the central region of the Gulf of Mexico, beyond the 200 miles of each State.

According to Article 76, sections 4 and 5 of the Montego Bay Convention, in cases where the outer edge of the continental margin extends beyond the 200 nautical miles from the baselines from which the width of the territorial sea is measured, the fixed points that form the line of the outer limit of the Continental Shelf to the seabed should be drawn at a distance not exceeding 350 nautical miles from the baselines from which the width of the territorial sea is measured, or of 100 nautical miles from the 2,500 meter isobath which is a line that joins a depth of 2,500 meters.

The delimitation of the Continental Shelf between Mexico and the United States of America beyond 200 nautical miles was made by the Treaty on the Delimitation of the Continental Shelf in the Western Region of the Gulf of Mexico beyond the 200 nautical miles.<sup>28</sup> This treaty demands several reflections. Although the notion of the Continental Shelf as a natural extension of the territory of a State has application beyond 200 nautical miles, States do not consider it as the basis of their negotiations, but these were made based on studies that determined the oil potential of the region.

On the other hand, in accordance with Section 8 of Article 76, of the United Nations Convention on the Law of the Sea:



<sup>28</sup> This treaty was signed in Washington on June 9, 2000. The exchange of instruments of ratification provided for in Article IX of the treaty was made in Mexico City on January 17, 2001, and it was published in the *Federal Official Gazette* on March 22, 2001.

The coastal State will present information on the limits of the Continental Shelf beyond the 200 nautical miles from the baselines from which the width of the territorial sea is measured to the Commission on the Limits of the Continental Shelf, established in accordance with Annex II on the basis of equitable geographical representation, the Commission will make recommendations to coastal States on the issues related to the determination of the outer limits of their Continental Shelf. The limits of the shelf determined by a coastal State, based on such recommendations, shall be final and binding.

However, since only Mexico is a party to the Convention of 1982, this obligation could not be imposed on the United States of America, because treaties are only binding on the parties, unless the evolution of the law of the sea allows for considering this norm as part of the general international law.

The purpose of the treaty is to delimit the Continental Shelf in the Western polygon of the Gulf of Mexico, which is established in Article 1. However, in addition to the delimitation, a system of meetings and consultations is established, as well as mutual cooperation in relation to geological and geophysical studies that lead to the location of transboundary deposits in what is called “the area”, that is to say, 1.4 nautical miles from each side of the boundary marked by Article 1. For example, Article IV, due to the possible existence of transboundary deposits of oil or natural gas, the parties agree not to authorize or allow oil or natural gas drilling or exploitation on the Continental Shelf in said “area”, for a period of ten years from the time the treaty is in force. The international law recognizes that the States are sovereign for the purpose of exploration and exploitation of natural resources, such rights are exclusive but in the case that the natural resources of the soil and subsoil do not allow a linear division, the very concept of exclusivity seems inadequate.

This means that the traditional delimitation through a line cannot be fully applied to the Continental Shelf, when there are transboundary deposits in it. Indeed, if these exploration powers have to be shared, even if it is under a conventional authorization obligation, the delimitation line becomes an area of exploration cooperation between the States. It seems that the principles that international law has developed on the Continental Shelf are overwhelmed by a geophysical reality that does not volunteer for a legal regulation.

On the other hand, we still do not know whether the equitable result established by international law was reached. In principle, given that the States reached an agreement without resorting to the peaceful means of dispute resolution, we can conclude that both coincide in an equitable result. The question of how to obtain this equitable result will be of greater importance in the delimitation of the Eastern polygon of the Gulf of Mexico, a delimitation in which the United States of America, Mexico and Cuba will participate.

