

**FACTORS OF RELEVANCE IN THE DELIMITATION BETWEEN THE
TERRITORIAL SEAS OF THE NETHERLANDS AND GERMANY**

Master Thesis



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Year 2011/2012**

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Part I

Chapter 1: Introduction

The Netherlands and Germany have not been able to agree on the course of the maritime border between their territorial seas. The two states are not the only neighbouring countries that seem to fail settling these issues by concluding a delimitation agreement. Unlike most other states disagreeing on the delimitation between their territorial seas, the Netherlands and Germany have previously succeeded in delimiting maritime zones other than the territorial seas.¹ The reason both states cannot agree to delimit their territorial seas may be found in the special nature of the international law applicable in delimitation between territorial seas. The equidistance-special/relevant circumstances rule has been applied in most cases of maritime delimitation. International law applicable to delimitation between territorial seas does, however, also allow for special title to affect the boundary course.² The Netherlands and Germany seem not to agree on the weight to be given to the claim made by Germany that an historic title exists and that this historic title is applicable to parts of the territorial seas. The described dispute is not new: it has been tried without success to negotiate a delimitation line since the early 20th century.³

A recent construction of a wind energy park in the disputed territorial seas is the particular reason that the conflict has become relevant again. The construction of a wind energy park called “Riffgat” started in June 2012 by ramming the first 30 foundation piles or “monopiles” into the ground at a water depth of 40 meters. The building happens under licensing by Germany and takes place just 8 nautical miles (*from now on*: miles) northwest of the German island Borkum. The construction site is also just north and relatively close to the shores of the Netherlands. It is planned that by summer 2013 approximately 30 wind turbines start producing enough energy for around 120.000 households in Germany.⁴

¹ Dinter, S. van. De zee grens ten noorden van het Eems-Dollardgebied, *Integraal Beheer Noordzee: Nieuwsbrief*. Vol. 13 (2011), p. 10.

² United Nations Convention on the Law of the Sea, Montego Bay 10 December, 1982, 21 *ILM* 1245 (1982), Article 15.

³ Treviranus, H. D., *Der deutsch-niederländische Ems-Dollart-Vertrag*. Heidelberg, (Max-Planck-Institut für Ausländisches Öffentliches Recht und Völkerrecht) 1963, p. 540.

⁴ EWE startet Bau von “Riffgat”. THB, 16-06-2012. <http://www.thb.info/news/single-view/id/ewe-startet-bau-von-windpark.html> (last visited on 15 August 2012).

The erection of this wind energy park has its controversies. The Netherlands and Germany are still in dispute on whose territory the wind energy park are actually being built. The Dutch government claims that the park is, at least partly, located within Dutch territorial waters and that therefore also licensing by the Netherlands is required. In the view of the German government the construction zone falls completely within Germany's jurisdiction and further discussion is not needed.⁵ The absence of an official border between the territorial seas of both states makes it impossible to ascertain in which territorial sea the wind energy park is built.⁶

Eemsmonding zorgt al jaren voor grensconflict

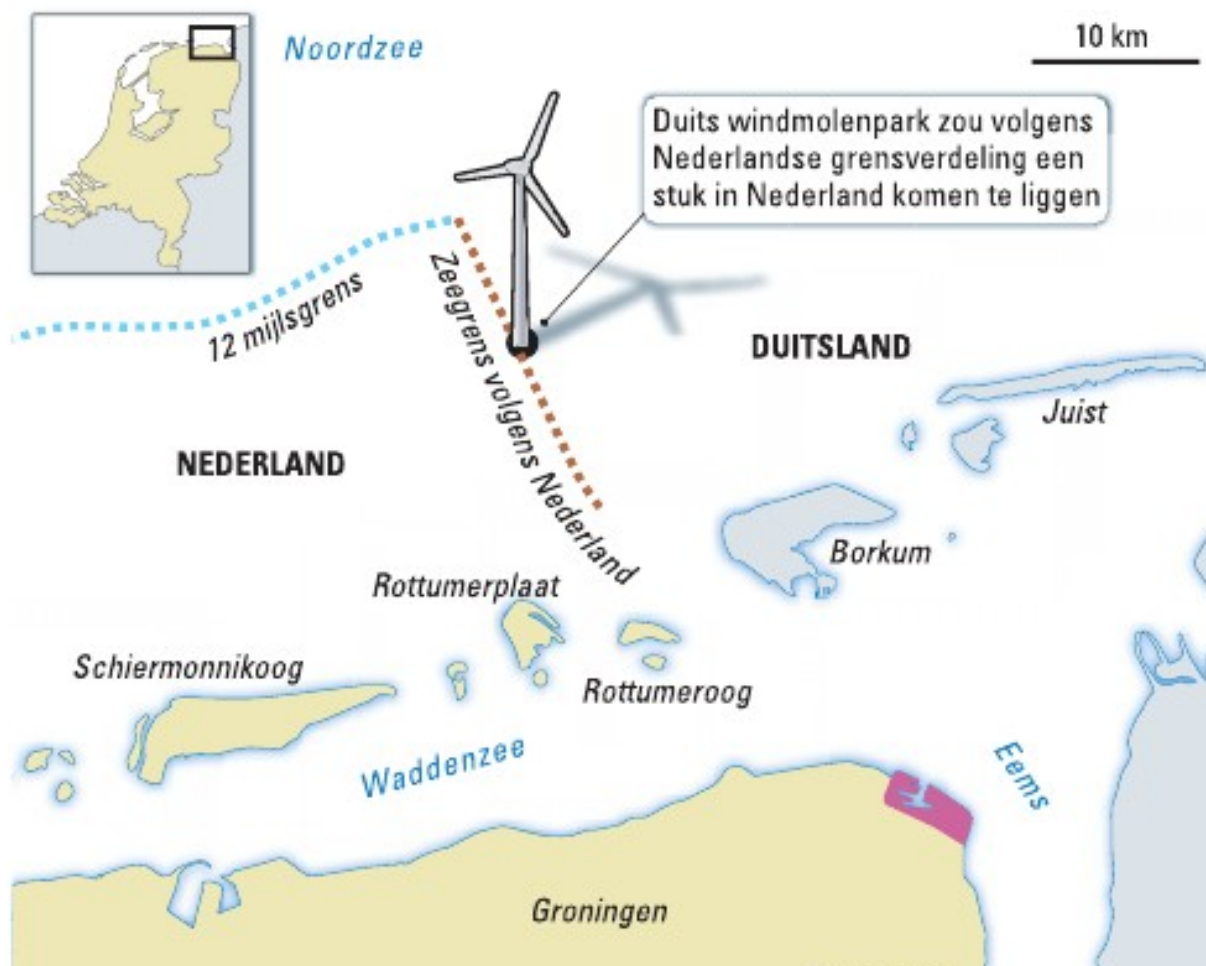


Figure 1: portraying the location of the wind energy park “Riffgat” in the territorial sea.⁷

⁵ Bruin, A. de. Windmolenpark in Nederlands of Duits water? *Visserijnieuws*. Vol. 32 (2012), pp. 25-28.

⁶ Eems-Dollardverdrag/Ems-Dollart-Vertrag (1960), Article 46.

⁷ Title over figure: Eemsmonding zorgt al jaren voor grensconflict (English: *Ems mouth causing border conflict for many years*). In: Grensruzie met Duitsers over windmolenpark. *Fibronot*. 11-08-2011.

<http://fibronot.nl/nieuwsartikel257-2011-grensruzie-met-duitsers-over-windmolenpark/> (last visited on 15 August 2012).

Chapter 2: Sources and Methods

This thesis will analyse the origins of and relevant factors to the delimitation dispute. The main hypothesis to be answered is: what factors can be identified as relevant in order to achieve a delimitation between the territorial seas of the Netherlands and Germany in accordance with Article 15 of the United Nations Convention on the Law of the Sea (*from now on*: LOS Convention)? In order to answer this question this thesis gives the necessary background information to understand the dispute in Part I. The national claims and historic developments will then be reviewed in Part II and, subsequently, the relevant baselines, line of equidistance, historic title and special circumstances applicable to the delimitation of territorial seas will be analysed in Part III. Finally, a legal analysis, the possibilities of dispute settlement and a conclusion determine which factors are identified as relevant in achieving an objective delimitation between the territorial seas of the Netherlands and Germany in Part IV.

The research carried out is based on qualitative methods. A relevant bibliography is composed of articles, conventions, jurisprudence and other sources and found in Part V. The bibliography consists of literature in the Dutch, English and German languages. The fact that not much research has been carried out on this specific topic made it difficult to find the right sources. However, it also indicated and emphasised the need for research on the dispute on the delimitation of the territorial seas between the Netherlands and Germany.

Chapter 3: The Dispute

Geographical description

Several failed negotiations between the Netherlands and Germany on the boundary course in the territorial sea indicate that both neighbours continued to disagree on the course of the shared borders in the waters adjacent to their coasts. Both states do not want to give in to demands and seem not able to reach an agreement on the delimitation of their territorial sea borders.⁸ This status quo exists for a long time period and reflects the complexity of the status of the waters in both internal waters and territorial sea around the region called the Ems-

⁸ Deutsch-Niederländische Nachbarschaft: Grenzkrieg Fällt Aus. TAZ. 23-12-2010. <http://www.taz.de/!63337> (last visited on 15 August 2012).

Dollard. The disputed waters are found seawards of the intersection points of the Dutch and German land borders and baselines.

The disputed area starts in the east of the Ems-Dollard, just under Emden. The river Ems, mostly a small and only partly navigable river, widens here into a funnel-shaped delta mouth. At this point it meets the waters of the Dollard and together they form an estuary flowing into the open sea. From the Ems-Dollard multiple arms find their way through the shallow waters and many the islands of the Wadden Sea into the North Sea. The largest part of the Ems-Dollard has never officially been delimited. The Dollard is an exception: here a partial border exists and 4/5th of its waters belong to the Netherlands.⁹ The largest part of the Ems-Dollard qualifies as inland or internal waters. Only waters laying seaward of the approximate line of fringe of island Schiermonnikoog and Rottumeroog on the Dutch side and Borkum and Juist on the German side are considered waters falling under the regime of the law of the sea. Baselines run across this line of fringe of islands to mark the border between internal waters that fall under national law and maritime zones falling under international law.

The maritime zones regulated the LOS Convention, including the part of the disputed territorial sea, start seaward of the baselines, which are formed by connecting the appropriate base points on respectively the Dutch and German side.¹⁰ The disputed territorial sea should not be seen as one legal entity. For reasons of historical developments in the law of the sea that will be discussed later on, the disputed territorial sea is divided into two separate parts. The first part covers the area between the baseline and the 3-mile line, the historic maximum extent of the territorial sea, and the second part includes the area between the 3-mile line and the 12-mile line, the current maximum extent of the territorial sea. Beyond this outer limit of the territorial sea other maritime zones such as the contiguous zone and Exclusive Economic Zone (*from now on*: EEZ) start. Delimitation for these maritime zones is undisputed, but they may still be relevant due to their adjacency to the territorial sea.

Legal developments

The legal framework within which the Netherlands and Germany form their positions is found in the LOS Convention. Both states are party to this convention and it officially regulates the

⁹ Treviranus, H. D., p. 536.

¹⁰ Treviranus, H. D., p. 537.

“delimitation of the territorial sea between states with opposite or adjacent coasts”.¹¹ Article 15 of the convention requires states to delimit on the basis of the principle of equidistance in combination with the median line. It also regulates that in case of historic entitlement the equidistance principle is not the applicable standard to apply. It is true that the equidistance principle forms a general starting point for delimitation, but states are required “where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two states in a way which is at variance therewith”.¹² It is however necessary to first understand certain historic developments in the law of the sea before applying Article 15 of the convention. This historical background information can help putting abstract definition into the appropriate context.

To begin with, Germany believes that the disputed waters of the territorial sea should fall under its jurisdiction. Germany believes as well that the internal waters of Ems-Dollard constitute an ordinary river that should fall almost completely under its jurisdiction. The German claim only excludes parts of the Dollard that, according to a bilateral agreement on the Dutch-German land border, fall under Dutch sovereignty. Almost all the other waters of the Ems-Dollard were to fall under German sovereignty. The reasons put forward are mainly based on historic title and historic use.¹³ The disputed territorial sea is furthermore also considered to fall under territorial jurisdiction. Relevant delimitation would be based on historic title and the boundary should largely run along the Dutch low-water line by following the Dutch shores and low-water levels up until 3 miles from the baseline. Germany proposes its delimitation line from the 3-mile line to the 12-mile outer limit to be running along old continental shelf delimitation lines.

The Netherlands does not agree with the German view. It believes that the boundary line in the internal waters of the Ems-Dollard should follow the thalweg-line, a line based on the thalweg-principle. The thalweg-line is a boundary line between two states that are separated by a watercourse and where this line follows the lowest point of the (main) shipping lane. The line of this shipping lane is denoted as the thalweg of that watercourse. The Netherlands rejects therewith the view that almost the whole Ems-Dollard should fall under German jurisdiction. Delimitation in the territorial sea should be based on the equidistance or median line, derived from the principle of international law in which equidistance is the starting point

¹¹ United Nations Convention on the Law of the Sea (1982), Article 15.

¹² *Ibid*, Article 15.

¹³ Treviranus, H. D., p. 538.

for delimitation of the territorial sea. Both states should have equal access to the waters in the Dutch view.¹⁴ The Netherlands apparently finds the absence of modern bilateral agreements on delimitation of the territorial sea enough reason to disagree with the German claims, which are based on historical title.

After a long period of disagreement both parties came to a status quo agreement in 1929.¹⁵ The states guaranteed each other not to make any claims that would affect any future entitlements or otherwise negatively influence the all right so far enjoyed in the Ems-Dollard. Territorial sovereignty was not discussed any further and remained untouched until the 1960's. The Netherlands and Germany concluded in 1960 the first of series of agreements called the Ems-Dollard-Treaties.¹⁶ An increasing need for cooperation in an area in which legal responsibilities have not always been clear was the main reason for conclusion.¹⁷ The treaty was signed in spirit of good neighbourliness and established a legal framework for shared maritime management. It was however explicitly mentioned that provisions of the treaty would not affect bilateral standpoints on the course of the boundaries.¹⁸ Both contracting parties reserved their legal positions in this respect.¹⁹ The treaty was mainly intended to find pragmatic solutions to and solve problems created by navigational challenges, such as increasing silt, traffic and shipping volumes in the relevant waters.²⁰ The interests of the two Ems-Dollard harbours, Emden in Germany and Delfzijl in the Netherlands, were of great importance.²¹ The agreement specified the area geographically, laid down rights and duties for both contracting parties and secured cooperation between them.

The Ems-Dollard-Treaty of 1960 covers parts of the internal waters as well as a part of the territorial seas. Its geographical scope is in the territorial sea limited by a 6-meter depth line on the one side and a 3-mile line on the other side. The treaty covers the two Ems watercourses Hubertgat and Westerems, which flow into the territorial sea. Germany finds that almost the whole area governed by the Ems-Dollard-Treaty should belong to its

¹⁴ Bruin, A. de, pp. 25-28.

¹⁵ Treviranus, H. D, p. 540.

¹⁶ *Ibid*, p. 539.

¹⁷ Bruin, A. de, pp. 25-28.

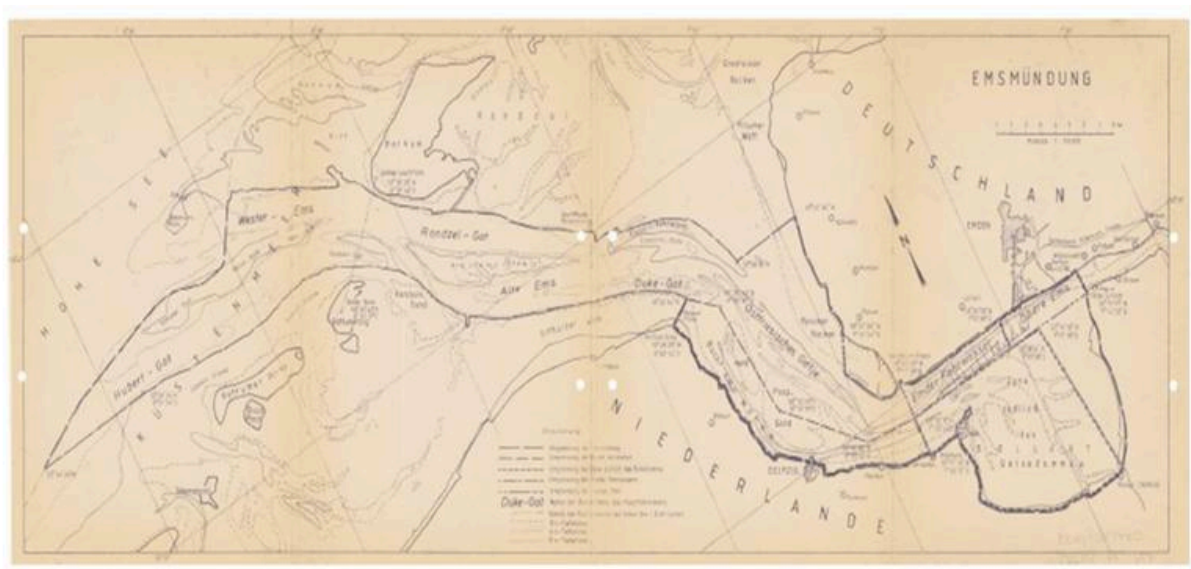
¹⁸ *Ibid*, pp. 25-28.

¹⁹ Werners, S.E.. Complicaties bij een grensgeschil, *Nederlands Juristen Blad*. Vol. 43 (1968) pp. 224-225.

²⁰ Treviranus, H. D, p. 540.

²¹ Bruin, A. de, pp. 25-28.

territories.²² The Netherlands, on the other hand, bases its position on the thalweg- and equidistance-principles and believes it has the right to approximately half of this area. To regulate the extraction of oil and gas reserves under the soil of the Ems-Dollard another treaty was signed in 1962.²³ This treaty covers approximately the same area as the first 1960 treaty.²⁴ The Netherlands and Germany agreed in 1964 on a delimitation of their continental shelves for a limited area beyond the (former) 3-mile outer limit of territorial sea.²⁵ They additionally signed a treaty in 1971 that subsequently would delimit the whole continental shelf beyond the territorial sea.²⁶ It is worth noting that both of the two continental shelf treaties contain a reservation explicitly stating that the continental shelf delimitation does not affect the states' official positions and rights on the delimitation of the territorial sea.²⁷



Figuur 4: Bijlage bij het Eems-Dollardverdrag

Figure 2: portraying the waters included in the Ems-Dollard-Treaty of 1960.²⁸

²² Treviranus, H. D., pp. 541-542.

²³ Aanvullende Overeenkomst Eems-Dollardverdrag/Zusatzabkommen Ems-Dollart-Vertrag (1962), Article 2.

²⁴ Het Eems-Dollardverdrag en de aanvullende Overeenkomst. Ministerie van Defensie. 01-07-2012. http://www.defensie.nl/marine/hydrografie/geodesie_en_getijden/zonegrenzen/noordzee (last visited on 15 August 2012).

²⁵ Verdrag tussen het Koninkrijk der Nederlanden en de Bondsrepubliek Duitsland inzake de zijdelingse begrenzing van het continentale plat in de nabijheid van de kust (1964), Article 1: at that time a 3-mile line.

²⁶ Verdrag tussen het Koninkrijk der Nederlanden en de Bondsrepubliek Duitsland inzake de zijdelingse begrenzing van het continentale plat onder de Noordzee (1971), Article 1.

²⁷ Verdrag tussen het Koninkrijk der Nederlanden en de Bondsrepubliek Duitsland inzake de zijdelingse begrenzing van het continentale plat in de nabijheid van de kust (1964), Article 2(1).

²⁸ Bijlage bij het Eems-Dollardverdrag (English: *Attachment to the Ems-Dollard-Treaty*), 1960. http://www.defensie.nl/marine/hydrografie/geodesie_en_getijden/zonegrenzen/noordzee (last visited on 15 August 2012).

Legal claims

The status quo situation between the two states changed after the ratification of the LOS Convention. In 1985, and as reaction to this new international regime, the Netherlands proclaimed an extension of its territorial sea. National legislation incorporated new international legal developments: the LOS Convention had given coastal states the rights to extend the maximum breadth of the territorial sea to 12-mile from the baselines. The Netherlands legislated that, firstly and in accordance with the new international standards, the outer limit of its territorial sea was extended to 12-mile from the baselines and that, secondly, territorial sea delimitation with neighbouring countries was to be done based on the principle of equidistance. Consequently, the Netherlands used the equidistance line, which supported its claim in the 'old' territorial sea, and prolonged this in the 'new' territorial sea to 12-mile from its baselines. Problematically, this proclamation resulted in partially overlapping maritime claims and zones.

However, a part of the territorial sea that was situated between 3 and 12 miles from the baselines and that was now claimed by the Netherlands overlapped with an area of the continental shelf belonging to Germany.²⁹ Germany did also incorporate the recent developments in the law of the sea into its legislation in 1995. It proclaimed an extension of its territorial sea from the former outer limit of 3 miles to the new outer limit of 12 miles from its baselines as well.³⁰ Germany decided to support its proclamation by suggesting that the old continental shelf delimitation lines between 3 and 12 miles were automatically converting into boundary lines between the territorial seas of the two states.

It is important to emphasise the legal difference of the waters in the 'old' and 'new' territorial seas. The Netherlands and Germany agreed to not agree on delimitation between their territorial seas from the baseline until the 3-mile lines and signed the Ems-Dollard-Treaty in 1960 to deal with the practicalities related to the absent territorial sea delimitation. The treaty laid down rights and duties of both states and gave clear limits of its jurisdiction. Both states have committed themselves to not undertake action in a way that would hamper the current status quo. Even though 'new' territorial sea beyond the 3-mile line falls outside of the scope

²⁹ Bruin, A. de, pp. 25-28.

³⁰ Dinter, S. van, p. 10.

of the treaty regulating the Ems-Dollard, no agreement has been concluded that could regulate problems arising in this part of the territorial sea. Furthermore, whereas the territorial sea delimitation landwards of the 3-mile line has been disputed over for a long period of time, the dispute over the delimitation between the territorial seas outward of the 3-mile line has been relatively recent.

Negotiations between the Netherlands and Germany started again in 1988 after the extension of the territorial sea. They did not result in a satisfying solution and were stopped again in 1992.³¹ It was not seen as very necessary to come to a delimitation agreement and due to frequent annexes to the treaties regulating the Ems-Dollard its regulatory power did not become outdated. Because not many activities causing possible problems occurred beyond the 3-mile lines it was also not considered really necessary to find a definite answer to the delimitation dispute. Naturally, this changed after Germany published its plans for the wind energy park in 2001. New negotiations started in 2005, but again did not lead to a positive outcome. Germany eventually granted its licenses for the wind energy park in 2010 after which the Netherlands objected to Germany's actions.³² The Netherlands started to put more emphasis on the importance to first solve the overlapping claims by means of negotiations before undertaking action in the disputed area. It is said that the Netherlands objected to the licensing of the wind energy park not because their position on the wind energy park is negative, but because non-objection could have been interpreted as an acceptance of German claims over the disputed territorial sea area.³³

New attempts to negotiate recently took place in 2010 and 2011.³⁴ New negotiations did not result in a final solution for the current situation. Nevertheless, the construction of the wind energy park has now officially been started in June 2012 and its foundation in the form of underwater piles is being built.³⁵ Because the wind energy park is constructed in the area between the 3-mile and 12-mile line it does not fall directly under the provisions of the treaties regulating the territorial sea of the Ems-Dollard. The question remains whether the wind energy park construction could be considered as a legal breach. States are required to

³¹ Dinter, S. van, p. 10.

³² *Ibid*, p. 10.

³³ Deutsch-Niederländische Nachbarschaft: Grenzkrieg Fällt Aus. TAZ. 23-12-2010. <http://www.taz.de/!63337> (last visited on 15 August 2012).

³⁴ Dinter, S. van, p. 10.

³⁵ EWE startet Bau von "Riffgat". THB, 16-06-2012. <http://www.thb.info/news/single-view/id/ewe-startet-bau-von-windpark.html> (last visited on 15 August 2012).

settle their transnational disputes by peaceful means³⁶ and to make effort to settle maritime disputes through negotiation.³⁷ There are no requirements for the maximum length of the negotiations, but they are required to be serious and in good faith.³⁸ In the provisions of LOS Convention applicable to the EEZ, for example, it is explicitly prohibited to act in a way that could jeopardise or hamper the reaching of a final agreement between two parties in delimitation.³⁹ A similar provision for the territorial sea is absent.

The wind energy park construction could obstruct the reaching of a final agreement and it thereby is hard to argue that negotiations continue to be ‘serious and in good faith’. The LOS Convention requires states to cooperate toward reaching agreement regarding delimitation disputes in the EEZ.⁴⁰ If cooperation fails, states are required to make every effort to first enter into practical provisional arrangements and then settle their dispute in accordance with the provisions under the Part XV of the convention.⁴¹ A similar provision for the territorial sea is absent, but other legal principles of dispute settlement and negotiation apply. These principles include good faith, listening to the other state, being prepared to move from an opening position and to act peacefully.⁴² With the construction of the wind energy park it is important to assess whether Germany does not violate these principles. In absence of an agreement states are normally not entitled to extend their territorial seas beyond the median equidistance line.⁴³ Germany extended its territorial sea beyond this line and justifies this extension by reasoning of historic title or other special circumstances. The seriousness and good faith of the bilateral negotiations are however to be seen in light of the construction and licensing beyond the median line.

Part II: Positions

Chapter 4: Historic Developments

The historic title put forward by Germany to support its position to require delimitation in the territorial sea at variance with the median line, is inherited from a time period in which the

³⁶ Rothwell, D.R., Stephens, T., *The International Law of the Sea*, 1st edition. Portland, (Hart Publishing) 2010, p. 440 and United Nations Convention on the Law of the Sea (1982), Article 279.

³⁷ United Nations Convention on the Law of the Sea (1982), Article 283.

³⁸ Rothwell D.R., p. 449.

³⁹ United Nations Convention on the Law of the Sea (1982), Article 74(3).

⁴⁰ *Ibid*, Article 74(3).

⁴¹ *Ibid*, Article 74(2).

⁴² The Charter of the United Nations (1945), Article 33(1).

⁴³ United Nations Convention on the Law of the Sea (1982), Article 15.

modern concept of territorial sea did yet not exist. No clear difference between the internal waters and territorial sea of the Ems-Dollard existed in the time that historic titles acquired their legal status. For this reason it is rather difficult to attribute the historic title only to one of the two areas. Nevertheless, the suggested historic title appears to be applicable for the waters on both sides of the modern baselines. It has been said that the arguments behind the lawful acquisition of the waters appear to be quite solid. Germany claims that is the legal successor of an historic title that would give Germany the right to Ems-Dollard. Research indicates that this historic title would still be of legal relevance in the present modern time indeed.⁴⁴ Parts of what nowadays constitute the internal waters and territorial seas of the Ems-Dollard were first added in the second half the 15th century to the territories of Ostfriesland, a former medieval state at present day located within German territory.⁴⁵

It is worth mentioning that the legality of this acquisition act has not been undisputed at historic times. It was not until 1558 that Ostfriesland would formally establish its sovereignty over the waters.⁴⁶ In that same historic period the Netherlands officially belonged to the German Empire, a historic federal state to which also Ostfriesland belonged. It was actually until 1648 that the Ems-Dollard fell completely under the sovereignty of one state. With the Westphalian peace in 1648 the Netherlands became an official state and the Ems-Dollard formally formed a border between two sovereign states.⁴⁷ The historic title has first been passed over from Ostfriesland to Prussia in 1744, then from Prussia to the Kingdom of Hannover in 1815 and finally from the Kingdom of Hannover to the North German Confederation in 1863.⁴⁸ This North German Confederation was the first German modern nation state and was the basis for the later German Empire, Weimar Republic and modern Germany.

The concept of the nation state gained popularity during the 19th century. The Congress of Vienna in 1815 focussed especially on the sovereignty of nation states in Europe. It was found that sovereign borders were an important factor in the process of state building. In that *Zeitgeist* the Congress of Vienna confirmed the German sovereignty over the waters of the

⁴⁴ Broek, J. van den. *Groningen en de voorbijvaart van Emden*. In: Groningen een stad apart (1st edition). Assen, (Koninklijke Van Gorcum BV) 2007. pp. 471-492.

⁴⁵ *Ibid*, pp. 471-492: exact official date not known, but either in 1454, 1464 or 1495.

⁴⁶ *Ibid*, p. 474.

⁴⁷ *Ibid*, p. 482.

⁴⁸ *Ibid*, p. 482.

Ems-Dollard.⁴⁹ The Netherlands was initially given the sovereign right over a strip on the western shore of the Ems-Dollard with the extent of a distance one could throw a horseshoe. Not much later this distance has been specified as and fixed at the low water level line.⁵⁰

Further treaties in the 19th century did not change the course of the boundary. Germany started to unilaterally set out its rights and duties in respect to the creation and maintenance of the navigable channels. The fact that the Netherlands did not, or just weakly, react to these declarations arguably reconfirms the German standpoint of exclusive sovereignty. In the early 20th century the Germans also continued harbour construction and maintenance works in the Ems-Dollard. These works were partly executed in the waters that were located on the Dutch side of the thalweg- and equidistance-lines. In the 19th and early 20th century a combination of unilateral actions undertaken by Germany on the one hand and the absence of official reactions by the Netherlands on the other hand slowly strengthened the German position on claiming exclusive sovereignty based on historic title.⁵¹

Lastly, and in relation to the territorial beyond the 3-mile line, official maps published by Germany indicate that Germany claims a boundary line between the territorial seas beyond the 3-mile line that runs along the old EEZ⁵² and continental shelf boundary lines.⁵³ The continental shelf boundaries were agreed upon by the two states in respectively 1964 and 1971, and the territorial sea delimitation lines suggested by Germany exactly coincide with these old continental shelf delimitation lines. These old EEZ and continental shelf boundaries fell within the area at present claimed by the Netherlands as its territorial sea. In order to give an analysis of the argumentation used by both states, there are some additional steps to be taken. First of all, it is necessary to explain the positions taken by both parties a bit further.

Chapter 5: National Positions

Three maritime areas

⁴⁹ Broek, J. van den, p. 482.

⁵⁰ *Ibid*, p. 482.

⁵¹ *Ibid*, pp. 482-483.

⁵² Proclamation Exclusive Fisheries Zone in 1977; from 2000 onward Exclusive Economic Zone.

⁵³ Area covered in the German Bight. *Bundesamt für Seeschifffahrt und Hydrographie*. 25-01-2011.

http://www.bsh.de/en/Marine_data/Hydrographic_surveys_and_wreck_search/Hydrographic_surveys/e_awz_n.jsp (last visited on 15 August 2012).

In getting an objective and complete overview of the specifics of the dispute it is important to understand the reasoning behind the states' positions. From a legal perspective these positions are best to be dealt with separately for three different and distinctive maritime areas. The first maritime area covers the waters that are considered internal waters and are landward of the baseline. The second maritime area includes part of the waters that are considered territorial sea and are seaward of the baselines extending until the 3-mile line. The third maritime area encloses a part the waters that are considered territorial sea and are starting beyond the parts the Ems-Dollard-Treaty applies to or at the 3-mile line. This third area extends up until the outer limit of the territorial sea and therefore ends the 12-mile line. For the delimitation of the territorial sea all three maritime areas are relevant. Delimitation of internal waters is necessary to establish the point of intersection of land borders between the Netherlands and Germany with the baseline. A precise starting point for territorial sea delimitation would thereby be established.

Dutch position

The Dutch position on the course of the border is quite straightforward for all the three applicable maritime areas of the Ems-Dollard. The Netherlands believes that delimitation of the internal waters should be based on the thalweg-principle and delimitation of the whole territorial sea should be based on the prolonged equidistance line, which should not make any distinctions between the waters before and beyond the 3-mile line in the territorial sea. The Netherlands finds that the internal waters of the Ems-Dollard do not fall under German sovereignty and are therefore still open for an equitable delimitation.⁵⁴ The internal waters were to be delimited in a manner of which state practice has shown is to be considered accepted in internal waters and rivers delimitation disputes. The delimitation of internal water concerns a land border and the Netherlands argues that the delimitation standard to apply is the thalweg-principle, a principle accepted in international law and in which the boundary follows the line of lowest points of the (main) navigable watercourse.

In addition, the Netherlands believes that delimitation of the territorial sea should start at the location where the thalweg-line meets the baselines. This delimitation should be completely based on the equidistance principle. The Netherlands is obliged by their national legislation to establish the boundaries of its territorial sea together and in agreement with neighbouring

⁵⁴ Dinter, S. van, p. 10.

states. The Netherlands argues that the territorial sea should be delimited based on the principle equidistance in absence of such an agreement with neighbouring states. In this standpoint the Dutch view coincides with the general principles for territorial sea delimitation under international law.⁵⁵ Equidistance is a principle in which the median is used to form a boundary line, which runs along a line that is on both sides of the line on the exact same distance to the baselines of both states.⁵⁶ The Netherlands claim a territorial sea boundary line that follows this equidistance line for the whole 12 miles until the point where it would connect to the starting point of the boundary line of the Dutch EEZ, which follows the continental shelf delimitation lines in the maritime zones beyond the 12-mile line.⁵⁷

German position

The German position a little bit more complicated on the courses of the boundaries for these three maritime areas of the Ems-Dollard. The German position is based on the following argumentation: in the case the Dutch reasoning would be followed, thus emphasising the absence of an recent agreement or treaty on maritime delimitation between both neighbouring states, this can still not lead to the application and justification of the thalweg-principle in the internal waters nor equidistance principle in territorial sea-waters. Both principles delimitation would be subordinate to the special entitlements Germany would enjoy based on historical titles and/or special circumstances. Germany says it acquired the waters by inheritance from territorial predecessors and long and continuous, and uninterrupted and unhampered exercise of these special entitlements would support its position.⁵⁸ What Germany has not made very clear is whether it claims the historic title to be relevant for the whole territorial sea or just for the waters between the baselines and the 3-mile line, the historic outer limit of the territorial sea. It seems to be the most logic to give relevance to the historic title in the area within the limits of the historic outer limit of the territorial sea only, since historic titles related to the territorial sea are less likely to have developed in areas that historically were not known to be territorial seas.

Relevant for the strength of Germany's position is that the Netherlands does not oppose the supremacy of historic title and special circumstances in territorial sea delimitation. The

⁵⁵ United Nations Convention on the Law of the Sea (1982), Article 15.

⁵⁶ Dinter, S. van, p. 10.

⁵⁷ Besluit grenzen Nederlandse exclusieve economische zone (2000), Article 1(b).

⁵⁸ Khan, D.E., *Die deutschen Staatsgrenzen: Rechtshistorische Grundlagen und offene Rechtsfragen*, 1st Edition. Tübingen, (Mohr Siebeck GmbH & Co. K) 2004, p. 423.

Netherlands argues that Germany failed to support its historic title by sufficient evidence.⁵⁹ As mentioned earlier, the LOS Convention indeed regulates that the equidistance principle is not directly the applicable standard to apply in the delimitation between two territorial seas in case of historic entitlement. It is true that the equidistance principle forms a general starting point of delimitation, but states are required “where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two states in a way which is at variance therewith”.⁶⁰

Similarly, the thalweg-principle established itself throughout the 19th and early 20th century as part of customary international law. It was found to be applicable for border delimitation in internal waters that were considered navigable. Former state practice and international jurisprudence have always reinforced the supremacy of “historic title and other vested rights over the median or equidistance line principle, as well as over all other rules”⁶¹ thus including the thalweg-principle.⁶² Hugo Grotius argued that in two situations thalweg should not be followed: firstly, in the case a river would fall under the effective occupation by one of the two adjacent states or, secondly, if an agreement regulating delimitation was already concluded. Germany justifies its claim, firstly, by reasoning historic entitlement on lawful acquisition, secondly, based on uninterrupted and long-lasting possession and, thirdly, by effective occupation.⁶³

Analysing the Dutch and German standpoints helps in understanding the complexities of this dispute. It also creates the possibility to check their standpoint against any legal duties, rights, obligations, and other relevant factors influencing the strengths and/or weaknesses of these positions. In trying to find these strengths and/or weaknesses a practical stance will be taken; it will be possible to find them when carrying out the regular procedure in territorial sea delimitation. Before starting any process of territorial sea delimitation, first, the relevant coastlines, baselines, the pertinent base points and other relevant points that are needed when calculating the median line need to be determined. Then the three steps in territorial sea delimitation are to be followed.⁶⁴ After the drawing of a provisional median line based on the principle of equidistance, it is the next step to consider whether by reason of historic title or

⁵⁹ Dinter, S. van, p. 10.

⁶⁰ United Nations Convention on the Law of the Sea (1982), Article 15.

⁶¹ Khan, D.E., p. 423.

⁶² *Ibid*, p. 423.

⁶³ Broek, J. van den, p. 494.

⁶⁴ *Qatar v. Bahrain*, ICJ, The Hague, 16 March 2001, para. 176, 280, 281.

special circumstances the final delimitation should be different from or at variance with this median line.⁶⁵

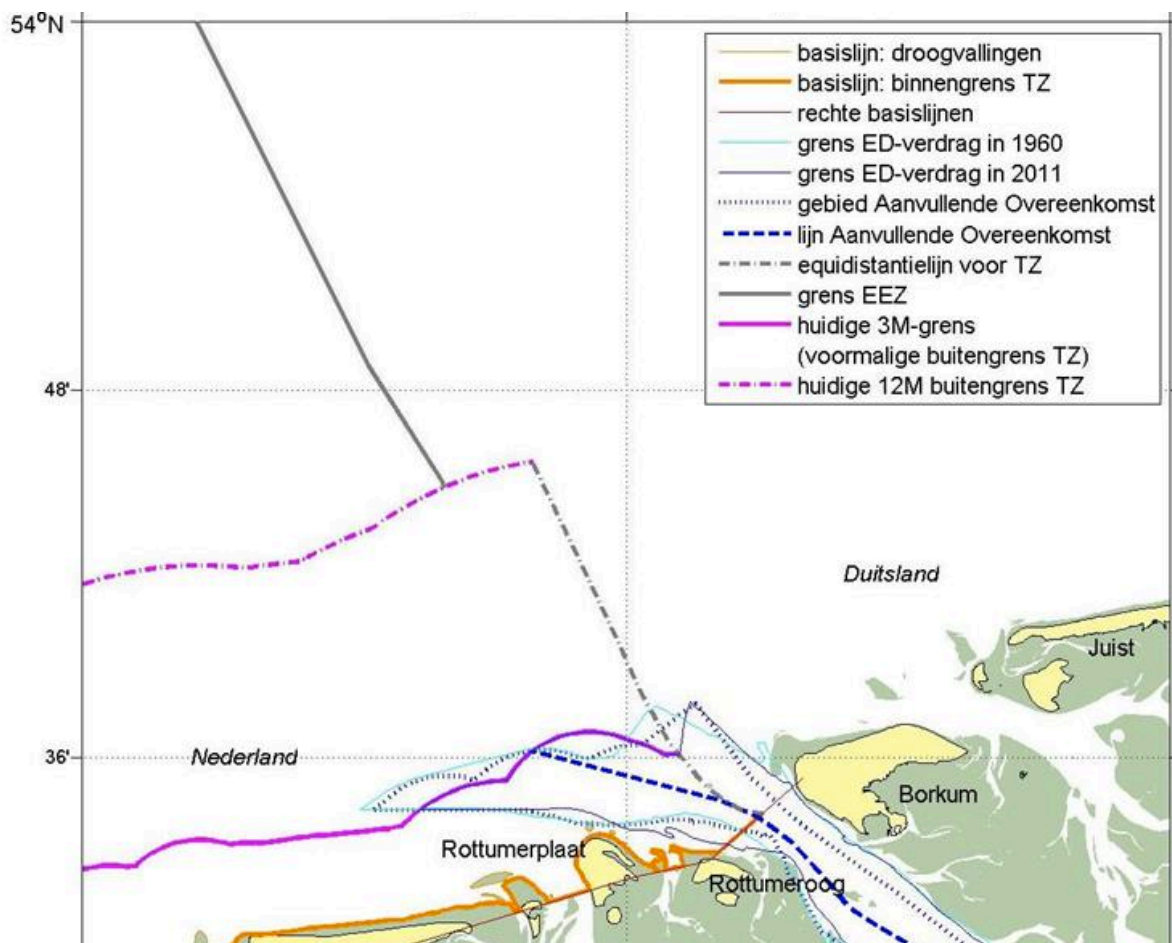


Figure 3: portraying the relevant lines in the Ems-Dollard.⁶⁶

Part III: Delimitation

Chapter 6: Baselines

In determining the boundaries of coastal states' maritime zones, it is necessary to first of all establish from what points on the coast the various outer limits are to be measured. This is the function of the baselines. The baseline is furthermore important because in the case of equidistance delimitation between neighbouring states the line of equidistance is calculated

⁶⁵ Degan, V-D. Consolidation of Legal Principles on Maritime Delimitation: Implications for the Dispute between Slovenia and Croatia in the North Adriatic. *Chinese Journal of International Law*. Vol. 6 (2007), p. 611.

⁶⁶ Relevant claims en verdragen in de Eems-Dollard (English: *Relevant claims and treaties in the Ems-Dollard*), 2011. http://www.defensie.nl/marine/hydrografie/geodesie_en_getijden/zonengrenzen/noordzee (last visited on 15 August 2012).

from the baseline of each state.⁶⁷ Baselines can be drawn in various manners. Normal baselines follow the low-water line along the coast and straight baselines are less dependent on the low-water line and follow geographical points in the general line of low-water marks. Main condition for these baselines it is that, first, they “must be drawn so that they do not depart to any appreciable extent from the general direction of the coast”⁶⁸ that, second, “they must be drawn so that the sea areas lying within these lines are sufficiently closely linked to the land domain to be subject to the regime of internal waters”⁶⁹ and, third, that “it is legitimate to take into account certain economic interests peculiar to a region”.⁷⁰

The Netherlands formulated in 1985 that, in conformity with Article 2 of the LOS Convention, its territorial sea is calculated seawards from the baseline. It was confirmed that the baseline is the official demarcation line between the inland waters and the territorial sea⁷¹ and is constructed based on points on “the low-water line along the coast”⁷² with the condition that “where a naturally formed elevation of the seabed which is covered at high tide but dry at low tide lies within the distance from the low-water line”⁷³ the baseline follows “the closest point on the low-water line of such an elevation”.⁷⁴ This low-water line “shall be defined as the line indicating the depth of 0 metres”.⁷⁵ Because of these formulations baselines can be drawn in a wide variety of geographical circumstances.⁷⁶ The Dutch baseline is drawn through a number of confirmed points, starting in the southwest of the Dutch territories at the intersection of the land boundary between the Netherlands and Belgium with the low-water line, and ending in the northeast at point Great Cape on Rottumeroog.⁷⁷ The Dutch baselines are based on a combination of normal and straight baselines. The last part of these baselines is based on the direction of the last part of Germany’s straight baselines.

Even though the last set geographical coordinate officially given by the Netherlands is already located at Rottumeroog, this does not mean that the Netherlands believes that its baselines stop here. Rottumeroog is the last land point of the low-water line along the coast before

⁶⁷ Churchill, R.R., p. 31.

⁶⁸ *Ibid*, p. 35.

⁶⁹ *Ibid*, p. 35.

⁷⁰ *Ibid*, p. 35.

⁷¹ Netherlands Territorial Sea (Demarcation) Act (1985), Article 2(1).

⁷² *Ibid*, article 1(1).

⁷³ *Ibid*, article 1(1).

⁷⁴ *Ibid*, article 1(1).

⁷⁵ *Ibid*, article 1(2).

⁷⁶ Churchill, R.R., p. 32.

⁷⁷ Netherlands Territorial Sea (Demarcation) Act (1985), Article 2(2): no coordinates specified.

entering German territory. The straight baseline continues eastwards with its official end unknown. At this point, the Dutch claim enters the disputed area covered by the Ems-Dollard-Treaty and the baseline is deemed to be formed by a straight line between the Great Cape on Rottumeroog, situated in Dutch territory, and the large lighthouse at Borkum, situated in German territory, insofar as the said line remains within Netherlands territory.⁷⁸ Somewhere between these points the official end of the Dutch baseline should be located.

Closing lines

The baseline between Rottumeroog and Borkum is considered to be a baseline closing the mouth of the Ems-Dollard. It is necessary to clarify which provision of the LOS Convention regulates the drawing of baselines over internal waters flowing into the sea. Normally, situations in which baselines run across rivers and their mouths fall under a relevant provision set out in Article 9 of the convention. In these cases, “if a river flows directly into the sea, the baseline shall be a straight line across the mouth of the river between points on the low-tide line of its banks”⁷⁹ and “no limit is placed on the length of such a river closing line”.⁸⁰ It should however be stressed that this article only applies “to rivers that flow ‘directly’ into the sea”.⁸¹ The Ems-Dollard, similar to many other rivers, does actually not flow directly into the territorial sea. Rivers flowing indirectly into the sea via their multiple arms or other course variations are called estuaries. In some situations, however, it may be difficult to exactly define an estuary and to distinguish between rivers entering the sea directly and rivers entering the sea via an estuary.⁸²

Nevertheless, if a river forms an estuary it does not fall under Article 9 of the LOS Convention. Normally, the drawing of baselines across estuaries is governed by Article 10 of the convention, which relates to baselines across juridical bays.⁸³ What this means for the baselines across the Ems-Dollard is not directly clear. Article 10 of the convention begins with setting out a criterion under which the Ems-Dollard would initially not fall under this provision. Because “this article relates only to bays the coasts of which belong to a single

⁷⁸ Netherlands Territorial Sea (Demarcation) Act (1985), article 3(2).

⁷⁹ Churchill, R.R., p. 46.

⁸⁰ *Ibid*, p. 46.

⁸¹ *Ibid*, p. 39.

⁸² *Ibid*, p. 39.

⁸³ *Ibid*, p. 39.

State”⁸⁴, it is problematic to argue that the estuary of the Ems-Dollard is to be closed by baselines in a similar manner as juridical bays are. The Ems-Dollard has coasts that belong not to one single state, but to two states, being the Netherlands and Germany. This problematic situation appears to be solved with the exception that “the foregoing provisions do not apply (...) in any case where the system of straight baselines provided for in Article 7 is applied”⁸⁵. Article 7 of the convention relates to straight baselines and since the Netherlands refer to the baseline across the estuary as a baseline that “shall be a straight line across the mouth of the river”⁸⁶, it is assumed that the baseline between Rottumeroog and Borkum was to be drawn as a straight baseline. The Netherlands refers to the baseline over the estuary as a “river closing line”⁸⁷, which thereby creates the boundary between the territorial sea and the internal waters.

Similarly, Germany uses both normal and straight baselines and formulated that the outer limit of the territorial sea in the North Sea shall be “running at a distance of 12 miles, measured from the lower-water line and the straight baselines, as appropriate”.⁸⁸ For both the Netherlands and Germany tides play an important role for drawing a baseline. Germany’s baseline follows therefore not only the low-water mark line between islands adjacent to the coast but also follows banks that lie dry at low tide⁸⁹. In a direction towards the Netherlands, the German baselines run from the intersection of the land border between Denmark and Germany along the coastlines to the island Juist.⁹⁰ The open waters between the German islands and the mouths of the rivers Weser and Elbe are crossed by straight baselines. Delimitation of internal waters does however take place at the place where the character of river streams is lost and sea-like conditions prevail. Almost none of these river-closing lines do play a role in drawing Germany’s baseline. In that aspect the Ems-Dollard is an exception.⁹¹

⁸⁴ United Nations Convention on the Law of the Sea (1982), Article 10(1).

⁸⁵ *Ibid*, Article 10(6).

⁸⁶ Churchill, R.R., p. 46.

⁸⁷ *Ibid*, p. 46.

⁸⁸ Proclamation of 11 November 1994 by the Government of the Federal Republic of Germany concerning the extension of the breadth of the German territorial sea (1994), Article 1.

⁸⁹ Khan, D.E., pp. 50-51.

⁹⁰ Proclamation of 11 November 1994 by the Government of the Federal Republic of Germany concerning the extension of the breadth of the German territorial sea (1994), Article 1: the baseline starts at point 53 41 24 N 7 04 02 E at the island Juist and runs to the intersection of the boundary between Germany and Denmark at point 54 04 14 N 8 23 30 E.

⁹¹ Khan, D.E., p. 51: only for the river Trave the closing line and baseline are the same.

The German baselines, as said before, run from the intersection of the land border between Denmark and Germany along the coastline to the island Juist, which is after Borkum the second closest island to Dutch territories. Borkum is also marked as a point on Germany's baselines but is not connected to the rest of the points of the official baselines. Germany probably decided not to connect these base points due to the fact that Borkum and Juist are both located too far from the disputed waters of the Ems-Dollard and official delimitation is still absent. Moreover, the straight baseline ends at the western point of Juist and an official German line to be connected to the official Dutch straight line between Rottumeroog and Borkum does therefore not exist. It can nevertheless be said that the drawing of a baseline between Juist and Borkum would not be disputed by the Netherlands since it falls far outside the area falling under the treaties regulating the Ems-Dollard. The Ems-Dollard is closed by straight baselines drawn approximately 10 miles from the mainland more or less consistent with the straight baseline proposed by the Netherlands and seems to be fulfilling the criteria to qualify as a straight baseline.⁹²

It is important that both countries use a similar method of drawing a baseline closing the mouth of the Ems-Dollard, because this will make it easier to establish the point where the land border between Germany and the Netherlands would intersect and the territorial sea delimitation line would start. This baseline forms the boundary between internal waters and territorial sea and its course seems not to be disputed by either the Netherlands or Germany. What has been disputed is the exact location of the base point at which the land border between the Netherlands and Germany intersect. Agreement on the exact location thereof is needed to establish the starting point of delimitation. In the Dutch opinion this exact location is to be calculated based on where a land boundary based on the thalweg-principle would intersect with the baseline. Germany believes that by reasoning of historic title this location is calculated by following the low-tide line along the Dutch coast until the point where this line meets the baseline. This location is more difficult to establish when sovereignty over this base point is not in dispute.⁹³

Chapter 7: Equidistance

⁹² Khan, D.E., p. 52.

⁹³ *Guyana v. Suriname*, Permanent Court of Arbitration, The Hague, 17 September 2007, para. 301.

Previous territorial sea delimitation disputes indicated that the first step to start the process of delimitation is to draw a provisional median line.⁹⁴ If both States cannot agree on the basepoints it is, however, difficult to draw one provisional median line. In some delimitation cases it even has been impossible to plot an equidistance line because of the absence of viable basepoints.⁹⁵ Territorial sea delimitation should however “not be based solely on the choice of basepoints made by one of those parties for its baseline from which the breadth of its territorial sea is measured”.⁹⁶ International courts and tribunals have the opportunity to establish the correct baselines themselves in cases of disagreement between the parties. Equidistance and median lines have gotten a central place in maritime boundary delimitation law and practice. The equidistance line is important since neither of the disputing states is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median line, every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the states is measured. The principle of equidistance may be employed in conformity with Article 15 of the LOS Convention, subject to historic title, special circumstances and parties reaching agreement on methods at variance with the aforementioned principles.

Nevertheless, it is sometimes not directly possible to create a median line. The objectivity behind the drawing of the equidistance line can be limited by technical reasons.⁹⁷ The equidistance method is mentioned in the LOS Convention but is, based on ICJ jurisprudence, evidently not the only method to come to delimitation.⁹⁸ Other methods, although sometimes unconventional, may considered to be on equal footing with the equidistance method. The perpendicular method, for example, is based on straight lines following the general direction of the coasts. Also variations of equidistance such as methods based on parallels, meridians, enclaves etcetera can be applied in delimitation. It has however consistently been made clear that equidistance acquired a privileged status in jurisprudence.⁹⁹

Without an agreed location of the exact starting point of an equidistance line for the territorial sea, multiple starting points should be considered. Following the Dutch view on the course of the land border, the equidistance line should start running from the base point where the

⁹⁴ *Guyana v. Suriname*, para. 303.

⁹⁵ Khan, D.E., p. 402.

⁹⁶ *Romania v. Ukraine*, ICJ, The Hague, 3 February 2009, para. 137.

⁹⁷ Dewaelsche, L., *De rol van olie en gas in delimitatie*, 1st edition. Gent, (University Press) 2010, p. 35.

⁹⁸ *Ibid*, p. 35.

⁹⁹ *Ibid*, p. 35.

internal thalweg-line crosses the baseline. Following the German view on the course of the land border, the equidistance line should start running from the base point where the low-tide line along the Dutch shores crosses the baseline.

Chapter 8: Historic Title

Germany clearly opposes the Dutch standpoint that the territorial sea delimitation should solely be based on equidistance. It argues that the disputed waters should be delimited by reason of historic title and special circumstance. Germany does not believe that the principle of equidistance prevails over reasoning by historic title and special circumstances. Both the Netherlands and Germany agree that the law applicable to the delimitation of the territorial sea is provided by Article 15 of the LOS Convention.¹⁰⁰ The states' conflicting standpoints indicate that there is no agreement on the execution of Article 15 of the convention. It follows from this article that before the equidistance principle is applied, consideration should be given to the possible existence of historic title relevant to the area to be delimited.¹⁰¹ It has been made clear that Germany has invoked the existence of such a right in the territorial sea delimitation. It claims the existence of this right for both the land border in the internal waters and delimitation line in the territorial sea. Germany supports its claim by referring to a series of historic treaties that would have given exclusive territorial sovereignty over the relevant waters.

The exact definition of historic titles is somewhat unclear. To assess whether Germany's reasoning by historic title has any legal relevance it is necessary to first establish a clear definition of historic title. Unfortunately, the content of the meaning of historic title is not clarified any further by Article 15 or other provisions of the LOS Convention. The absence of a clear definition makes historic title appear somewhat vague and obscure, but the existing jurisprudence can partly help clarify its content.¹⁰² Nevertheless, the importance of reasoning by historic title in maritime delimitation has been acknowledged in *Tunisia v. Lybia*. It was concluded, "historic titles must enjoy respect and be preserved as they have always been by long usage".¹⁰³ The logic behind this seems to be that claims are not to be made if they had no

¹⁰⁰ United Nations Convention on the Law of the Sea (1982), Article 15.

¹⁰¹ *Ibid*, Article 15: "or other special circumstances".

¹⁰² Vukas, B., *The Law of the Sea: Selected Writings*, 1st edition. Leiden, (Martinus Nijhoff Publishers) 2004, p. 86.

¹⁰³ Tanaka, Y., *Predictability and Flexibility in the Law of Maritime Delimitation*, 1st edition. Oxford, (Hart Publishing) 2006, p. 300.

recognition by neighbouring states in the past.¹⁰⁴

Broadly speaking, historic titles depend upon “the existence of a *possessio longi temporis*, carried out *à titre de souverain*, to which it has to be given due notoriety, and to which the international community as a whole has acquiesced”.¹⁰⁵ In other words, historic titles are dependent upon the acquiescence and, accordingly, also are dependent upon complying state practice. Acceptance of historic title by the international community is important since maritime territories inherently have been in conflict with the principle of the high seas.¹⁰⁶ Historic titles are for this reason most often claimed in relation to internal waters and less often in relation to the waters seaward of the baseline. Instances of claims for historic waters most often relate to bays. Claims for non-bay areas are less in quantity and mainly concern historic archipelagic coastal waters, historic straits or territorial seas.¹⁰⁷

Claims by historic reasoning can be divided into two categories; by historic titles and by historic rights. In short, historic titles are principally *erga omnes* and historic rights are recognised merely *inter partes*.¹⁰⁸ Historic rights are non-exclusive rights and their scope supposedly falls short of sovereignty. Historic rights mostly emerge from acts of private individuals and do not imply related territorial sovereignty. Historic titles can on other hand only be originated by acts of state officials or parties authorised to act on behalf of the states.¹⁰⁹ The *travaux préparatoires* of Article 15 of the LOS Convention refer to an indication that the wording of historic title was seen as comprising historic titles and historic rights. Content wise, historic title and historic rights are distinctive from each other. The former emphasises that “no other states can potentially be entitled to exercise powers over the area to which the title is referred”.¹¹⁰

An historic title is exclusive and implies the absence of any other title over the same territory. Historic rights, on the other hands, are considered non-exclusive and are “reconcilable with a maritime title vested in another state”.¹¹¹ What Germany believes to have is a historic title

¹⁰⁴ Vukas, B., p. 87.

¹⁰⁵ Antunes, N.M.. *The 1958 Conventions*. In: Towards the delimitation of maritime delimitation: Legal and technical aspects of a political process (1st edition). Leiden, (Martinus Nijhoff Publishers) 2003. pp. 35-36.

¹⁰⁶ *Ibid*, pp. 35-36.

¹⁰⁷ Symmons, C.R., *Historic Waters in the Law of the Sea: A Modern Re-Appraisal*, 1st edition. Leiden, (Martinus Nijhoff Publishers) 2008, p. 284.

¹⁰⁸ Antunes, N.M., pp. 35-36.

¹⁰⁹ *Ibid*, pp. 35-36.

¹¹⁰ *Ibid*, pp. 35-36.

¹¹¹ *Ibid*, p. 36.

over the waters of the Ems-Dollard. It refers thereby to the conclusion of historic treaties, which could qualify directly as acts of state officials and parties authorised to act on behalf of these states. Germany also believes that it is the only state entitled to exercise powers in the relevant parts of the Ems-Dollard. It sees its historic title as exclusive and rejects thereby a conflicting Dutch claim on delimitation based on the equidistance principle. The reason is that Germany finds that its claim has historically always been the only one for the waters of the Ems-Dollard; a Dutch claim has been absent.

Criteria

Claims by historic title are tested by a series of corresponding criteria that have to be fulfilled. The factors to weigh in the determination of a historic title are: “(i) exercise of authority for a long period and in accordance with the maritime title that is being claimed; (ii) notoriety and continuity of such display of authority; (iii) reaction – or lack of it – of other states”.¹¹² These basic requirements for proving historic title are derived from international customary law, but are confirmed by international jurisprudence.¹¹³ First, concerning the exercise of authority for a long period and in accordance with the maritime title that is being claimed, it has been established that the arguments behind Germany’s acquisition of the waters around the Ems-Dollard appears to be quite solid. As successor of territorial property including the relevant waters, the German claim by reasoning of historic title can be traced back to the 15th century.¹¹⁴ Even though the legality of this claim was not completely evident in the beginning, eventually the sovereignty by Germany was formally established in 1558.¹¹⁵

The historic title fell under German sovereignty in the centuries following and was reconfirmed in several historic border treaties between the Netherlands and Germany. The first of the three previously named criteria appeared to be fulfilled thereby. Then, second, concerning the notoriety and continuity of such display of authority, it is more difficult to establish whether Germany can support its claim of uninterrupted and long-lasting possessor. A full academic analysis appears to be absent here, but what can be concluded is that Germany felt it had the right to undertake maintenance and construction works and ask

¹¹² Antunes, N.M., p. 36.

¹¹³ Symmons, C.R., p. 286: notably in *El Salvador v. Honduras*, ICJ, The Hague, 11 September 1992.

¹¹⁴ Broek, J. van den, pp. 471-492: exact official date not known, but either in 1454, 1464 or 1495.

¹¹⁵ *Ibid*, p. 474.

vessels for a financial charge in return.¹¹⁶ Third, concerning the reaction – or lack of it – of other states, it can be observed that throughout history the Netherlands was not always as persistent against the German sovereignty claim as currently would be assumed. What has been constant is its pragmatic position. It has been found that the Netherlands did not raise objections against the German dominance as long as this did not directly affect national interests.¹¹⁷ These last findings do not imply that the Netherlands accepted the German claim over the Ems-Dollard, on the contrary, they show that the Netherlands has occasionally partially rejected Germany's presumed sovereignty.¹¹⁸

Argumentation by reason of historic title can apply to different maritime zones. It can be invoked in relation to “generally all those waters, which can be included in the maritime domain of a state”.¹¹⁹ The claims of historic title often concern internal waters but they are also used in the territorial sea.¹²⁰ Germany claimed its historic title for the territorial sea limited to 3 miles from the baseline and the internal waters in the Ems-Dollard. The inclusion of historic title in Article 15 of the LOS Convention can be seen as recognition of that fact that, in modern times, historic titles are still seen as of relevance in the delimitation of the territorial sea.¹²¹ On the other hand, claims to historic waters are often described as relics of an older regime. The current regime has frozen the emergence of new historic claims by limiting its scope. The international community is still willing to consider the validity of claims in the territorial sea, seeing its inclusion in Article 15, but seems to be rejecting any new claims in waters beyond this maritime zone.¹²² In theory, claims by reasoning of historic title “seems to allow states to claim sovereignty over areas that lie beyond the limits of what would be in principle their maximum territorial sea entitlement”.¹²³ As long the existence of the historic title can be proven, the existence of such sovereignty would be possible, but the acceptance of a historic title to maritime zones beyond the territorial sea limit seems to be very unlikely.¹²⁴

If a state puts forward a claim to a maritime zone beyond the territorial sea by reason of historic title, the state's claim can only qualify as such if it fulfils certain criteria stemming

¹¹⁶ Broek, J. van den, pp. 482-483.

¹¹⁷ *Ibid*, pp. 494-495.

¹¹⁸ *Ibid*, pp. 494-495.

¹¹⁹ Antunes, N.M., pp. 36-38.

¹²⁰ *Ibid*, pp. 36-38.

¹²¹ *Ibid*, pp. 36-38.

¹²² Symmons, C.R., p. 298.

¹²³ Antunes, N.M., p. 37.

¹²⁴ *Ibid*, p. 37.

from the general principles of historic title.¹²⁵ The acceptance of any of such claims is very unlikely due to their juridical nature. Historically, historic titles only existed for the territorial sea until the 3-mile outer limit. It is therefore not very plausible that Germany would argue for delimitation by reasoning of historic title for the parts of the territorial sea beyond the 3-mile outer limit. Before 1995 Germany did not proclaim a territorial sea beyond the old 3-mile line and could, in line with previous argumentation, not refer to the existence of a historic title in any of the maritime zones beyond the territorial sea. A position to apply this historic title in the territorial sea beyond the 3-mile line would therefore, and in light of general theory of historic title, become difficult to support.

Moreover, it would be difficult to prove a state's long possession of waters beyond the 3-mile limit and recognition of this possession by other states. It is therefore likely that Germany would refer special circumstances to be applicable in the delimitation of this part of the territorial sea. Both historic title and special circumstances are included in the relevant provision on delimitation indeed and even though "the textual element of the delimitation rule seems to indicate that historic title is just another type of special circumstances"¹²⁶ this is not a valid argument. Historic titles are principally exclusive and overlap "of potential entitlements is a *condition sine qua non* for delimitation"¹²⁷, indicating that historic title enjoys priority and precedence in any territorial sea delimitation.

Article 15 of the LOS Convention does furthermore imply that historic titles are, in juridical terms, on equal footing with explicit agreements, indicating that an 'equidistance-special circumstances rule' is not required.¹²⁸ Historic titles normally get full recognition and thereby make other delimitation rules in historic waters irrelevant. States reasoning by historic title are allowed to claim a delimitation line in their territorial sea that is different from what normally is drawn based on the principle of equidistance. Historic titles are established by recognition and acquiescence and do not need to be considered to be a special circumstance because their weight in delimitation is larger in comparison to special circumstances.

Historic rights have the same status as special circumstances. Their weight in delimitation can only be measured on individual basis. Historic rights are not necessarily exclusive and allow

¹²⁵ Antunes, N.M., pp. 36-38.

¹²⁶ *Ibid*, p. 37.

¹²⁷ *Ibid*, p. 37.

¹²⁸ *Ibid*, pp. 36-38.

for conflict with sovereign titles of another state. Historic rights can be interpreted as a special circumstance because they do not confirm establishment of sovereignty and jurisdiction over areas in question and thereby leaving room for potential dispute over the recognition of delimitation.¹²⁹ Delimitation different from equidistance has “to be justified by a situation of manifest unreasonableness or hardship *in casu*”.¹³⁰ Giving the same weight to historic titles and historic rights would consequently affect the juridical nature of historic title in a negative manner. It is necessary to distinguish between these two and recognise the sovereign status of historic title in the delimitation processes.

Chapter 9: Special Circumstances

After having given content to the principle of equidistance and the historic title, it is now time to focus on the role of special circumstances. Special circumstances can, in the absence of an historic title, lead to an outcome of the territorial sea delimitation process at variance with the median line. The standard delimitation practice requires checking for possible special circumstances that may justify this variance. Special circumstances have often been categorised into two groups: geographical and non-geographical special circumstances.¹³¹ Geography has been used as collective term for various geographical circumstances. The equidistance method would in certain situations lead to an outcome that is considered not to be equitable when these spatial characteristics are not taken into account. Geography does however not mean that all of these spatial circumstances always would influence delimitation in the same manner; the relevant circumstances always depend on the specifics of a case. The list of special circumstances that are considered geographical is not exhaustive, meaning that every case potentially could add a new spatial characteristic to this list.¹³² Also non-geographical circumstances need to be taken into account in the process of delimitation. Non-spatial characteristics may adjust the equidistance line if this leads to a more equitable delimitation. The list of non-geographical circumstances has been recognised as being not exhaustive as well.¹³³

Geographical circumstances

¹²⁹ Antunes, N.M., pp. 36-38.

¹³⁰ *Ibid*, pp. 36-38.

¹³¹ Dewaelsche, L., p. 35.

¹³² *Ibid*, p. 35.

¹³³ Oude Elferink, A.G., *The Law of Maritime Boundary Delimitation: A Case Study of the Russian Federation*, 1st edition. Dordrecht (Martinus Nijhoff Publishers) 1994, p. 128.

The list of factors recognised as special circumstance is extensive and predominantly geographical.¹³⁴ States have the freedom to decide which of these geographical circumstances they consider relevant, but it is a task of international courts to refashion geography.¹³⁵ It can furthermore not be expected that international courts “take all such geographical peculiarities into account in order to adjust or shift the provisional delimitation line”.¹³⁶ Certain geographical circumstances are impossible not to take into account because delimitation otherwise leads to a situation that is too inequitable. Geographical factors that have consistently been considered as special circumstance include regional geography, the configuration of the coast, including significant disparities in the length of the relevant coasts, special coastal configuration or concavity and the cutting-off effect, basepoints and the presence of islands in front of the coasts.¹³⁷ Other geographical factors may significant as well, but are to be assessed on a case-by-case basis. Of these geographical circumstances only the length of the relevant coasts appears to be of further relevance in the territorial sea delimitation. Dutch and German islands are located around the Ems-Dollard, but these are not relevant because they are not located beyond the baselines, or in other words, in the territorial seas.

It is considered a distortion of lengths of the relevant coastlines if a relatively short length of coasts had a gigantic effect on delimitation.¹³⁸ Different ratios between coastlines can adjust delimitation to the advantage of the state with the longer length of coast.¹³⁹ It should be noted that only the relevant coast could be playing a role in delimitation. This means that the coasts that are considered relevant correlate in length with the size of the maritime zone to be delimited. The effect of coastal disparity is however not mathematically set. At first sight, the length of the German coasts located close to the equidistance line appears to be longer than the Dutch coasts. Possible consequences of this observation are not easy to predict because “taking account of the disparity of coastal lengths does not mean a direct and mathematical application of the relationship between the length of the coastal fronts”.¹⁴⁰ Varying lengths of

¹³⁴ Rothwell, D.R., p. 403.

¹³⁵ *Cameroon v. Nigeria*, ICJ, The Hague, 10 October 2002, para. 295.

¹³⁶ Rothwell, D.R., p. 403.

¹³⁷ *Ibid*, p. 403.

¹³⁸ Dewaelsche, L., p. 36. In *Denmark v. Norway* regarding the delimitation between Greenland and Jan Mayen the relevant coastlines were calculated. A 9/1 ratio between the coastlines was found. The ICJ found that this qualified as distortion and special circumstance. Consequently, the median line was adjusted to the advantage of Denmark.

¹³⁹ *Ibid*, p. 36.

¹⁴⁰ *Ibid*, pp. 36-37.

coasts do not always have an effect on the equidistance line. In *Cameroon v. Nigeria*, for example, an argument to adjust the equidistance line because of disparity of coastal lengths was not accepted by the ICJ.¹⁴¹

There are also other geographical factors that could qualify as special circumstance in territorial sea delimitation. It is always unsure how fundamentally important these geographical circumstances are to actually influence delimitation. Perhaps relevant for the present case is it to see whether low-tide elevations exist and how these would play a role in adjusting the median line. Additionally, attention could be devoted to the possible problem of the cutting off-effect. A delimitation line following the Dutch low-water lines would cut across the approaches to the Ems-Dollard and affect Dutch navigational, security or other relevant interests. Vice versa, delimitation other than by reasoning of historic title could also affect German interest. The cutting-off effect was acknowledged as a special circumstances in *North Sea Continental Shelf* and was more recently defined in *Ukraine v. Romania* as the cutting off of a state's access to or sovereignty over maritime zones within its jurisdiction.¹⁴² Other geographical factors could also qualify as special circumstance but this mainly depends on the specifics of a case. The Netherlands and Germany would naturally be free to put forward geographical circumstances that they further consider to be relevant.

Non-geographical circumstances

There are several non-geographical factors that have been accepted as a special circumstance in territorial sea delimitation. Non-geographical factors that have been put forward as special circumstance include, amongst others, economic factors, political and security considerations, the interest of third states, social economic circumstances and other factors.¹⁴³ Additionally, historic rights may qualify as a non-geographical special circumstance as well.¹⁴⁴ Contrary to common belief, however, historic title does not qualify as special circumstance. As argued before, historic title should be seen as a separate reason leading to a specific boundary and not as special circumstance justifying deviation from a proposed equidistance line.

Accepting of what exactly constitutes a special circumstance can cause disagreement between

¹⁴¹ Dewaelsche, L., pp. 36-37.

¹⁴² *Ibid*, pp. 42-43.

¹⁴³ *Ibid*, pp. 41-42.

¹⁴⁴ *Ibid*, pp. 41-42.

states. As mentioned before, international courts are not constrained by a finite list of special circumstances.¹⁴⁵ Moreover, notions of “special circumstances generally refer to equitable considerations rather than notions of defined or limited categories of circumstances”.¹⁴⁶ There is no limit on the list of factors constituting a special circumstance. In *Suriname v. Guyana* it was defined that “every particular factor of the case which might suggest an adjustment or shifting”¹⁴⁷ of the median line may qualify as special circumstance. The list of special circumstances accepted as such in delimitation disputes has been consistent in its degree of predictability, however.¹⁴⁸ Based on earlier considerations it is argued that these circumstances could also include state conduct.¹⁴⁹

State conduct

Historic conduct of the two parties may justify an adjustment based on special circumstances as well. State conduct is characterised by the activities of the organs and officials of a state in relation to another particular state. In the states’ position on the delimitation in the territorial sea it is necessary to look more closely at historic behaviour characterising the relation between the Netherlands and Germany. State conduct is especially important for the delimitation of the territorial sea beyond the 3-mile line. Until the extension of the territorial sea to 12 miles, various bilateral agreements existed that regulated the delimitation of maritime zones previously located here. Two treaties between the Netherlands and Germany have been concluded regulating delimitation of the continental shelf. After the proclamation of territorial sea extension by the Netherlands, parts of the official German continental shelf now came to be located within the newly proclaimed territorial sea.

An overlap of the Dutch territorial sea and German continental shelf leads to one main problem: it is not possible for a territorial sea and continental shelf to overlap. The jurisdictional scope of the territorial sea is worded to be extending “to the air space over the territorial sea as well as to its bed and subsoil”.¹⁵⁰ The continental shelf on the other hand comprises “the seabed and subsoil of the submarine areas that extend beyond its territorial

¹⁴⁵ *Guyana v. Suriname*, para. 302.

¹⁴⁶ *Ibid*, para. 302.

¹⁴⁷ *Ibid*, para. 303.

¹⁴⁸ *Ibid*, para. 303.

¹⁴⁹ *Ibid*, para. 303.

¹⁵⁰ United Nations Convention on the Law of the Sea (1982), Article 2.

sea¹⁵¹. It is said that the continental shelf starts where the territorial sea ends, thereby excluding the possibility for possible overlap. After Germany also extended its territorial sea to an outer limit of 12 miles, the situation changed and started to revolve around overlapping territorial sea claims. Question is whether this conduct could qualify as special circumstance.

Normally, “when two countries establish a frontier between them, one of the primary objects is to achieve stability and finality”.¹⁵² It is seen in state practice that boundary agreements appear inviolable. Delimitation treaties can only be terminated with the consent of both parties, or in conformity with a possible termination or withdrawal provision or in the case of a limited number of situations. A termination or withdrawal provision has however been absent in the applicable treaties governing the continental shelf delimitation. This absence could be seen as evidence “that the treaty is binding in perpetuity”.¹⁵³ Unless “material breach, impossibility of performance, a fundamental change in circumstances or the emergence of a new peremptory norm of international law”¹⁵⁴ occurred the treaties remain applicable. Even if a treaty would no longer be in force the boundaries would in principle remain, unless parties agree otherwise. Nevertheless, resorts for termination of the treaties do exist and are to be in conformity with generally accepted grounds for unilateral termination. Valid grounds are laid down in the Vienna Convention on the Law of Treaties (*from now on*: Vienna Convention) from 1969. Certain provisions of the Vienna Convention can give guidance in examining whether the old continental shelf boundary lines overlapped after the 12 miles territorial sea extension can qualify to be considered a relevant special circumstance or whether the applicable treaties deserve to be terminated legally.

Previous agreements of legal character have to be kept according to the *pacta sunt servanda* principle. Delimitation treaties, including those concluding marine boundaries, do not lose their relevance because they are excluded from the *rebus sic stantibus* principle, which is an escape clausal to the *pacta sunt servanda* principle.¹⁵⁵ The *rebus sic* principle allows treaties to become inapplicable because of a fundamental change of circumstances and gives contracting parties the opportunity to dissolve an agreement that no longer serves their

¹⁵¹ United Nations Convention on the Law of the Sea (1982), Article 76.

¹⁵² Lisztwan, J.. Stability of Maritime Boundary Agreements, *The Yale Journal of International Law*. Vol. 37 (2011), p.179.

¹⁵³ *Ibid*, p. 183.

¹⁵⁴ *Ibid*, p. 183.

¹⁵⁵ Vienna Convention on the Law of Treaties (1969), Article 62.

original object and purpose without a possible breach.¹⁵⁶ States can however not successfully invoke the *rebus sic stantibus* principle to terminate boundary agreements because these are exempted¹⁵⁷, including maritime boundary agreements.¹⁵⁸

To illustrate, it was observed in *Greece v. Turkey*, “whether it is a land frontier or a boundary line in the continental shelf that is in question, the process is essentially the same, and inevitably involves the same element of stability and permanence, and it is subject to the rule excluding boundary agreements from fundamental change of circumstances”.¹⁵⁹ It is interesting to find out whether this implies that the old continental shelf delimitation lines are still relevant as a special circumstance in the delimitation of the territorial sea. It could be argued that the applicable treaties on the continental shelf delimitation remain in force due to the absence of a bilateral agreement on termination. To decide whether this state conduct qualifies as special circumstance is open to debate.

The Netherlands could argue that the rights and duties of the continental shelf delimitation treaties do not apply to other maritime zones. In addition, the Netherlands proclaimed an Exclusive Fisheries Zone (*from now on*: EFZ) in 1977 and selected the continental shelf boundary lines as delimitation for this EFZ.¹⁶⁰ The EFZ started at the 3-mile line and was partly located in the area now considered territorial sea. From this conduct it can be implied that the Netherlands enjoyed not only corresponding rights and duties on the continental shelf, but also certain rights and duties, in conformity with international customary law, in the waters above the seabed and subsoil. It is therefore necessary to assess whether this conduct qualifies as a special circumstance. The question to be raised is whether historical acceptance of delimitation of the EFZ and continental shelf automatically implies that these boundaries remain in force and that territorial sea delimitation should follow the same boundaries.

It was established in *Guinea-Bissau v. Senegal* that maritime treaties “must be interpreted in the light of the law in force at the date of its conclusion”.¹⁶¹ Moreover, agreements “must be assessed in the light of the law in force at the time”¹⁶² of their occurrence and do “not delimit

¹⁵⁶ Lisztwan, J., p. 184.

¹⁵⁷ Vienna Convention on the Law of Treaties (1969), Article 62.

¹⁵⁸ Lisztwan, J., p. 184.

¹⁵⁹ *Greece v. Turkey (Aegean Sea Continental Shelf Case)*, ICJ, The Hague, 19 December 1978, para. 85.

¹⁶⁰ Uitvoeringsbesluit ex artikel 1 Machtigingswet instelling visserijzone (1977), Article 1.

¹⁶¹ *Guinea-Bissau v. Senegal*, ICJ, The Hague, 31 July 1989, para. 85.

¹⁶² *Ibid*, para 85.

those maritime spaces which did not exist at that date”¹⁶³, regardless of how they are named. Additionally, an agreement cannot be objectively interpreted any longer when by modification occurrences are added that happened after an agreement’s conclusion.¹⁶⁴ International courts, for example, have the duty “to interpret treaties, not to revise them”.¹⁶⁵ The duty does not include interpretation of the evolution of the legal content and this would imply that developments in the law of the sea do not affect agreements concluded prior to this development.

However, concepts that were expressly mentioned and existed at the time of an agreement’s conclusion are open to developments in the law of the sea.¹⁶⁶ Evolution of the definitions of maritime concepts existing at conclusion should be interpreted as such. The continental shelf delimitation treaties of 1964 and 1971 and the EFZ act of 1977 are to be interpreted in light of the legal developments in the law of the sea. The territorial sea was expressly mentioned in and existed at least since the Convention on the Territorial Sea and the Contiguous Zone (from now on: *Convention on the Territorial Sea*) of 1958, to which both the Netherlands and Germany were party. Already in 1958 the territorial sea and contiguous zone were not to be extending beyond 12 miles from the baseline.¹⁶⁷ These developments should be taken into account in considering whether state conduct could be interpreted as special circumstance.

Due to the presence of several ports around the waters of the Ems-Dollard it is relevant to assess whether navigational factors may be included in special circumstances. It was demonstrated in *Guyana v. Suriname* that navigational interests are considered to be a special circumstance.¹⁶⁸ Navigation may justify a deviation from the median line. Adjustments can be made as a reaction on existing routes of navigations, which can be characterised by physical factors of the seabed under these channels.¹⁶⁹ Access of internal waters does also play a role in navigation: states may want to make sure that shipping routes are located within their jurisdiction.¹⁷⁰ State practice has furthermore illustrated that several agreements especially provide for navigation routes passing through the territorial sea of the state in which the harbour is located. The equidistance line was adjusted in *Beagle Channel* because of a

¹⁶³ *Guinea-Bissau v. Senegal*, para. 85.

¹⁶⁴ *Ibid*, para 85.

¹⁶⁵ *Ibid*, para 85.

¹⁶⁶ *Ibid*, para 85.

¹⁶⁷ Convention on the Territorial Sea and the Contiguous Zone, Geneva 29 April, 1958, Article 24(2).

¹⁶⁸ *Guyana v. Suriname*, para. 306.

¹⁶⁹ *Handbook on the Delimitation of Maritime Boundaries*, 1st edition. New York, (United Nations Publications) 2000, p. 40.

¹⁷⁰ *Ibid*, p. 40.

“habitually used navigable track”.¹⁷¹ This can, however, lead to situations in which delimitation based on navigable channels and following the equidistance principle becomes inequitable.¹⁷² It is essential that there should always be an actual navigation practice “as opposed to a purely hypothetical one”.¹⁷³ This criterion can be established by reviewing the state practice between the two parties: this may indicate that states are indeed “prepared to take the special circumstances of navigation into account in adjusting the boundary to deviate from the median line”.¹⁷⁴

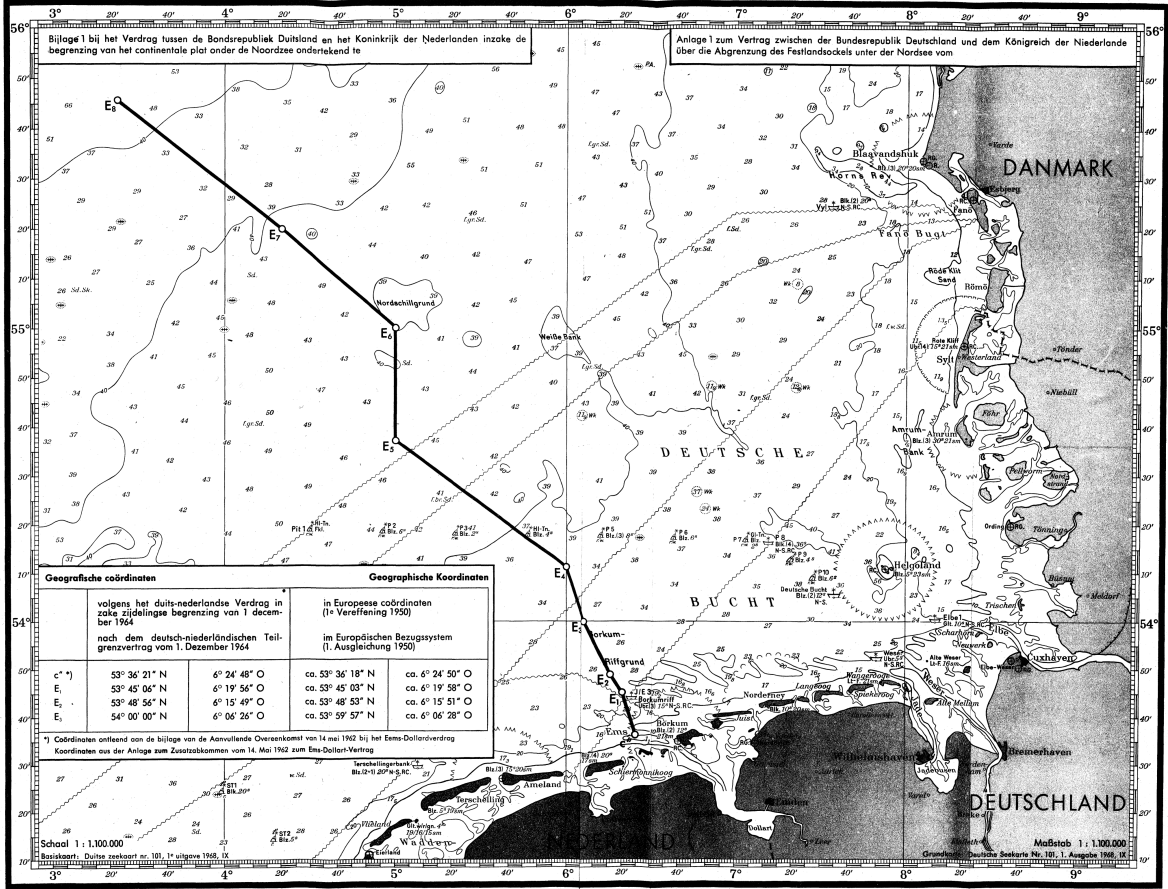


Figure 4: portraying the 1971 continental shelf delimitation between the Netherlands and Germany.¹⁷⁵

Part IV: Analysis

¹⁷¹ *Handbook on the Delimitation of Maritime Boundaries*, p. 41.
¹⁷² Rothwell, D.R., p. 400.
¹⁷³ *Guyana v. Suriname*, para. 294.
¹⁷⁴ Rothwell, D.R., p. 400.
¹⁷⁵ Verdrag tussen het Koninkrijk der Nederlanden en de Duitse Bondsrepubliek inzake de begrenzing van het continentaal plat onder de Noordzee, Kopenhagen, 28 January, 1971: attachment 1.

Chapter 10: Legal Analysis

Article 15 of the LOS Convention calls upon states to reach an agreement over delimitation of the territorial sea between states with opposite or adjacent coasts.¹⁷⁶ Naturally, any agreement on delimitation of maritime zones, including the territorial sea, is to be required to be in accordance with the rules of international law.¹⁷⁷ The exact content of what constitutes international law is referred to in Article 38 of the Statute of the International Court of Justice.¹⁷⁸ International conventions, international customs, the general principles of law, judicial decisions and teaching of the most highly qualified publicists shall be applied to give content to international law.¹⁷⁹

The legal framework is further shaped by the LOS Convention and in particular by Article 15 of this convention. Accordingly, the Netherlands and Germany are required to delimit their territorial seas by equidistance in the absence of an historic title or any special circumstance. The convention places primacy on a median line as the delimitation to be applied between the territorial seas of two states.¹⁸⁰ Only historic titles or special circumstances can justify an interpretation at variance with this median line.¹⁸¹ Naturally, evidence is required to prove that historic title to and special circumstances in the territorial sea exist. Within this framework all factors of relevance in the delimitation are to be interpreted and applied.

The Netherlands considers the thalweg-line as the appropriate starting point of delimitation and argues this to be based on equidistance.¹⁸² This position implies the Netherlands to believe that any historic title and special circumstance are absent or not proven. Germany does not share this position and has rejected delimitation not including other factors than equidistance.¹⁸³ The Netherlands also contends that delimitation by reasoning of historic title applies in the territorial sea beyond 3 miles from the baseline. The Netherlands seems not to support the view that the states' conduct historically followed the line invoked by Germany based on the historic title. There is no historical evidence of an agreement on an equidistance line. Both states have not worked jointly to identify an equidistance line and bilateral

¹⁷⁶ United Nations Convention on the Law of the Sea (1982), Article 15.

¹⁷⁷ *Ibid*, Preamble.

¹⁷⁸ Charter of the United Nations (1945), Article 38.

¹⁷⁹ *Ibid*, Article 38.

¹⁸⁰ *Guyana v. Suriname*, para. 296.

¹⁸¹ United Nations Convention on the Law of the Sea (1982), Article 15.

¹⁸² Dinter, S. van, p. 10.

¹⁸³ Khan, D.E., p. 423.

negotiations with the purpose of reaching an agreement have not been successful yet. These opposite positions illustrate that reaching an agreement between the two states will not be self-evident.

Germany argues for a delimitation line adjusted by historic title and possibly special circumstance.¹⁸⁴ It already believes that delimitation should proceed along line reasoned by historic title, at least in the part of the territorial sea historically extending until 3 miles from the baselines. It is unclear if Germany believes that its historic title would be applicable in the territorial sea until 12 miles from its baselines. It seems that historic titles lose their relevance beyond the 3 mile-line, because, based on the legal nature of historic titles, it has been concluded that historic titles almost certainly lose their historic character beyond the 3-mile outer limit.¹⁸⁵ Recognition of a historic title beyond this extent therefore seems to be unlikely.

Looking more closely at the criteria historic titles have to fulfil can test the validity of Germany's reasoning by historic title. An historic title can be interpreted as such if "exercise of authority for a long period and in accordance with the maritime title that is being claimed"¹⁸⁶, secondly, "notoriety and continuity of such display of authority"¹⁸⁷ and, finally, "reaction – or lack of it – of other states"¹⁸⁸ of an historic title can be proven. Historic research suggests that evidence exists that there is little doubt that two of these three criteria have been fulfilled. Germany begun to exercise authority in the Ems-Dollard during the 15th century and continued to display this until early 20th century, when both states came to a status quo in 1929.¹⁸⁹ Evidence that confirms the absence of other states' reaction is less convincing. It can be concluded that the Netherlands was not always as persistent in objecting as currently would be assumed, but it has been argued that Germany's historic title occasionally has been rejected by the Netherlands.¹⁹⁰

Historic titles enjoy special status in the delimitation process of the territorial sea. It seems, however, that Germany's reasoning by historic title cannot sufficiently be supported because (the lack) of corresponding evidence. An historic title overrules other factors normally of

¹⁸⁴ Dinter, S. van, p. 10.

¹⁸⁵ Antunes, N.M., p. 37.

¹⁸⁶ *Ibid*, p. 36.

¹⁸⁷ *Ibid*, p. 36.

¹⁸⁸ *Ibid*, p. 36.

¹⁸⁹ Treviranus, H. D., p. 540.

¹⁹⁰ Broek, J. van den, pp. 494-495.

influence in the territorial sea delimitation.¹⁹¹ It thereby automatically implies sovereignty over the territories the historic title is applicable to. A fully established historic title could give Germany the right to extend its territorial sea to parts of the territorial sea referred to by this title. If the historic title were to be acknowledged, the starting point of the territorial sea delimitation would be located at the intersection of the baseline and the low-water line along the west banks of the Ems-Dollard.¹⁹² Found evidence suggested that the historic title could not be fully proven. It therefore seems that Germany's position based on historic title cannot be fully recognised as such, suggesting that partial recognition is the most Germany can argue for.

If Germany indeed fails to provide sufficient evidence for its historic title, it still does not directly have to support delimitation by equidistance. As last resort, it can bring forward special circumstances that can lead to a boundary line that is at variance with the equidistance line. These special circumstances may be of geographical or non-geographical nature and are not limited by number: states and international tribunals are free to bring forward any factor they consider to be qualifying.¹⁹³ The delimitation can be complicated when both states do not agree on accepting what exactly constitutes a special circumstance. International jurisprudence can form a guiding factor here: the list of special circumstances recognised by international tribunals has been relatively consistent and contains a certain degree of predictability.¹⁹⁴ Due to its historic presence in the territorial sea, Germany might want to emphasise historic rights, state conduct and navigation as special circumstances.

Contrary to historic titles, which could not automatically be extended and applied to territorial seas beyond the 3 miles¹⁹⁵, it seems to be impossible to answer with complete certainty whether the historical acceptance of the boundary of the territorial sea based on historic rights would be altered by the extension of the breadth of the territorial sea to 12 miles. The limit of this acceptance depends on the exact content of the historic agreements between the Netherlands and Germany concluded throughout the 15th until 19th century. The agreements concluded that Germany had its maritime boundary running along the Dutch low-water line, but a maximum extent of this line has not been found for this research.¹⁹⁶ The question comes

¹⁹¹ Antunes, N.M., p. 37.

¹⁹² *Guyana v. Suriname*, para. 308.

¹⁹³ *Ibid*, para. 302.

¹⁹⁴ *Ibid*, para. 303.

¹⁹⁵ *Ibid*, para. 311.

¹⁹⁶ Broek, J. van den, pp. 482-483.

up whether the historic rights are to be applied to the full or only a limited part of the territorial sea. The answer to this question could perhaps be found when future research can look in to the object and purpose of these agreements. Nevertheless, a legal framework exists to help interpreting historic treaties.

Similar to the argumentation of Suriname in *Guyana v. Suriname* and in light of *Greece v. Turkey*, it can sometimes be argued that:

“where a text specifies the location and direction of the territorial sea boundary without reference to geographic limit, the correct interpretation is the ordinary meaning of the text, so that the boundary applies to the entire territorial sea up to the limits claimed by the parties at any given time in accordance with international law”.¹⁹⁷

This builds upon the view that legal agreements are to be read in light of developments of international law and that these developments should be incorporated.

From another point of view and as was established in *Guinea-Bissau v. Senegal*, it can be argued that treaties “must be interpreted in the light of the law in force at the date of its conclusion”.¹⁹⁸ This view is more traditional and would indicate that historic treaties, and thereby also historic rights, are only applicable to the waters historically seen as territorial sea. Historic rights could furthermore be justified if it is proven that the object and purpose of the historic boundary treaties were to limit the influence the Netherlands could exercise in the territorial sea and that, thereby, Germany could maintain control over the approaches of the Ems-Dollard. Nevertheless, it should also be examined whether these historic approaches for the territorial sea are still applicable in current times.

In any case, delimitation of the territorial sea can be influenced by other special circumstances brought forward by the parties. If a special circumstance is recognised as such, it may adjust the median line. So far, the Netherlands has not put forward any special circumstance and it is not clear whether it would prefer to do so. Germany, on the other hand, rejects the relevance of the equidistance method and can, by absence of full prove of its historic title, only justify this position if it provides evidence for a special circumstance. Depending on the special circumstance Germany brings forward, it is relevant to assess whether this circumstance needs to be given the same weight for the total extent of territorial sea or whether alteration

¹⁹⁷ *Guyana v. Suriname*, para. 286. It was however decided that the reasoning by historic title was not applicable for the full 12 miles of the territorial sea.

¹⁹⁸ *Guinea-Bissau v. Senegal*, para. 85.

depending on its proximity to the baseline is required. Additionally, waters not being part of the territorial seas might be considered relevant; the access of internal waters may influence delimitation as well. In addition, state practice and state conduct may be included as factors of interest.

The delimitation line between the two territorial seas has to be connected to the EEZ and continental shelf lines at the 12-mile outer limit. For a long period of time these maritime zones started at from the 3-mile limit. These boundaries were recognised by both the Netherlands and Germany. It is relevant to know whether this former delimitation has any implication for the current delimitation between the territorial seas. Coastal states enjoy more rights in the territorial sea than in the EEZ. Comparatively, a state's control "over navigation, pollution, customs and other coastal state laws, including its general criminal law"¹⁹⁹ is therefore more important in the territorial sea. A coastal state's jurisdiction in the EEZ and on the continental shelf is however not to be underestimated.²⁰⁰ Some of the activities falling under this jurisdiction may require long-term planning and investments. Changes in jurisdiction can therefore be inconvenient and were perhaps unforeseeable for parties previously active here.

Not only would it be unwelcome when maritime jurisdiction would suddenly shift to another state, but it would also become unclear which rights remain and become applicable to the states. The boundaries of the continental shelf between the Netherlands and Germany were not altered by subsequent agreement and this means that the boundaries are still applicable. In any case, the rights the two states have on the continental shelf follow these lines and remain unchanged.²⁰¹ This situation can have two possible solutions: first, a different line can be drawn for remaining territorial sea rights which do not include rights over the continental shelf and jurisdiction will thereby be divided by the two states, or, second, the existence of a continental shelf boundary is a special circumstance requiring one line in the delimitation.

Nevertheless, analysing the possible historic titles and special circumstances will be a solid basis to depart from in the hope of reaching an agreement on the delimitation between the territorial seas of the Netherlands and Germany. The relative weight that has to be given to these factors often remains problematic. It seems that the historic title put forward by

¹⁹⁹ *Guyana v. Suriname*, para. 316.

²⁰⁰ United Nations Convention on the Law of the Sea (1982), Article 56-57.

²⁰¹ Lisztwan, J., p. 184.

Germany cannot fully, or at least without a doubt, be recognised as such. It will furthermore be difficult to calculate the exact weight of the special circumstances. It would already be a step forward when both parties can agree on which factors are relevant and which are not. If two states decide to negotiate for a bilateral agreement it is up to these states only to interpret these factors and give them recognition as such. Only if these negotiations fail and the states wish to decide to take the dispute to an international court a third party will come in to give a definite answer to all these uncertainties.

Chapter 11: Dispute Settlement

States are required to settle transnational disputes by peaceful means, in such a way that peace, security and justice are not endangered.²⁰² The options states have in resolving their disputes are listed in Article 33 of the UN Charter. They include “negotiation, mediation, conciliation, arbitration and judicial settlement”.²⁰³ Disputes in the law of the sea are settled by negotiation in most cases; third party procedures are invoked only occasionally.²⁰⁴ Settlement procedures involving third parties are less popular because it entails a certain degree of uncertainty for the outcome of the procedure.²⁰⁵ Alternatively, a third party can also be invoked to give guidance to the negotiation procedures. Additionally, third parties can examine the dispute in contention by enquiring the facts and laws involved.²⁰⁶ Arbitration and judicial settlement procedures also include third parties, but are of a more formal character and give outcome through decisions that are binding on the parties.²⁰⁷

In disputes involving the law of the sea, parties are required by Article 283 of the LOS Convention to make efforts to settle their dispute through negotiation and are thereby obligated to exchange views.²⁰⁸ There are not requirements for the maximum length of the negotiations, they are, however, required to be serious and in good faith.²⁰⁹ If negotiations are without success, parties have to make a choice of procedure to settle under Article 287 of the convention. The choice of procedure may include the International Tribunal for the Law of

²⁰² Rothwell D.R., p. 440 and United Nations Convention on the Law of the Sea (1982), Article 279.

²⁰³ Rothwell D.R., p. 440.

²⁰⁴ *Ibid*, p. 440.

²⁰⁵ *Ibid*, p. 440.

²⁰⁶ *Ibid*, p. 440.

²⁰⁷ *Ibid*, p. 440.

²⁰⁸ United Nations Convention on the Law of the Sea (1982), Article 283.

²⁰⁹ Rothwell D.R., p. 449.

the Sea (*From now on: ITLOS*), the ICJ, or other arbitral or special tribunals in accordance with the convention.²¹⁰

The Netherlands declared that it prefers the ICJ as method of dispute settlement and Germany declared that it prefers the ITLOS, other arbitrations under Annex VII of the convention, and the ICJ as methods of dispute settlement under Article 287 of the convention.²¹¹ Moreover, both states have declared that they recognise the jurisdiction of the ICJ as compulsory *ipso facto* and without reservations in marine delimitation.²¹² If the Netherlands and Germany both agree to take the proceedings a step further, they would most likely agree to take the dispute to the ICJ. This is in line with corresponding provisions of the Ems-Dollard-Treaty, which explicitly provide the right to take issues directly related to the delimitation between the territorial seas to the ICJ.²¹³ Additionally, the states may also chose to start proceedings before a special delimitation arbitration tribunal, in conformity with the Dutch-German Arbitration and Reconciliation Treaty of 1926.²¹⁴ Naturally, this provision is only applicable to the part of the territorial sea falling under the treaty, thus, to the territorial sea within the 3-mile limit.

Conclusion

Delimitation in conformity with the relevant provisions of the LOS Convention and dividing the territorial seas between the Netherlands and Germany should start at the baseline. The exact starting point and the line to be followed depend on the recognition of the historic title claimed by Germany. Evidence to suggest that this historic title to the territorial waters in dispute had inured to either party is not complete. With information presently available, it cannot be guaranteed that Germany's reasoning by historic title fulfils the corresponding criteria. If the historic title is absent indeed, special circumstances may be invoked to adjust the initial median line. In light of the historic claim, a special circumstance may be constituted by historic factors of unusual nature. Other factors of interest may be navigation, state conduct or other special circumstances.

Bearing the findings in mind, a line starting at the baseline and ending at the 3-mile limit

²¹⁰ United Nations Convention on the Law of the Sea (1982), Article 287(1).

²¹¹ Rothwell D.R., p. 450.

²¹² Declarations Recognizing the Jurisdiction of the Court as Compulsory by Germany, 30 April, 2008 and by the Netherlands, 1 August, 1956. <http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=3> (last visited on 15 August 2012).

²¹³ Ems-Dollardverdrag/Ems-Dollart-Vertrag (1960), Article 46(2).

²¹⁴ Ems-Dollardverdrag/Ems-Dollart-Vertrag (1960), Article 46(2).

would constitute the first part of the boundary. If the starting point of delimitation were the intersection of the baseline and on the low-water line along the Dutch shores of the Ems-Dollard, the access to the internal waters would fall in German territory. If the starting point were the intersection of the baseline and median line, access to the internal waters would be equitably divided between the Netherlands and Germany. The question remaining is whether there are any special circumstances which justify a deviation from the equidistance line. Features such as historic rights and navigation seem to be relevant for Germany. The Netherlands could bring forward that the possibility exists that applying a line at variance with equidistance would cut off its coast.

The second part of the boundary is constituted by line drawn from the 3-mile limit to meet the point at the 12-mile limit adopted by the two states as starting point to delimit their continental shelf and exclusive economic zone. Factors constituting a special circumstance close to the coast may be less relevant as the delimitation line goes further into the territorial sea.²¹⁵ There should therefore not be an automatic extension of the first part of the boundary line. There is evidence to suggest that at least one special circumstance exist requiring extra consideration. Previous state conduct seems to be a factor of special interest when drawing this line. It is necessary to consider the relevance of delimitation previously concluded for the continental shelf in this part of the territorial sea.

The boundaries of the continental shelf between the Netherlands and Germany were not altered by subsequent agreement and this means that the boundaries are still applicable. In any case, the rights the two states have on the continental shelf follow these lines and remain unchanged. This situation can have two possible solutions: first, a different line can be drawn for remaining territorial sea rights which do not included rights over the continental shelf and jurisdiction will thereby be divided by the two states, or, second, the existence of a continental shelf boundary is a special circumstance requiring one line in the delimitation.

²¹⁵ Rothwell, D.R., p. 400.

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Figure 1: Title over figure: Eemsmonding zorgt al jaren voor grensconflict (English: *Ems mouth causing border conflict for many years*). In: Grensruzie met Duitsers over windmolenpark. Fibronot. 11-08-2011. <http://fibronot.nl/nieuwsartikel257-2011-grensruzie-met-duitsers-over-windmolenpark/> (last visited on 15 August 2012).

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Figure 3: Relevant claims en verdragen in de Eems-Dollard (English: *Relevant claims and treaties in the Ems-Dollard*), 2011.

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Figure 4: Verdrag tussen het Koninkrijk der Nederlanden en de Duitse Bondsrepubliek inzake de begrenzing van het continentaal plat onder de Noordzee, Kopenhagen, 28 January, 1971: attachment 1.

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