

Cambridge University Press

978-1-107-04146-2 - The Delimitation of the Continental Shelf Between Denmark, Germany and the Netherlands: Arguing Law, Practicing Politics?

A. G. Oude Elferink

Excerpt

[More information](#)

1

Introduction

1.1 Origins and objectives

My interest in the role of international law in negotiations was first raised when I was working on my dissertation on the delimitation of the maritime boundaries of the Russian Federation in the first half of the 1990s. Most of the negotiations on the Russian Federation's maritime boundaries had been conducted by the Soviet Union. Negotiations with a number of neighboring States¹ were particularly complex and it took a long time to reach agreement. For instance, Sweden and the Soviet Union started their negotiations in 1969 and reached an agreement in 1988 and the negotiations with Norway that started in 1970 were only concluded in 2010. My impression of these negotiations was that international law did have an impact on State behavior. As I concluded at the time:

the law indicates within certain margins what acceptable claims are. States can evaluate their dispute in legal terms and are not forced to fall back completely on political bargaining. This is not to say that political bargaining does not take place, but it is set in the framework of legal rules.²

I reached these conclusions on the basis of talks with people who had been involved in the negotiations and articles in newspapers and journals and other written sources. However, I did not have access to the records of the negotiations and the internal deliberations of the parties. This left me with the curiosity of what access to these documents might have added to my analysis. Some years later, I started considering the

¹ In this book, the word state with an upper case identifies independent states. If reference is made to a state that is part of a federation, such as the states of the Federal Republic of Germany, lower case will be used.

² A. G. Oude Elferink, *The Law of Maritime Boundary Delimitation: A Case Study of the Russian Federation* (Dordrecht: Martinus Nijhoff Publishers, 1994), p. 371 (footnote omitted).

Cambridge University Press

978-1-107-04146-2 - The Delimitation of the Continental Shelf Between Denmark, Germany and the Netherlands: Arguing Law, Practicing Politics?

A. G. Oude Elferink

Excerpt

[More information](#)

possibility of a more detailed case study of one of the delimitations I had analyzed previously. My initial inquiries pointed out that getting access to all of the relevant archives would be difficult, if not impossible, and I decided to let the matter drop. Apparently, the idea lingered in the back of my mind and I revived this project when it was suggested to me that the delimitation of the continental shelf between Denmark, Germany and the Netherlands in the North Sea might be a good alternative, as these delimitations had been concluded in the early 1970s and archives would probably be open for research.³ After I had ascertained that I could get access to the archives of the ministries of foreign affairs of the three States, I decided to embark on the project that eventually was to result in this book. Apart from the fact that these archives were accessible, a number of other considerations indicate that this choice was fully justified. Germany on the one hand, and Denmark and the Netherlands on the other, had advanced diametrically opposed views on the applicable law and were not able to reach a settlement of all of their boundaries through negotiations. This led to an agreement to submit the two disputes, between Germany and the Netherlands and between Germany and Denmark, to the International Court of Justice (ICJ). The three States committed themselves to determine the remainder of their continental shelf boundaries on the basis of the judgment. The outcome of the negotiations suggests that the judgment did not have a profound impact on it. This raised the question of what might explain this limited impact.

At the start of the project, I formulated its main purpose to be the determination of the role of international law in the negotiations between Denmark, Germany and the Netherlands. Answering this question required a number of things. First of all, it would be necessary to get a complete picture of the internal deliberations of the parties and the negotiations. Apart from looking at their bilateral negotiations, I considered it relevant to determine how the three States had contributed to the development of the general regime of the continental shelf. That development mostly took place in the 1950s and in 1958 resulted in the Convention on the continental shelf. The rule on the delimitation of the shelf between neighboring States contained in article 6 of the Convention was central to the legal controversy between Germany and its two

³ At that time, Germany was still divided in the Federal Republic of Germany and the German Democratic Republic. All references to Germany in the present book concern the Federal Republic.

Cambridge University Press

978-1-107-04146-2 - The Delimitation of the Continental Shelf Between Denmark, Germany and the Netherlands: Arguing Law, Practicing Politics?

A. G. Oude Elferink

Excerpt

[More information](#)

neighbors. It thus could be expected that their position on the formulation of the rule of article 6 had been influenced by their interests in the North Sea. Second, my case study of the Russian Federation had shown various examples of how the interests of a State in a specific delimitation may affect its overall position on the law and its other pending delimitations. This required looking into the other delimitations that the three States were facing in the period up to the final settlement of their disputes in the North Sea. To be able to determine the role of the law in the negotiations it would also be necessary to analyze the applicable law. This again pointed to the importance of looking at the genesis of article 6 of the Convention on the continental shelf. In view of the significance of the judgment of the ICJ for the second stage of the negotiations, that judgment would also require careful review.

In looking at the above issues, and other legal matters that came up during the negotiations, the analysis is based on a legal positivist approach to the law: the existence and content of rules of international law can be determined in accordance with the relevant rules contained in such instruments as the Vienna Convention on the law of treaties and the judgments of the ICJ. This approach allows determination of the content of the relevant rules and to what extent they have an impact on the behavior of States. The negotiating record also shows that the parties looked at the law in the terms of rules that mandate specific outcomes. A description of the internal deliberations and negotiations from this perspective allows determination as to how the parties viewed the content of the law and how this relates to my own assessment of the content of the law, and the consequences they attached to their view on the law in determining their approach to the negotiations. However, I decided that the analysis should not stop at this point. International legal scholarship and international relations theory offers a wide range of explanatory models concerning the relationship between international law and State behavior. Chapter 11 of this book looks at a number of these models to establish what they can tell us about the case study and whether the case study allows conclusions to be drawn about the value of these different models.

1.2 Outline of the book

Chapter 2 provides some necessary background to the case study. It describes the development of the continental shelf regime in international law in the 1940s and 1950s. That regime provided the framework

Cambridge University Press

978-1-107-04146-2 - The Delimitation of the Continental Shelf Between Denmark, Germany and the Netherlands: Arguing Law, Practicing Politics?

A. G. Oude Elferink

Excerpt

[More information](#)

for the negotiations between Denmark, Germany and the Netherlands on the delimitation of the continental shelf in the North Sea. Chapter 2 also briefly describes the North Sea and in particular looks at the implications of the characteristics of the North Sea for the delimitation of the continental shelf between neighboring States. Finally, the chapter analyzes the other delimitations that Denmark, Germany and the Netherlands were facing, in order to assess if their interests in these other delimitations as regards a rule of delimitation were similar to, or different from, their interests in the North Sea.

Chapter 3 looks at the development of the rule on the delimitation of the continental shelf that is contained in article 6 of the Convention on the continental shelf. The focus of the analysis is on the contribution of Denmark, Germany and the Netherlands to the debate, but is also intended to determine the content of article 6 and its implications for the delimitations in the North Sea. In looking at the practice of Denmark, Germany and the Netherlands their broader interests in the delimitation of the continental shelf are also considered. A final section of Chapter 3 summarizes the main findings in respect of the approach of Denmark, Germany and the Netherlands in relation to the law and its linkages to the delimitation in the North Sea. A similar, final section is included at the end of the other chapters.

After the conclusion of the Convention on the continental shelf, Denmark, Germany and the Netherlands did not immediately engage in negotiations on the delimitation of the continental shelf in the North Sea. They did start considering whether to become a party to the Convention on the continental shelf and how to deal with a continental shelf claim in the North Sea. This matter is considered in Chapter 4. There is some overlap in time of this matter with the start of the negotiations on the delimitation of the continental shelf in the North Sea. This not only concerned the delimitation between Denmark, Germany and the Netherlands, but also bilateral delimitations with the other coastal States of the North Sea. In order to provide the reader with a clear picture of these different issues, they are presented in separate chapters. Chapter 5 looks at the first phase of the negotiations between the Netherlands and Germany and between Denmark and Germany. In both cases, the parties were able to reach agreement on a partial boundary and agreed to look into the options to settle the remainder of the boundary at a later stage. The second part of Chapter 5 looks at the negotiations on the delimitation of a continental shelf boundary between Denmark and the Netherlands and of both States with their other North

Cambridge University Press

978-1-107-04146-2 - The Delimitation of the Continental Shelf Between Denmark, Germany and the Netherlands: Arguing Law, Practicing Politics?

A. G. Oude Elferink

Excerpt

[More information](#)

Sea neighbors. The conclusion of these other agreements was an important aspect of the shelf policy of Denmark and the Netherlands and raises the question of their legal and political significance in relation to Germany.

During the second phase of the negotiations between Denmark, Germany and the Netherlands, which is considered in Chapter 6, there were still some attempts to arrive at a negotiated settlement, but it was predominantly concerned with agreeing on the modalities for submitting the two bilateral disputes to compulsory third party dispute settlement. Germany had a preference for arbitration, but the other two States wanted to submit their dispute with Germany to the ICJ. The latter option was eventually accepted by Germany. The continued uncertainty about the location of Germany's boundaries with its two neighbors also required consideration of an interim agreement on activities in the disputed area. The negotiation of this interim agreement illustrates the interaction between the applicable law and the impact of broader interests. The activities that were carried out in accordance with the interim agreement were to have a significant impact on the further negotiations between the parties after the ICJ had issued its judgment, even though the interim agreement was intended to safeguard the rights of the parties.

Before turning to the pleadings in the *North Sea continental shelf* cases, Chapter 7 picks up the analysis of the other delimitations of Denmark, Germany and the Netherlands. While Chapter 3 looks at developments in the 1950s, Chapter 7 deals with the 1960s. In particular in the case of the Netherlands, there was a close linkage between its delimitation with Germany and the delimitations of Suriname and the Netherlands Antilles, the other parts of the Kingdom of the Netherlands, and their neighbors.

In Chapter 8 we return to the case study. This chapter looks at the preparation by the three States of their pleadings before the ICJ and sets out the main arguments of these pleadings in order to determine how they presented the law to the Court and what other factors possibly played into that presentation. As will be seen, one of the most significant aspects of the pleadings was Germany's cautious approach to its own positive case. After the judgment, Denmark and the Netherlands would successfully exploit that German approach to limit the judgment's consequences. Chapter 8 considers whether Germany could have taken a different approach.

The judgment of the Court is analyzed in Chapter 9. The chapter first looks at how the Court dealt with the arguments of the parties. A second

Cambridge University Press

978-1-107-04146-2 - The Delimitation of the Continental Shelf Between Denmark, Germany and the Netherlands: Arguing Law, Practicing Politics?

A. G. Oude Elferink

Excerpt

[More information](#)

part of the chapter looks at the kind of guidance the judgment provided to the parties. The parties had agreed beforehand that they would negotiate the remainder of their boundaries on the basis of the judgment. The specificity of the judgment, or lack thereof, would impact on the scope for diverging views in these subsequent negotiations. As will be seen, the Court's pronouncements on the law are quite general in nature and leave much room for argument. At the same time the judgment and the views of individual judges that are appended to the judgment do allow us to establish what the Court considered the general characteristics of an outcome should be. This matter is considered in the third part of Chapter 9. As will be apparent, Chapter 9 is intended to determine the framework the judgment set for the further negotiations of the parties. The chapter is not intended to put it in the perspective of the subsequent development of the law or to criticize the Court's approach to the law. Those points are not relevant for the case study and the judgment has already been the subject of many such assessments.⁴

The negotiations between Denmark, Germany and the Netherlands that followed the judgment are considered in Chapter 10. Each State made an assessment of the judgment after it had been handed down and determined its approach to the further negotiations. After a description of these preliminaries, Chapter 10 turns to the actual negotiations, analyzing each of the negotiating rounds in turn. As this analysis points out, Denmark and the Netherlands were both intent on avoiding an

⁴ See e.g. N. M. Antunes, *Towards the Conceptualisation of Maritime Delimitation* (Leiden: Martinus Nijhoff Publishers, 2003), pp. 46–63; E. D. Brown, *Sea-bed Energy and Minerals: The International Legal Regime* (Dordrecht: Martinus Nijhoff Publishers, 1992), pp. 49–84; I. Foighel, "The North Sea Continental Shelf Case; Judgment by the International Court of Justice of 20 February 1969," 1969 (39) *Nordisk tidsskrift for international ret*, pp. 109–127; W. Friedman, "The North Sea Continental Shelf Cases – A critique," 1970 (64) *AJIL*, pp. 229–240; E. Grisel, "The Lateral Boundaries of the Continental Shelf and the Judgment of the International Court of Justice in the North Sea Continental Shelf Cases," 1970 (64) *AJIL*, pp. 562–593; E. Menzel, "Der Festlandsockel der Bundesrepublik Deutschland und das Urteil des Internationalen Gerichtshofs vom 20. Februar 1969," 1969 (14) *Jahrbuch für internationales Recht*, pp. 14–100; F. Münch, "Das Urteil des Internationalen Gerichtshofes vom 20. Februar 1969 über den deutschen Anteil am Festlandsockel in der Nordsee," 1969 (29) *ZaöRV*, pp. 455–475; A. Reynaud, *Les Différends du Plateau Continental de la Mer du Nord devant la Cour Internationale de Justice* (Paris: Librairie générale de droit et de jurisprudence 1975); H. M. Waldock, *The International Court and the Law of the Sea* (The Hague: T.M.C. Asser Institute, 1979), pp. 11–15; P. Weil, *The Law of Maritime Delimitation: Reflections* (Cambridge: Grotius Publications, 1989), *passim*.

Cambridge University Press

978-1-107-04146-2 - The Delimitation of the Continental Shelf Between Denmark, Germany and the Netherlands: Arguing Law, Practicing Politics?

A. G. Oude Elferink

Excerpt

[More information](#)

outcome that would be based on the judgment of the Court, but they at times conflicted on how to go about this.

An overall assessment of the case study is provided in Chapter 11. After setting out its most salient points, Chapter 11.3 presents a number of theoretical perspectives on the relation between international law and State behavior. The outcomes of the case study are further assessed in the light of these perspectives in Chapter 11.4.

1.3 On documentary sources

This book would not have been possible without the documents held in the archives of various ministries in Denmark, Germany and the Netherlands. This section sets out how I approached the research in respect of materials contained in archives and other sources of information.

In view of the central role of the ministries of foreign affairs of the three countries in the negotiations, this provided a logical starting point for my research in the archives in all three cases. This had somewhat varying results. In the case of Denmark, my research in the archives of the Ministry of Foreign Affairs led me to conclude that research in the archives of other ministries was unlikely to add much of particular value.⁵ I consider that this preliminary conclusion is confirmed by the present analysis. The available material from the archives of the Ministry of Foreign Affairs allowed me to address the central research question in relation to Denmark in detail. At the same time, I have little doubt that further research might have yielded additional information. However, there also was an important practical consideration to refrain from further research. At some point, additional research in further archives that may be less central to the research will involve going through large amounts of documents that sometimes will not yield any new information.

For Germany and the Netherlands, I concluded that I should not limit myself to the archives of respectively the Foreign Office and the Ministry of Foreign Affairs. In the case of Germany, this was mostly explained by two considerations. My research pointed out that in particular the Ministry for the Economy had been actively involved during various

⁵ Access to a limited number of files of the MFA was not granted. This mostly concerned files that contained personal information on individuals that were part of the Danish delegations in negotiations with Germany and the Netherlands.

Cambridge University Press

978-1-107-04146-2 - The Delimitation of the Continental Shelf Between Denmark, Germany and the Netherlands: Arguing Law, Practicing Politics?

A. G. Oude Elferink

Excerpt

[More information](#)

stages of the negotiations. Some key documents, such as a study by Professor Rudolf Bernhardt that seemed to have provided important input into Germany's approach to the pleadings before the ICJ, that were mentioned in documents in the archives of the Foreign Office could not be located in those archives. Second, there was a gap in the record in respect of the negotiations with Denmark and the Netherlands after the judgment of the Court.⁶ Research in the archives of the Ministry for the Economy in the Bundesarchiv in Koblenz allowed me to locate Professor Bernhardt's study and other relevant documents. They also provided some additional information on the negotiations after 1969, but did not make up completely for the missing folders in the archives of the Foreign Office – quite understandably, as the latter had the primary responsibility for conducting the negotiations. Fortunately, as far as the actual negotiations are concerned, this gap in the records could to a large extent be filled in by documents from the archives of the Ministries of Foreign Affairs of Denmark and the Netherlands. While I was in Koblenz, I also used the opportunity to look at the relevant archives of other Federal Ministries. In general, these archives were not essential for the case study, but did yield some interesting information.

Apart from the Federal Government, four of the German states had an interest in the delimitation of the continental shelf of the North Sea. In general, the state of Lower Saxony acted on behalf of the four states and the archives of the Foreign Office and the Ministry for the Economy allowed to determine the impact Lower Saxony and the other states had on Germany's shelf policy.⁷ I decided against research in the archives of Lower Saxony because the focus of my research did not concern the relationship between the Federation and the states or the role of the states, and the material that I already had access to allowed me to deal with these issues in sufficient detail for the purposes of the case study.

In the Netherlands, an important reason to check archives other than those of the Ministry of Foreign Affairs was that the archives of that Ministry on some points are far from complete. For instance, there is little information on the preparation of the Dutch pleadings in its case

⁶ A likely explanation seems to be that files at some point had been renumbered and a couple of them in the process were misplaced. The last volume in folder B 80/966 of the Political Archive of the FO is number 18 and runs to December 1969. It is indicated that the file is continued in number 19. The next available folder, Zwischenarchiv-193914, starts with volume 25, covering the period July 1971 and beyond.

⁷ I have chosen to refer to the Federal Ministries without including the term federal and to specifically indicate in the text if a ministry of one of the states is concerned.

Cambridge University Press

978-1-107-04146-2 - The Delimitation of the Continental Shelf Between Denmark, Germany and the Netherlands: Arguing Law, Practicing Politics?

A. G. Oude Elferink

Excerpt

[More information](#)

with Germany. The archives of the Ministry for the Economy, the only other Ministry that had an involvement during this stage, contained little additional information. This lack of information could be filled in, to some extent, from the archives of the Ministry of Foreign Affairs of Denmark. Those archives hold correspondence and other information on the cooperation between the Danish and Dutch Ministries of Foreign Affairs.

Apart from the above archives, a number of other archives were also potentially relevant for the case study. I visited the National Archives in London to consult the archives of the British Foreign and Commonwealth Office when I was there in connection with other business. This did provide some interesting information on the British participation in the drafting of the Convention on the continental shelf and contacts with Denmark, Germany and the Netherlands, but it also showed that this type of information was not critical to understanding the interactions between the latter three States. For that reason I decided to refrain from visiting the archives of the Ministries of Foreign Affairs of the other North Sea States.

Oil interests played a significant role in shaping the shelf policies of Denmark, Germany and the Netherlands and there were regular contacts between the Ministries of Foreign Affairs and specific companies. I eventually got permission to do research in the archives of Shell International in The Hague, but a keyword search in the index by the staff did not yield any hits. At that point I decided against putting further effort into this matter. Available documents already gave me a pretty good idea of the kind of contacts there existed between the companies and the Ministries and how the Ministries dealt with the companies. The archives from the companies would most likely not yield much information on the latter point, which would have been of most interest from the perspective of the case study.

Apart from archival materials a number of other sources were potentially relevant for trying to reconstruct events. When I carried out my research on the Russian Federation, newspaper reports, journal articles and interviews with Foreign Ministry staff of various countries were helpful in piecing together what had transpired. In the present case I have made less use of these other sources. For starters, in most cases they have little to add to the detailed information that is contained in archival materials. The couple of interviews I was able to organize after the many years that had passed since the negotiations and a couple of chance meetings were most interesting because they provided me with a feel

Cambridge University Press

978-1-107-04146-2 - The Delimitation of the Continental Shelf Between Denmark, Germany and the Netherlands: Arguing Law, Practicing Politics?

A. G. Oude Elferink

Excerpt

[More information](#)

for the perceptions of the participants to the negotiations, and allowed me to get a better idea of the general atmosphere during the negotiations. The interviews and talks did not lead to significant new information. In my experience, one should in any case be careful not to attribute too much weight to statements concerning the facts many decades after the events actually took place.

Articles in newspapers and journals from the 1950s and 1960s are mostly of interest because in a number of instances they had some impact on the course of events and because they provide an impression of perceptions in public opinion. Otherwise, they did not add anything substantial to the material contained in the archives. During my research I did come across one rather detailed personal account by someone who had been directly involved. That account, by ambassador Fack, the head of the Dutch delegation to the negotiations after the judgment of the ICJ, provides a good illustration that personal impressions may not always be a reliable source of information. For instance, at the end of his narrative, Fack contends that Denmark and the Netherlands were focusing on the areas of interest from an oil and gas perspective, whereas Germany instead was focusing on a geologically uninteresting area that would give it access to the center of the North Sea. According to Fack “[t]he Germans were as pleased as Punch with the result.”⁸ The delegation reports on the negotiations show that Germany actually was interested in the areas with a promising oil and gas potential and that Denmark and the Netherlands did everything to exclude Germany from those areas. Germany considered the outcome of the negotiations barely acceptable.⁹ As far as the collaboration between the Netherlands and Denmark is concerned, according to Fack everything was hunky-dory.¹⁰ One will look in vain in Fack’s account for any hint concerning Danish frustrations about the Dutch approach to the negotiations or the Dutch attempts to reach a separate deal with Germany.¹¹ Notwithstanding these observations, a personal account like this is of significant interest if it can be compared to a detailed negotiating record. Omissions and discrepancies at times may be just as insightful as concordance.

⁸ R. Fack, *Gedane zaken; Diplomatieke verkenningen* (Amsterdam: Sijthoff, 1984), p. 82. Translation by the author. The original text reads “De Duitsers waren in hun nopjes met het resultaat.”

⁹ See further Chapter 10.5. ¹⁰ See Fack, *Gedane zaken*, pp. 77–82.

¹¹ For the frictions between Denmark and the Netherlands see e.g. Chapter 10.5.2.