

The Ems-Dollart Predicament

*Dutch-German relations and the delimitation of the continental
shelf of the North Sea*

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1. Introduction

1.1 Introduction to the Ems-Dollart border dispute

The Ems-Dollart estuary geographically separates the northern most Dutch province of Groningen from the German region of East Friesland. In 2011, Germany started building an offshore wind farm in the Ems-Dollart region. This immediately led to protests from the Dutch side. Although Germany claims to own all of the territory, the envisioned location of the wind farm encompassed territory partially claimed by the Netherlands as well.¹ The border dispute as well as the claims have a long history. The German claim on the area stretches all the way back to 1464, specifically to a deed of enfeoffment stating that the Ems water was *de jure* part of East Friesland. This document has been forged by count Edzard I of East Friesland however, and was confirmed to have been postdated to 1454. According to the Netherlands this meant that there had been a forging of documents, nullifying any legally binding aspects the document had. Germany has stated that the deed should not be declared obsolete, for they hold on to the claim that the 1464 document is a valid legal document.² In practice it should be noted however that both regions that claimed the Ems-Dollart area, were *de jure* a part of the Holy Roman Empire, meaning that any claims at the time were not regarded state boundaries to begin with.³ This demonstrates that some of the arguments in this legal part of the debate tend to have an anachronistic character.

The earlier mentioned example of the wind park shows that the legal debate about the demarcation of the Ems is still in full swing nowadays. Both countries have not always been keen on solving the dispute however. Throughout the history of the Ems-Dollart region, the unresolved border dispute has had its advantages for both parties as well. In the early twentieth century Germany quickly became stronger and more ambitious, and started

1 Jonathan Witterman, "Grensconflict: Nederland in verweer tegen Duitse windmolens", *De Volkskrant*, July 13, 2012, accessed January 7, 2016, <http://www.volkskrant.nl/vk/nl/2664/Nieuws/article/detail/3286033/2012/07/13/Grensconflict-Nederland-in-verweer-tegen-Duitse-windmolens.dhtml>.

2 Walter Deeters, 'Geschichte der Grenze zwischen Drenthe und dem Emsland und Groningen und Ostfriesland', in *Rondom Eems en Dollard: Historische verkenningen in het grensgebied van Noordoost-Nederland en Noordwest-Duitsland* (Groningen/Leer, 1992) 63, 69.

3 Ibidem 63.

building a navy to push German interests on a global scale.⁴ When the Great War was pending, this led to a conflict of interests on the Dutch side. On the one hand The Hague wanted to get rid of the burden of defending the Ems-Dollart estuary in order to remain neutral, but on the other hand they did not want to give it up too easily either, for economic reasons as well as the argument that Britain would start questioning Dutch neutrality if they gave away the strategically important estuary.⁵ When the First World War broke out, the Dutch military was instructed not to defend the estuary, and negotiations that were previously being held were effectively suspended.⁶ Dutch neutrality was to be respected, and Delfzijl would be able to remain a neutral harbour. After the First World War, negotiations were taken up again, but in 1922 it became clear that both parties were too far apart, and they effectively returned to their previous policy of *quieta non movere*: do not rock the boat unless it is absolutely necessary to do so.⁷ This did not mean that the Dutch and German governments did not attempt to solve the issue. Indeed after World War II the conflict could have been resolved on a number of occasions. For example, the Ems-Dollart dispute was mentioned but again only partially resolved along practical lines when in 1960 the Netherlands and Germany signed a treaty to settle the final disputes that remained after the Second World War, for both countries held unto their own respective legal standpoints.⁸

The reason both countries were reluctant to give up their claim on the area must be looked for in the broader context of maritime law. It must be noted that after 1945, the field of maritime law went through a period of radical transformation. In 1945, United States President Harry Truman made a statement known as the 'Truman Proclamation', which boiled down to countries claiming parts of the seabed that had been neutral territory before, primarily because of the natural resources that were located there.⁹ Because the entire North Sea was considered to be on the so-called continental shelf

4 Robert Massie, *Dreadnought: Britain, Germany, and the Coming of the Great War* (1992) 184.

5 André Beening, 'A Riddle of the sands. The German Dutch border dispute over the boundary in the Ems-Dollart estuary, 1909-1914', in Johan Joor and Ries Roowaan (eds.), *Tussen beeld en werkelijkheid: verzamelde optellen van André Beening* (Amsterdam, 2014) 44.

6 Ibidem.

7 Ibidem.

8 Daniel-Erasmus Khan, *Die Deutschen Staatsgrenzen: Rechtshistorische Grundlagen und offene Rechtsfragen* (2004) 418.

9 Bjarni Már Magnússon, *The continental shelf beyond 200 nautical miles: delineation, delimitation and dispute settlement* (2015) 9-10.

that was to become the new standard for the delimitation of exclusive territorial waters, the whole area had to be delimited between the coastal states adjacent to it.¹⁰

Lengthy negotiations were being held over this subject between Denmark, the Federal Republic of Germany, and the Netherlands, because large quantities of oil and gas were present under the seabed, and there were indications that natural gas was also present under the Dollart and the Ems.¹¹ The Germans drew the short straw with regard to the continental shelf, as they only acquired a small portion of the North Sea compared to the contending countries, Denmark and The Netherlands. The dispute on the boundary in the Ems estuary also had an impact on the delimitation of the territorial sea, which in turn had legal implications for the delimitation of the continental shelf as well.¹² It is important to note that in the Ems-Dollart dispute, during and after the case for the delimitation of the North Sea, another important economic element - the presence of mineral resources in the area - gets added into the mix of conflicting interests. Even though the Netherlands and Germany eventually reached a legal agreement on the delimitation of the North Sea, they did not reach such an agreement on the delimitation of the Ems in this period.

This thesis will explore the Ems-Dollart dispute between the Netherlands and Germany, and focus primarily on this dispute after 1945. The main question for the thesis will be: 'Why did the Dutch government refrain from resolving the Ems-Dollart border dispute with Germany after 1945?' To answer this question, maritime law, Dutch-German relations and the political and economic interests of both countries will all be taken into account. The thesis will be divided into a number of chapters along these lines, that will each answer a subquestion. The third chapter will give an historical overview of the border dispute up to 1945. The fourth chapter will shed light upon the dispute directly after 1945, by first looking at the context of post-war Dutch-German relations, and then looking into how both parties looked upon the issue and tried to secure their interests in this period. The fifth chapter will go into detail about the changes in the field of maritime law after Truman made

10 Alex Oude Elferink, *The delimitation of the Continental Shelf between Denmark, Germany and the Netherlands: arguing law, practicing politics?* (Cambridge, 2013) 20.

11 Beening, 'A Riddle of the sands', *Tussen beeld en werkelijkheid* 46.

12 Oude Elferink, *The delimitation of the continental shelf* 26.

his proclamation, and more specifically about the delimitation of the North Sea continental shelf. This has been relevant for the dispute and Dutch-German relations as well, as the delimitation of the Ems-Dollart – or rather a lack thereof – played a major role in claims on the continental shelf of the North Sea. The sixth chapter will then examine the predicament after the Ems-Dollart treaty had been signed and the maritime delimitation of the continental shelf had been resolved. These solutions appeared to be only temporary in nature because the core of the conflict, the demarcation line itself, had still not been resolved. The central question for this chapter will be to examine how and why both sides resolved the issues at hand without solving the actual question at hand, and what this means for the present day state of the conflict.

1.2 Theoretical concepts

There are a number of theoretical concepts of importance that will be used throughout the thesis and require some explanation. The first important concept is that of international law. Within the field of international law, there is a difference between 'customary international law' and 'consent-based international law'. Customary international law can be defined as a customary practice that states follow and comply with, without there being a centralised lawmaker or an executive enforcer, much like the idea of natural laws.¹³ Consent-based international laws get their authority through legally binding treaties that are signed between states.¹⁴ Neutrality is a concept within the framework of international law that is used in this thesis to describe the political stance the Dutch were striving for during the First and Second World War. Neutrality must be understood as a form of consent-based international law: a number of international treaties were signed, for example during the Hague Conventions of 1907, that guaranteed territorial integrity of neutral states as long as they remained impartial.¹⁵ Countries at war can still decide to violate the territorial integrity of a neutral country however. During the First World War, the Dutch were able to remain neutral because it was not in the German interest to violate Dutch neutrality. In the Second World War the

13 Jack Goldsmith and Eric Posner, 'A theory of customary international law', *John M. Olin law & economics working paper no. 63-2* (1998) 1.

14 Basak Çali, *The authority of international law: obedience, respect, and rebuttal* (Oxford, 2015) 24-25.

15 'Neutrality', *Encyclopædia Britannica Online*, accessed January 7, 2016, <http://www.britannica.com/topic/neutrality>.

Dutch declared neutrality as well, but were invaded by Germany nonetheless. An even more relevant concept within international law that applies to this thesis, is the concept of a border dispute. As well as neutrality, border disputes are usually a matter of customary international law. When a territorial dispute arises, both countries will seek to legally justify their claim through a number of categories, amongst which are geography, treaties, culture, effective control and history.¹⁶ When a dispute arises, states can decide to bring it to the International Court of Justice. This is not obligatory, but if they do bring the case in front of the ICJ, the final verdict is legally binding for all the parties involved.¹⁷ It is important to note that states are still the main agents when they have a dispute, and can always choose a bilateral solution, which would come down to them negotiating over the matter and coming to a solution amongst themselves.

Maritime law should be seen as a distinctive branch of international law. There is a difference between 'admiralty law' and the 'Law of the Sea'. Admiralty law is the umbrella term for private shipping laws, whereas Law of the Sea refers to international public maritime law: the former deals with individuals and companies, whereas the latter is the term used for the laws that govern the interaction between states in the maritime area.¹⁸ In this thesis, I will only use the concept of the Law of the Sea, and use the term 'maritime law' interchangeably with it. A vital concept within maritime law, the first legal definition of 'territorial water' that was being used in the seventeenth and eighteenth century was the so-called 'three mile limit'. Cornelius Bynkershoek formulated this standard by stating that the jurisdiction of a state on the sea reached as far as its weapons could from land, and cannons were able to shoot three miles.¹⁹ Only after 1945, when president Truman made his proclamation, the idea of seeing the continental shelf as an extension of the territory of a state called for a legally binding set of rules that was to replace the three mile principle. The United Nations Convention on the Law of the Sea further elaborated on the proclamation of Truman that the continental shelf was a natural continuation of the territory

16 Brian Sumner, 'Territorial disputes at the international court of justice', *Duke law journal* 53-6 (2004) 1779.

17 The International Court of Justice, *Handbook 6th edition* (2013), accessed January 7, 2016, http://www.icj-cij.org/publications/en/manuel_en.pdf 76-77.

18 'Maritime law', *Encyclopædia Britannica Online*, accessed January 7, 2016, <http://www.britannica.com/topic/maritime-law>.

19 'The three mile limit as a rule of international law', *Columbia law review* 23-5 (1923) 472-473.

of a state into the sea, which could be claimed to up to 200 nautical miles.²⁰

The final concept in maritime law that requires some explanation is that of the Thalweg Principle: in international law, the middle of the main navigable shipping lane is normally seen as the boundary between two countries when a river lies between them.²¹ The first time the thalweg was proposed was at the Congress of Rastatt in 1797. Before this, Hugo Grotius had already written about determining the boundary by using the geographic middle of the river, which meant that a median line would be drawn at the point that is in the middle of the opposing shores.²² The idea of taking the middle of the navigable shipping lane as the boundary between two states is of a functional nature, for it guarantees the freedom of navigation for both states, which makes the doctrine of the thalweg a method to strive for equality and justice.²³ In the case of the Ems-Dollart dispute, the Dutch have invoked this general principle of international law to contest the German claim on the complete river.

20 Oude Elferink, *The delimitation of the continental shelf* 286.

21 Boleslaw Boczek, *International law: a dictionary* (2005) 208.

22 Victor Prescott and Gillian Triggs, *International frontiers and boundaries: Law, politics and geography* (Leiden/Boston, 2008) 216.

23 A. Cukwarah, *The Settlement of boundary disputes in international law* (Manchester, 1967) 52, 54.

2. Historiography

2.1 General border disputes

Within the field of international relations, the situation in the Ems-Dollart area is seen as a territorial boundary dispute between two states, in this case Germany and the Netherlands. Therefore it would be worth it to clarify the discussion surrounding theories of general border disputes. It is significant to understand that within the field of international relations, there are different theories as to why disputes arise and what the best method for solving them would be. As border disputes are quite common in interstate relations, many case studies have been conducted to determine what variables are the most important for a dispute to arise. John Vasquez demonstrated that capabilities and alliances are the primary points of departure for most research into these disputes, a perspective which has arisen from the realist point of view. In recent years however, the debate on this topic has included many more factors that should also be taken into account.²⁴ Brian Sumner already speaks of nine categories that should be taken into account when analysing how states define their claim in a border dispute: treaties, geography, economy, culture, effective control, history, old administrative boundaries changing when a state gains full independence, elitism and ideology.²⁵ Of these, treaties, geography, economy, effective control and history are the most important for the Ems-Dollart debate. Regarding geography, Paul Diehl diverges from the more classical realist approach to border disputes, by not focusing on territory as a facilitating resource for conflict, but instead as a source for conflict.²⁶ Paul Hensel mentions that, amongst other things, territory may be seen as being important to a state because of what it contains, for example strategic minerals or oil.²⁷ When looking at the Dutch-German conflict over the boundary of the Ems after it becomes clear that there might be valuable resources underneath it, indeed both parties hold on to their claims more firmly. For the historiography about the particular case of the Ems-Dollart

²⁴ Paul Hensel, 'Territory: Geography, contentious issues, and world politics', in John Vasquez (ed.), *What do we know about war* 2nd edition (2012) 3.

²⁵ Sumner, 'Territorial disputes', *Duke law journal* 1779.

²⁶ Paul Hensel, 'Charting a course to conflict: territorial issue and interstate conflict, 1816-1992), in Paul Diehl (ed.), *A road map to war: territorial dimensions of international conflict* (1999) 116.

²⁷ Ibidem 117.

dispute, Avery Kolers also does an interesting contribution by stating that mere boundary disputes occur simply because two conflicting parties want to use the same land usually for the same reason: because they do not have a shared conception of land, territorial issues arise.²⁸ This does indeed fit into the narrative of scholars challenging the idea that only realist variables, such as the earlier mentioned interplay of states pursuing their interest through sheer power or alliances, can explain interstate interaction over territorial disputes. Stephen Mumme and Carl Grundy-Warr also question the state-centric dominated realist approach, and instead focus on the Structuration Theory as pioneered by sociologist Anthony Giddens: “ST conceives power and influence more fluidly, placing greater emphasis on both the context and the subjective aspects of decision making.”²⁹ This broader way of looking at a territorial dispute by taking more factors into account, should also be applied on the case of the Ems-Dollart dispute.

The case itself is a dispute between a smaller state and a larger state, in which the smaller state has been able to hold on to its claims for a long period of time without losing the conflicted area. Theories of relations between smaller and larger states are therefore also worth looking at. According to André Beening, the Dutch policy in the dispute in the first half of the twentieth century was a short-term policy, which inevitably led to stalling, evading and surrendering whenever Germany started to exert pressure as a large state on its much smaller neighbour.³⁰ According to Annette Baker Fox, the way small states dealt with larger states in a dispute – in World War II in the case of her book – was to ride out the storm within the conflict while trying not to give in to the demands of the larger state, which would eventually lead to the larger state getting distracted by challenges from other large states that would be more urgent to deal with.³¹ This can be applied to the Dutch stance of neutrality in the First World War, but after World War II the Dutch had to adopt different tactics, because the nature of the international relations with Germany had changed substantially as well. Jeanne Hey states that smaller states have become more important after World War II because of the

28 Avery Kolers, *Land, conflict, and justice: a political theory of territory* (Cambridge, 2009) 14.

29 Carl Grundy-Warr and Stephen Mumme, 'Structuration Theory and the analysis of international territorial disputes: lessons from an application to the El Chamizal Controversy', *Political research quarterly* 51-4 (1998) 969-970. (969-985)

30 Beening, 'A Riddle of the sands', *Tussen beeld en werkelijkheid* 46.

31 Annette Baker Fox, *The power of small states: diplomacy in World War II* (Chicago, 1959) 183.

economic, political and security benefits that transnational organisations such as the EU and the NATO give them.³² She also notes that current literature on small states contains a number of problems within it. First of all there is a large variety of different conclusions and theories, which leads to conclusions that are not mutually comparable. Her second point of critique is that small state literature is outdated, because its primary focus is still on state security.³³ This is indeed a valid point, seeing that Dutch-German relations after World War II are not to be defined primarily along the lines of state security anymore, but as the introduction of this thesis has shown already, it should include economic and sociopolitical factors as well.

In line with theory about relations between smaller and larger states, it would also be worth looking into the liberal interdependence theory. Kenneth Waltz argues that interdependence becomes a fact when a relationship would be costly to break.³⁴ Robert Keohane and Joseph Nye refer to interdependence in world politics as “situations characterized by reciprocal effects among countries or among actors in different countries. (...) Where there are reciprocal (...) costly effects of transactions, there is interdependence.”³⁵ There has long been a debate between international relations scholars about the relationship between economic interdependence and political conflict. On the one hand there are followers of liberal theories – such as Keohane and Nye – who would claim that interdependence makes conflict less likely between two interdependent states. The realist school would however claim that interdependence leads to one of the parties becoming more dependent than the other, ultimately leading to an asymmetric relationship, which could in turn lead to conflict.³⁶

An interesting addition to the literature on general disputes in relation to the Dutch-German dispute on the Ems, is the case that arose between Belgium and the Netherlands right after World War I had ended. Chris van der Klaauw describes how after World War I, Belgium felt that it had to be compensated. In 1839, when Belgium became a kingdom and gained its

32 Jeanne Hey, 'Introducing small state foreign policy', in Jean Hey, *Small states in world politics: explaining foreign policy behavior* (2003) 1-2.

33 Ibidem 6-9.

34 Richard Rosecrance and Arthur Stein, 'Interdependence: myth or reality?', *World Politics* 26-1 (1973) 2.

35 Robert Keohane and Joseph Nye, *Power and interdependence*, 4th edition (2011) 7-8.

36 Martijn Lak, *Tot elkaar veroordeeld: de Nederlands-Duitse economische betrekkingen tussen 1945-1957* (Hilversum, 2015) 10, 12.

independence from the Netherlands, the Netherlands had deliberately been made a stronger country and the Belgians weaker so that it could remain neutral. According to Belgium, the fact that they were attacked by Germany and that the Netherlands could remain neutral proved that the London Treaty of 1839 was unfair to begin with, for the Netherlands were supposed to fulfill the military duty they had obtained in 1839 at the cost of Belgium.³⁷ In practice, this meant that Brussels wanted to revisit the treaties of 1839. The Belgian neutrality was officially established in a treaty, but according to Edwin Hoyt, after WW I Belgium decided to terminate its neutral status because of its experiences during the war.³⁸ Van der Klaauw proceeds to describe how the Belgians made a claim on Dutch territory, namely the river Schelde, which they felt they had a right to. At this point this dispute gets particularly interesting for this thesis. The English minister Balfour asked how Brussels envisioned the Dutch giving up their territory without being compensated, for which the Belgian representative Paul Hymans had the following solution, as was written down in the *Peace Conference, part III*: "The possible rectification in favour of Holland of the German-Dutch frontier on the lower Ems, as a compensation to Holland for meeting Belgian claims in regard to sovereignty over the mouth of the Scheldt and the southern part of Dutch Limburg."³⁹ Belgium did not have a claim on the territory of a neutral state, but the possibility of the Dutch being inclined to give the territory to Belgium if disputed German territory could be handed over made it a viable option to get both parties what they wanted.⁴⁰ The Hague did not want to consider transferring territory to Belgium however, even when taking into consideration the possibility of annexing German territory themselves.⁴¹ It is worth noting that this case shows that in an entirely different dispute within the international arena, that was within the framework of the First World War the Netherlands did not even participate in, the Ems-Dollart dispute was still brought up as part of a Belgian attempt at bargaining to obtain Dutch territory. This shows that a more inclusive approach to the Ems-Dollart dispute is indeed required to fully explain the context and background of the

37 Christoph van der Klaauw, *Politieke betrekkingen tussen Nederland en België 1919-1939* (Leiden, 1953) 10.

38 Edwin Hoyt, *The unanimity rule in the revision of treaties: a re-examination* (The Hague, 1959) 97.

39 Van der Klaauw, *Politieke betrekkingen tussen Nederland en België* 12.

40 Ibidem.

41 Ibidem 31.

dispute.

In conclusion it can be said that the debate in international relations theory, as far as it is of interest to the Ems-Dollart border dispute, has been defined clearly and extensively. The structuration theory when applied to territorial disputes is especially of interest for this thesis, for it seeks to incorporate more factors into the context of a dispute than the traditional realist theory regarding border disputes would. The ways in which geography and the location of natural resources can play a major role in this case, as Hensel and Diehl have shown, must also be taken into account. Regarding the theory of small states interacting with larger states, it is a lot harder to use general theories due to the fact that these have changed significantly after World War II. It will be interesting to see how the particular case of the Ems-Dollart dispute fits into current theories on small states' foreign policy towards larger states in disputes after World War II, especially because the Dutch-German dispute has lasted for a long time. The foreign policy the Netherlands have applied as a small state to hold on to their legal claims will be an important part of this thesis, and might lead to a different set of perspectives in the field of small state foreign policy.

2.2 Maritime law and maritime border disputes

The next historiographical debate that is of interest to the Ems-Dollart dispute is within the field of maritime law. In this case, the debate should not be centered as much on the laws themselves, but rather on the legal implications that they have on the way states conduct in international maritime affairs. The first important conference on maritime law after World War II was the Convention of the Continental Shelf. This convention was called upon to come to a legal definition within international law of what territory and to what extent a state could legally claim a certain boundary on the continental shelf. René Dupuy-Vignes writes that the 1958 convention was not a big success however, for states still made large and controversial claims, and because of the decolonisation it was considered by some to be obsolete.⁴² Besides that, Dupuy-Vignes also says that there were those who thought that in terms of technology it would not be possible to mine mineral resources at a depth of more than 200 meters - which was the maximum depth that the Convention

42 René Dupuy-Vignes, *A handbook on the new law of the sea* 1 (1991) 329.

proposed – but those who made that claim were quickly proven wrong due to rapid technological advancement in this area.⁴³ It was only during the United Nations Convention on the Law of the Sea (UNCLOS), a series of three conventions spread out between 1973 and 1982, that a legal agreement was reached to determine the extent to which a country could claim the seabed of the extended continental shelf. Within the agreements on the law of the sea, Part VI, Article 76, 'Definition of the continental shelf', the continental shelf was defined as follows:

“The continental shelf of a coastal State comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.”⁴⁴

Tullio Scovazzi shows that this concept could lead to trouble between states however, for in a number of specific cases there would be more than one country able to make a legal territorial claim on the seabed. For this thesis, the fact that there was no provision in UNCLOS to deal with mouths of rivers shared by two states is of great importance.⁴⁵ Oude Elferink mentions the developments in mining technology as well, and writes that because of this, Germany, the Netherlands and Denmark were involved in a number of cases to determine the jurisdiction of these coastal states on the North Sea continental shelf.⁴⁶ The three countries made this a legal case with the ICJ to determine their share of the North Sea continental shelf.⁴⁷ Interestingly enough both Germany and the Netherlands did not bring their own border dispute in the Ems to the international court, but instead decided to hold on to their claim. The literature so far does not explore extensively why the Netherlands and Germany did not want to do this, which is a relevant gap in the historiography.

43 René Dupuy-Vignes, *A handbook on the new law of the sea* 329.

44 Commission on the limits of the continental shelf, Part VI, Continental Shelf, Article 76, “Definition of the continental shelf”, accessed on 7 January, 2016, <http://www.un.org/Depts/los/index.htm>.

45 Tullio Scovazzi, 'Problems relating to the drawing of baselines to close shared maritime waters', in Clive Symmons (ed.), *Selected contemporary issues in the law of the sea* (Leiden/Boston, 2011) 15-17.

46 Oude Elferink, *The delimitation of the Continental Shelf* 15.

47 Ibidem.

A final area to mention under maritime law and border disputes is the actual exploitation of the continental shelf itself. The concept of a transboundary deposit of natural resources located in the seabed comes into play here. When there is a transboundary deposit, arrangements are usually made between parties in the form of a cooperative agreement, to ensure that one side does not illegally exploit resources that come from the side of the deposit of their neighbour.⁴⁸ Such is the case for the Ems-Dollart region as well, for both the Netherlands and Germany extract the natural gas found below the estuary. Masahiro Miyoshi talks about joint development agreements that have arisen in the absence of undisputed boundaries. Zou Keyuan recognises three types of joint development schemes:

- 1) Those that are devised with a delimited maritime boundary
- 2) Those that unitise the deposits that are found straddling a boundary line
- 3) Those that are worked out while the issue of boundary delimitation remains unresolved.⁴⁹

It is the third type that fits the Dutch-German case. Miyoshi formulated a number of theories after he looked at a number of cases where there was a joint agreement on the exploitation of mineral resources without a border agreement. His most important observation is that countries need to be willing to set aside issues of delimitation in exchange for economic profit.⁵⁰ William Onorato goes more in depth on the legal aspects that have arisen surrounding joint development on shared deposits of mineral resources. He observes and concludes that certain principles and rules of international law apply in this particular area:

- 1) A state may not unilaterally exploit a shared deposit when another such state has a reasonable objection
- 2) Therefore an agreement must be reached between states before exploitation can begin
- 3) States interested in a common deposit are obliged to enter into negotiations with the goal to reach an agreement on the distribution of

48 Ellen Hey, *The regime for the exploitation of transboundary marine fisheries resources: the United Nations Law of the Sea Convention; cooperation between states* (Dordrecht, 1989) 30.

49 Zou Keyuan, 'A new model of joint development for the South China Sea', in Myron Nordquist, John Moore and Kuen-chen Fu (eds.), *Recent developments in the law of the sea* (Leiden/Boston, 2006) 158-159.

50 Masahiro Miyoshi, 'The joint development of offshore oil and gas in relation to maritime boundary delimitation', *Maritime Briefing* 2-5 (1999) 1-2, 39-40.

the content of the deposit

4) It is recognised that there is not a clearly developed legal framework in international law in which negotiations on the division of shared deposits of natural resources takes place, but there are rules and institutions of international and private law that can be relevant directly or indirectly to the negotiations.⁵¹

Onorato also mentions however that practical considerations rather than legal mandates were actually the primary reason joint development schemes were set up in the North Sea, which coincides with the argument of Miyoshi that indeed countries need to be willing to set aside legal issues in exchange for economic profit.⁵² In 1960 and 1962, the Dutch and German governments signed two treaties that ensured that both Germany and the Netherlands - at least temporarily - set aside issues of delimitation. Joep Schenk describes how rules and agreements were set out between the Dutch 'Nederlandse Aardolie Maatschappij' (Dutch Oil Company, NAM) and its German counterpart Brigitta.⁵³ It must be noted that Nil Disco and Alex van Heezik state in their book, 'Different strokes for different folks', that "As it turned out, no fossil fuels were found in the estuary."⁵⁴ This is however an error, for the NAM and Brigitta have had to reach an agreement on the shared deposit of natural gas that encompasses the disputed area of the Ems-Dollart as well. Although the exploitation of the continental shelf and the exploitation of transboundary deposits of mineral resources has been discussed in small amounts by scholars, there is still room for new insights when literature currently available on the exploitation of the continental shelf is applied on the Dutch-German case.

To complete the historiography on maritime border disputes, it is also worth taking a look at another long lasting border dispute. From 1833 onwards the United Kingdom has continually claimed the Falkland Islands, whilst Argentina and its legal predecessors lay claim to this area as well.⁵⁵

51 William Onorato, 'Joint development of seabed hydrocarbon resources: an overview of precedents in the North Sea', *Energy* 6-11 (1981) 1311-1312.

52 Ibidem 1312.

53 Joep Schenk, *Groningen-gasveld vijftig jaar: kloppend hart van de Nederlandse gasvoorziening* (Amsterdam, 2009) 191-192.

54 Nil Disco en Alex van Heezik, *Different strokes for different folks: 50 years of agreements and disagreements in the Rhine, Meuse, Scheldt and Ems river basins* (2014) 219-220.

55 Lawrence Freedman, *The official history of the Falklands Campaign, vol. 1: the origins of the Falklands War* (2005) 2.

This means that both this conflict and the claim in the Ems-Dollart area go back a long time. In the case of the Falklands, Argentina eventually pressed its territorial claim in 1982, which led to a war between the United Kingdom and Argentina. The case had never been taken up by the International Court of Justice, which the United Kingdom tried to do in 1955, but after that both Argentina and Britain felt that the court would not bring a favourable solution.⁵⁶ Again a parallel can be drawn between the Dutch-German case: although diplomatic relations between the two countries were a lot better, both the UK and Argentina and Germany and the Netherlands did not want to bring their respective cases in front of the ICJ. Therefore when the Falklands War broke out, the United Nations called for a bilateral solution between the two countries instead. What makes this case interesting for the Ems-Dollart dispute, is that in both the UK-Argentina case as well as the Ems-Dollart case, there was a potential for valuable resources to be found underneath the seabed: already in 1976 this led to trouble between Argentina and the UK because of the newly established 200 miles delimitation area that had just been established by UNCLOS.⁵⁷ On a few occasions, the parties tried to reach a bilateral agreement on the extraction of these resources, but Argentina did not agree to this in the end. The theory set forward by Masahiro that countries must be willing to set aside legal issues for economic gain almost took effect in the 1970s: the attractive riches of the continental shelf appeared to be the key to the dispute during this time, but eventually both parties agreed that “economic issues were interesting and of some importance but quite secondary to sovereignty.”⁵⁸ After 2010, Britain started to exploit the seabed for themselves, which has led to increasing tensions between the two countries again.⁵⁹ Furthermore, this could be seen as an infringement of the principles Onorato formulated. Relating this to the case of the Ems-Dollart dispute, it is important to note that 1) political gain can be a primary motivator in negotiations 2) as put forward by Avery Kolers in the first paragraph already, mineral resources located in the disputed area are of major importance 3) diplomatic relations between countries play a major role

⁵⁶ Freedman, *The official history of the Falklands Campaign* 14.

⁵⁷ Ibidem 54.

⁵⁸ Ibidem 22-23.

⁵⁹ Rory Carroll, “Argentina appeals to UN over Falklands oil drilling”, *The Guardian*, 25 February, 2010, accessed January 22, 2016, <http://www.theguardian.com/uk/2010/feb/25/argentina-united-nations-falklands>.

when trying to get to an agreement.

2.3 Dutch-German relations after World War II

Before World War II, the relationship between the Netherlands and Germany could be described in positive terms: the Netherlands were able to remain neutral during the First World War, so they did not have a reason to see Germany as the enemy during this war. Economic relations between the two states were also of great importance. In the period between 1880 and 1913 for example, in 1880 40% of transshipment in Rotterdam had Germany as its destination, in 1900 this amount grew to 68%, and in 1913 it was almost 80%.⁶⁰ The Second World War should be seen as a major breaking point in Dutch-German relations. After the War had ended, Dutch-German relations were positively dominated by economic factors. Martijn Lak states that politicians and the private sector knew very well that the economic relations between Germany and the Netherlands would be vital to the recovery of the Dutch economy, but he described it as political suicide to say this out loud in 1945.⁶¹ It is rightfully stated that on a sociopolitical level, there still was a major sense of mistrust. It is therefore interesting to see that Martijn Lak divides available literature on Dutch-German relations into four categories: the first looks at how Germany saw the Netherlands, the second at the diplomatic relations between Germany and the Netherlands, the third looks at what kind of image the Dutch attached to the Germans, and the fourth and least researched category would be the Dutch-German economic relations.⁶²

Horst Lademacher would be the most important scholar to have written about Dutch-German relations from a German perspective. About post-war relations, Lademacher also emphasises that they would be dominated by emotions from the Dutch side. Besides that, he also points out that the Dutch government realised that the politics of neutrality the Netherlands had traditionally followed, should come to an end now.⁶³ Instead, the Dutch were to focus on the quick recovery of their economy, which meant that they had to be in favour of a quick German recovery as well. Regarding diplomatic

60 Hein Klemann, *Waarom bestaat Nederland eigenlijk nog? Nederland-Duitsland: economische integratie en politieke consequenties 1860-2000*, Oration 21 march 2006, Erasmus University Rotterdam 22.

61 Lak, *Tot elkaar veroordeeld* 26-27.

62 Ibidem 19.

63 Horst Lademacher, *Zwei ungleiche Nachbarn: Wege und Wandlungen der deutsch-niederländischen Beziehungen im 19. und 20. Jahrhundert* (Darmstadt, 1990) 194.

relations and the image the Dutch attached to the Germans, Friso Wielenga describes this by stating that, although the Netherlands knew that they would benefit economically from a strengthened Germany, they also felt the need to secure themselves against the Germany that had been 'the enemy' during the war.⁶⁴ This led to the conclusion by Wielenga that between 1949 and 1955, the political relations with Germany were exclusively along the lines of economic interests.⁶⁵ World War II shapes the context in which we should place this mistrust the Dutch felt towards the Germans in the period right after the war. Although this feeling of mistrust was not always noticeable on the surface, it most certainly was deeply embedded in the Netherlands: Jacco Pekelder shows that during the 1990s, anti-German sentiments were very widespread, and after the fall of the Berlin Wall it was the Dutch prime minister Ruud Lubbers who was openly stating his qualm of a reunified Germany.⁶⁶ Friso Wielenga speaks of a 'political-psychological relation' in the context of Dutch-German relations, for although the economic relations with Germany were completely normalised again, tensions on a political level still arose throughout the years after the war.⁶⁷ This context of the Netherlands still being wary when engaging in international relations with Germany is of importance for the context of the Dutch-German border dispute as well. Because the political normalisation of Dutch-German relations was a slow and difficult process, it was only in 1960 that the Netherlands wanted to seek formal political rapprochement in the shape of three treaties that were ratified in April 1960, and formally normalised relations twenty years after the Germans invaded the Netherlands during the war.⁶⁸ One of the treaties signed was the Ems-Dollart treaty, so it is important to note that the Dutch were negotiating a border treaty while the earlier described political-psychological relation was still playing an important role. This treaty eventually led to mere practical arrangements however, and did not touch on the actual demarcation line nor did it guarantee any territorial claims.⁶⁹

About the economic relations between the Netherlands and Germany,

64 Friso Wielenga, *West-Duitsland: partner uit noodzaak: Nederland en de Bonds-republiek 1949-1955* (Amsterdam, 1989) 4.

65 Ibidem 28.

66 Jacco Pekelder, *Nieuw Nabuurschap: Nederland en Duitsland na de val van de muur* (Amsterdam, 2014) 19-20.

67 Friso Wielenga, *Van vijand tot bondgenoot: Nederland en Duitsland na 1945* (Amsterdam, 1999) 346.

68 Disco and Heezik, *Different strokes for different folks* 217.

69 Ibidem 218-219.

Martijn Lak reached a number of interesting conclusions about the period between 1945 and 1947. First of all, he agrees that the Dutch-German relations after the War were primarily driven by economic interests, whilst complications in the sociopolitical sphere still remained unresolved: the title *Because we need them* is self-explanatory in that sense. The Netherlands tried to secure the pre-war investments of Dutch companies, such as Shell, Uni-Lever, AKU and Philips.⁷⁰ The allied politics on capital did not work out very well for the Netherlands, because capital movements were heavily restricted in Germany, which also meant that the Dutch economy was lagging behind in its recovery. Another interesting conclusion related to this is that eventually the German market had been of greater importance for the economic recovery of the Netherlands than the Marshall plan had been.⁷¹ For this thesis, it is important to note that even though on a sociopolitical level a by fits and starts complicated relationship emerged between the two countries, this did not hinder the economic relations from thriving. The Dutch were very pragmatic in that sense, a standpoint that must be taken into consideration when looking at the way they dealt with the economic aspects of the Ems-Dollart dispute.

⁷⁰ Lak, *Tot elkaar veroordeeld* 102.

⁷¹ Ibidem 175-177.

3. A history of the Ems-Dollart region up to 1945

3.1 Introduction

As was mentioned before, the idea of a dispute as it was outlined in the introduction can be traced back all the way to 1464. The main goal of this chapter is to show how the dispute evolved over time. In a broader sense this chapter also serves as an outline of the historical context in which the dispute should be placed. Under what different and constantly evolving circumstances has the dispute been kept in place, how did the nature of the disagreement change, and why have earlier attempts to solve it been fruitless throughout its long and winding history? Because the dispute encompasses such a long period of time – it is easy to forget that tracing it back to 1464 means that it has been in place for more than 500 years – the legal authorities on both sides of the estuary have changed quite a few times overtime. Therefore it is beneficial to start with a short and general overview of what different legal authorities Groningen and East Friesland have been a part of, and who the sides conducting in international relations effectively were throughout this period.

During the 17th, 18th and 19th century there have been attempts to solve the issue on a number of occasions, none of them leading to a satisfying outcome for both parties on the long run. The first half of the twentieth century then saw the First World War, during which the Dutch tried to pursue politics of neutrality to stay clear of any conflicts. The first half of the twentieth century also created a number of opportunities to conclude the issue within the framework of Dutch-German relations. The way the dispute was approached from both the German and Dutch side of the border will therefore be discussed in this chapter as well.

3.2 The root of the claims: The Ems-Dollart area in the 15th and 16th century

In 1464, the city of Groningen and its so-called 'Ommelanden' – the 'Surrounding Lands' in English – and the county of East Friesland were the responsible legal authorities in the area. Both had the Emperor of the Holy Roman Empire as their highest authority. The city of Groningen was an important Hanzeat city due to trade, and had a long history of autonomy, and

although its inhabitants formally had to acknowledge the Bishop of Utrecht as their feudal lord since 1419, Groningen still saw itself as a 'Free Imperial City'; only when it was absolutely necessary would they see the Emperor of the Holy Roman Empire as their overlord and listen to him.⁷² Even though the dispute originates from this time, East Friesland and Groningen and its Surrounding Lands did not necessarily have a bad relationship. Edzard I – the same Edzard who forged the earlier mentioned document that redefined the border of the Ems to fully fall within the authority of the East Frisian county – was even briefly count of East Friesland as well as Groningen between 1506-1514. This happened because the *de facto* authorities in the city of Groningen deemed him able to defend the city, with the guarantee that Edzard would not meddle with the Groninger interest of keeping as much autonomy for the city as possible.⁷³ The dispute thus originates from a time when the Ems-Dollart area was *de jure* united within the legal framework of the Holy Roman Empire, with a brief spell of the area even being united in a personal union Groningen willingly opted for.

By the 1540s, the Seventeen Provinces, roughly encompassing present day Belgium, Luxembourg and the Netherlands, had been incorporated into the Habsburg monarchy. After Charles V abdicated his possessions in the Netherlands in 1555 to his son Philip II, the area fell under the direct rule of the Spanish crown. The Spanish rule led to tensions, culminating into the Dutch Revolt of 1568. It was only in 1594 that Groningen joined the revolting side, subsequently becoming a part of the Dutch Republic.⁷⁴ This also meant that, in line with processes of centralisation, the traditional autonomy of the city would slowly start to decline over the next few decades.⁷⁵ When in 1648 the Peace Treaty of Münster was signed, Groningen became officially part of a *de jure* recognised, independent central authority in the form of the Republic of the Netherlands. East Friesland in the meantime had remained within the legal framework of the Holy Roman Empire.

The first time an actual dispute was mentioned between the two sides since Edzard I postdated the deed of enfeoffment in 1495, comes from 1541 in

⁷² Jan van den Broek, *Groningen: Een stad apart: over het verleden van een eigenzinnige stad (1000-1600)* (Assen, 2007) 27.

⁷³ Van den Broek, *Groningen: Een stad apart* 29.

⁷⁴ Ibidem 35.

⁷⁵ Ibidem 36.

the form of a trade dispute, more specifically a dispute about the right of passage. Since 1529, toll had to be paid to sail past Emden. The traders from Groningen were not exempt from this toll, even though they had never before have to pay certain sums of money for passage through the Ems.⁷⁶ This was the start of a long process, during which both parties kept taking the dispute to higher authorities. When eventually in 1545 Emperor Charles V was in Brussels, the responsible central authorities in Brussels could present the lingering dispute to the Emperor himself. Charles V ruled that East Friesland was levying the toll illegally, and proceeded to provide the envoy from Groningen with a writ stating that the toll was not justifiable by order of the Emperor himself.⁷⁷ Again the East Friesian countess Anna did not simply leave it at that, but instead decided to take up the case at the Imperial Diet, hosted in Worms that year. This shows how far both sides were willing to go in this dispute that was essentially about trading privileges in the mouth of the Ems, but in practice also about whether East Friesland was allowed to exert absolute authority over this area.

Another conference about the dispute was organised in Brussels that same year, and this time the outcome led to more coercive action from the side of the Emperor: to seize all East Friesian goods and ships in the Netherlands, until East Friesland would finally comply.⁷⁸ Over the next few years, it became clear that, again, trade obstructions in the Ems estuary were not cleared from the East Friesian side. It was only in 1550, when two delegations from both sides met again to come to an agreement, that the East Friesian delegation for the first time explicitly mentioned that all of the Ems is legally part of East Friesland, referring to the deed of 1464 that included the dubious interpolation about the sovereignty over the complete Ems.⁷⁹ The dispute remained in place, and both parties did not reach a satisfying outcome over the years. Interestingly enough it was eventually Groningen that gave in, despite their better legal claim that had even been backed up by Emperor Charles V before. The Hanseatic City was in the end suffering the most from the trade dispute, leading to the practical solution of settling the dispute through a new writ of enfeoffment, mentioning explicitly that all of the Ems

⁷⁶ Van den Broek, *Groningen: Een stad apart* 422.

⁷⁷ Ibidem 424.

⁷⁸ Ibidem 429-430.

⁷⁹ Ibidem 451.

would now belong to East Frysia.⁸⁰

This brings us to the question to what extent this writ by the emperor, which included an interpolation of the false writ of 1464, could actually be viable as a legal document to have East Frysia and its legal successors claim all the Ems as being fully part of their territory. It has certainly been a debate topic for well over a hundred years. Acker Stratingh wrote an article about the Ems in 1865, and already mentioned that in the several writs dated between 1454 and 1558, there was no mention of the words “auch dem Wasser die Eemse, und allen anderen Schiff-reichen Wassern, Bächen, Teichen, Flüssen , kein und gross, wie dieselbe Nahmen haben”, that makes the Germans claim all of the river in the first place.⁸¹ Walter Deeter wrote in 1992 that Stratingh proved in his article that the writ from 1454 had been forged, but states that the claim is irrefutable nonetheless: “Wilhelm von Bipen, der Bremische Stadtarchivar, bewies die Fälschung unwiderleglich.”⁸² Jan van den Broek makes the remark however that the debate is not about whether the writ is real or fake. More important would be the fact that the East Frysian authorities felt that their claim was not strong enough solely by using the false writ of 1454 and the writ with the interpolation from 1495, and the fact that this has been repaired in 1558 by making the Holy Roman Emperor sign a writ which specifically dealt with this problem.⁸³ The question according to Van den Broek should be whether the Emperor did indeed intentionally hand the Ems to East Frysia: the Dutch side would say no, the East Frysian side would say yes.⁸⁴ The fact remains however that both parties cling to legal claims that they see as rightful and viable. During the 80-years war, the Ems estuary gained military strategic significance for the Dutch Republic, and even before Groningen joined the Uprising against the Spanish, Dutch warships that were supposed to block the Ems are mentioned in documents from the States General.⁸⁵ The question at hand on the 20th of July 1584 was whether French

80 Van den Broek, *Groningen: Een stad apart* 473, 476.

81 Acker Stratingh, ‘De Eems’, in A. Stratingh, H.O. Feith, W.B.S. Boeles, *Bijdragen tot de geschiedenis van de oudheidkunde, inzonderheid van de provincie Groningen* (Groningen, 1865) 193-194.

82 Deeters, ‘Geschichte der Grenze zwischen Drenthe und dem Emsland’, in *Rondom Eems en Dollard* 63.

83 Van den Broek, *Groningen: Een stad apart* 514-515

84 Ibidem 515.

85 Nicolas Japikse, H.H.P. Rijperman, A.Th. van Deursen, J.G. Smit, J. Roelevink, I.J.A. Nijenhuis, P.L.R. De Cauwer, W.M. Gijsbers, M. Hell, C.O. van der Meij en J.E. Schooneveld-Oosterling (eds.), *Resolutiën der Staten-Generaal 1576-1630*, Huygens Instituut voor Nederlandse Geschiedenis, [<http://resources.huygens.knaw.nl/retroboeken/statengeneraal>] 21-10-2016, 704.

or Spanish ships would be allowed passage to Emden, to which the answer of the States General was that no ships would be allowed to sail on all of the Ems.⁸⁶ This example shows that East Friesland did not necessarily have *de facto* control over the complete estuary in this period: despite the *de jure* claim of sovereignty, the area was the scene of trade and military conflict throughout the 80-years war.

3.3 A lingering dispute (1648-1914)

The certificate of 1558 had included and confirmed the legal status of the earlier mentioned interpolation of the (postdated) 1464 writ. The Peace Treaty of Münster ensured that Groningen was in 1648 officially not a part of the Holy Roman Empire anymore. The status of the Ems therefore changed from *Reichsfluss*, a river within the Empire, to that of 'border river' separating the Dutch Republic and East Friesland. Hermann Aubin and Eberhard Menzel conducted a study on Dutch claims on the Ems in 1951. They state that within the framework of the 17th century as well as present day international law, it was possible for a 'border river' to be fully claimed by one of the two legal authorities sharing it.⁸⁷ They illustrate this position by using the works of three contemporary jurists; Hugo Grotius, Emer de Vattel and Christian Wolff. From the work of these thinkers, they derive the following three positions that legitimise the sovereignty of one state over a border river:

- a) If a State is the first to claim one of the shores, and was the first to claim sovereign rights
- b) If the river district has been in the recognised possession of a bordering state for some time
- c) When particular contractual arrangements are made⁸⁸

Aubin and Menzel then ask the question of whether the sovereign claim over the full area has been undoubtedly asserted for the timeframe between 1648-

⁸⁶ Japikse e.a., *Resolutiën der Staten-Generaal 1576-1630* 704.

⁸⁷ Hermann Aubin, Eberhard Menzel, *Die niederländischen Ansprüche auf die Emsmündung*, Abhandlungen der Forschungsstelle für Völkerrecht und ausländisches Öffentliches Recht der Universität Hamburg, band 4 (Hamburg, 1951) 30-31.

⁸⁸ Ibidem 30.

1815, to which they come to the conclusion that this was indeed the case: The East Frysian and later Prussian authorities have always adhered to the old claim of territorial sovereignty, exerted this in the form of for example fishery and beaching rights and spending money on beacons, and have always defended the claim in case of incursion. They therefore arrive at the conclusion that the territorial sovereignty of East Frysia and Prussia over the whole of the Ems can not be denied for this period, which leads to their conclusion that the Netherlands relinquished any right to claim the middle of the river as the rightful boundary under international law.⁸⁹

After the First World War, a few decades before Aubin and Menzel wrote down their findings, a similar study was conducted by Jan van der Hoeven Leonhard. His work, in which he challenges the German claims a number of times, was read during a lecture for the Dutch department of the Union of Neutral Countries. Van der Hoeven Leonhard starts out with the same argumentation, namely that the deed of enfeoffment that mentions Emperor Frederik III giving sovereign rights over the complete river to East Frysia was not found in the provincial archives of East Frysia within the kingdom of Hanover.⁹⁰ A border settlement is not mentioned in the border treaties from 1636, 1700, 1706 and 1723. Van der Hoeven Leonhard sees this as a confirmation that the Dutch government at the time was therefore implicitly content with the situation as it was, which he notes was a very inconsiderate way – from the Dutch side at least – of looking at the dispute.⁹¹ The discussion about whether the writs of 1454 and 1464 were forged and should be respected as a legal document is again being highlighted, but as was mentioned before, it cannot really be seen as a ‘groundbreaking’ factor that could be used by one side or the other to come to a satisfying conclusion. A more interesting contribution comes from the time when the Dutch Republic had been succeeded by the Batavian Republic, which only existed between 1795 and 1806. As an ally of (revolutionary) France, the Batavian Republic was at war with England. In 1799, this led to the English hijacking the Dutch ship ‘De Twee Gebroeders’, which under international law was possible in either international waters or Dutch territorial waters. Prussia – that had

⁸⁹ Aubin and Menzel, *Die niederländischen Ansprüche auf die Emsmündung* 39.

⁹⁰ Jan van der Hoeven Leonhard, *De Eemskwestie: een overzicht*, Uitgave van den Bond (Haarlem, 1918) 8, 25.

⁹¹ Ibidem 7.

acquired the region already in 1744 and was now the highest authority - protested against this, and claimed that the ships should be released by the English because they were seized on Prussian territory; the Prussian claim came forth from the writ of 1454 and the aforementioned idea that Groningen had acknowledged Prussian sovereignty due to the fact that Prussia had placed tons and beacons in the disputed area.⁹² Van der Hoeven Leonhard quotes - from Christopher Robinson's *'Reports of Cases'* (1812) - the judge Sir William Scott, who ruled that the situation in which a maritime province within an Empire is deprived of its natural extent of sea-jurisdiction with instead another province possessing it, opposes all common principle, and that the tons and beacons in the Ems were competitively of little interest to the Dutch side, which is why they left care and expense of it upon their neighbours.⁹³ This shows that the Prussian claims were by no means accepted by everyone under contemporary international law, which at the time gave room for more interpretations than Menzel and Aubin mentioned in their work.

From 1814, the Kingdom of Hanover became the highest legal authority responsible for the Ems-Dollart dispute. In 1824 there were negotiations about borders between Hanover and The Hague. There was a request from the Dutch side to come to an agreement on the delimitation of the Ems during these negotiations as well, which was ignored from the side of Hanover simply because the negotiators had not received any instruction to talk about this area.⁹⁴ The Dutch made clear that they saw the Ems as a border stream, meaning that they thought that the 'thalweg' should automatically apply as the border.⁹⁵ The Dutch did not act upon this however, and reacted weakly or not at all when in practice the German side continued with practices that confirmed their sovereignty over the complete area.⁹⁶ When Prussia annexed Hanover in 1866, they again became the highest responsible authority, and they did not change their opinion on the matter either. Van der Hoeven Leonhard highlights however, that in 1870 - during the Franco-Prussian war - the Prussian government asked The Hague for permission to remove the

⁹² Van der Hoeven Leonhard, *De Eemskwestie: een overzicht* 7, 34-35.

⁹³ Ibidem 8.

⁹⁴ Van den Broek, *Groningen: Een stad apart* 482.

⁹⁵ Van der Hoeven Leonhard, *De Eemskwestie: een overzicht* 9.

⁹⁶ Van den Broek, *Groningen: Een stad apart* 482.

maritime beacons and navigation lights from the river, to ensure that the French fleet would not be able to sail up on the Ems.⁹⁷ In a report of the secretary general of foreign affairs from 1896, this particular oddity is mentioned as well, leading to the conclusion that, if the complete river belonged to Prussia, they would not have needed this confirmation from The Hague.⁹⁸ Van der Broek mentions however that in the literature this event is sometimes mentioned, but also denied, meaning that it is not undisputed whether Prussia actually asked for this permission.⁹⁹ It is nonetheless relevant, for in practice it was mentioned in the Foreign Affairs report that the event took place. The preferred way to act upon the ambiguous situation that had emerged was to try to avoid a discussion with Prussia about the old German claims: would it not be preferable to keep this situation of uncertainty as is, instead of having an international deliberation, which could potentially have far reaching consequences?¹⁰⁰ Instead, the writer of the report states that it would be more beneficial if the Prussians would ignore the issue as well. Van der Hoeven Leonhard argues that this comes forth from the simple fact that the German side had been more powerful than the Dutch side.¹⁰¹ Relations that were vital from the Dutch perspective, and a simply display of military strength ensured that the German side could afford to hold on to their claim and act upon it, whereas the Dutch side had been in a weak position to press their claim without risk. Because there were no vital Dutch interests involved in this dispute, a powerful statement from the Dutch side would only mean risking a bad relationship with its powerful neighbour and important trading partner.¹⁰²

Again it is important to emphasise that it is the practical outcome that is being focused upon in this thesis. If anything, this paragraph demonstrates that scholars from both the Dutch and German side present their evidence and structure their narrative in such a way that it is in favour of either the Dutch or German case. It is important to note that the Dutch side did not challenge

97 Van der Hoeven Leonhard, *De Eemskwestie: een overzicht* 9.

98 '148A Nota van de secretaris-generaal van Buitenlandse Zaken Verkerk Pistorius inzake het treffen van een regeling met België en Duitsland nopens de territoriale zee, 25 januari 1896', in C. Smit, J. Woltring, C.B. Wels, A.F. Manning, A.E. Kersten, W.J.M. Klaassen, B.G.J. de Graaff, M. van Faassen en R.J.J. Stevens (eds.), *Documenten betreffende de buitenlandse politiek van Nederland 1848-1945, 2.6-GS 138* (1972-2004), Huygens Instituut voor Nederlandse Geschiedenis, [<http://resources.huygens.knaw.nl/retroboeken/bupo/>] 254.

99 Van den Broek, *Groningen: Een stad apart* 482.

100 '148A Nota van de secretaris-generaal' C. Smit e.a. (eds.), *Buitenlandse politiek van Nederland* 253-255.

101 Van der Hoeven Leonhard, *De Eemskwestie: een overzicht* 14

102 Van den Broek, *Groningen: Een stad apart* 495.

the sovereignty of Germany, and instead tried to have the situation remain in its ambiguous state. Van den Broek rightfully concludes that, when looking at the dispute over the past few centuries, it can be derived that continuity lies in the pragmatic stance Groningen, Brussels and The Hague always took towards the dispute.¹⁰³ This continuity in being pragmatic comes forth from the necessity from the Dutch side to try to remain neutral in order to not endanger more important national interests in a lopsided relationship dominated by an ever more powerful neighbour.

3.4 Ems-Dollart Region and the politics of neutrality

This Dutch stance in favour of neutrality becomes most important and is best demonstrated in the period before the First World War. The pragmatic stance with which the Dutch side approached the demarcation issue remained in place, and became part of the broader context of politics of neutrality the Netherlands was pursuing in the international playing field. Pursuing to keep their position as neutral as possible, it was only logical that the Dutch had to formulate policy towards seaships of belligerents calling in their harbours as well, something they did in the early 1890s. In a report on the draft decision from 1891 formulating such policy regarding warships of foreign powers, the advice is given not to include the Ems-Dollart area in such a decision due to the controversial nature of this subject, for the estuary belonged to both Emden and Delfzijl.¹⁰⁴ The Ems estuary was considered a special case, which was very important nonetheless if the Netherlands wanted to successfully pursue their politics of neutrality.

At the start of the twentieth century, The Hague therefore started deliberating about resolving the dispute. The Dutch wanted to remain a neutral country in an upcoming war, which meant that they did not want to have the burden of defending the Ems, for this would inevitably make them a belligerent party as well. Not all parties that were by now involved with the dispute on the Dutch side, shared the opinion of the Dutch government to start talks with the Prussian government. The Dutch ambassador in Berlin, Gevers, wrote on 12 July 1910 to his minister of foreign affairs, De Marees van

¹⁰³ Van den Broek, *Groningen: Een stad apart* 495.

¹⁰⁴ '52 De Vice-President van de Raad van State van Reenen aan de koningin-weduwe regentes, 28 april 1891', C. Smit e.a. (eds), *Buitenlandse politiek van Nederland*, 2.5 – GS 132, 93-94.

Swinderen, that he had decided to postpone handing in the request to the imperial government to start talks about the demarcation of the Ems. He did this on his own accord, for he was afraid that raising the question now would be utilised as a means for the imperial government to exert pressure.¹⁰⁵ From the reply by Minister De Marees van Swinderen it becomes clear that he did not appreciate the independent acting of ambassador Gevers.¹⁰⁶ He probably did comply with the request of the minister then, for in his next letter on December 23, 1911, Gevers writes about the Prussian stance on the Ems question: Prussia believes to have indisputable evidence regarding their sovereignty over the whole Ems, and besides that a German committee has also agreed that the Ems would be of great military strategic importance during a potential English-German war, whereas Dutch neutrality would also be of vital importance. The imperial government therefore would not change its views regarding the dispute, and would instead propose a treaty to secure Dutch economic interests on the Ems.¹⁰⁷

Van der Hoeven Leonhard mentions that in 1911, the German government did indeed agree upon the formation of a joint committee to prepare a border settlement. He also mentions however, that an international treaty during peacetime could have led to an unprecedented and inconvenient outcome for Germany: they would not have been able to seize the disputed area during the war in the way they eventually did, so Van der Hoeven says that in hindsight, it was better for Germany to simply postpone any settlement until an actual war would break out.¹⁰⁸ Negotiations did go on in the meantime however, for The Hague was still of the opinion that it was of importance to resolve the issue in order to secure their future neutrality. The (new) Dutch minister of affairs John Loudon concluded in a letter from April 8, 1914 – after seeing the evidence presented by the German committee – that the Dutch claim is not irrefutable. Loudon continues his letter to ambassador Gevers however by writing that it would not be possible – towards the Parliament, the

105 ‘545 De gezant te Berlijn Gevers aan de Minster van Buitenlandse Zaken De Marees van Swinderen, 12 juli 1910’, C. Smit e.a. (eds), *Buitenlandse politiek van Nederland*, 3.3-GS 106, 624-625.

106 ‘548 De minister van Buitenlandse Zaken De Marees van Swinderen aan de gezant te Berlijn Gevers, 16 juli 1910’, C. Smit e.a. (eds), *Buitenlandse politiek van Nederland*, 3.3-GS 106, 626-627.

107 ‘624 De gezant te Berlijn Gevers aan de minister van Buitenlandse Zaken De Marees van Swinderen, 23 december 1911’, C. Smit e.a. (eds), *Buitenlandse politiek van Nederland*, 3.3-GS 106, 724-725.

108 Van der Hoeven Leonhard, *De Eemskwestie: een overzicht* 27.

press and the other North Sea powers - to simply give up the Ems.¹⁰⁹ Without a neutral committee determining whether giving up the Ems would indeed be the righteous outcome, it would be very hard for The Netherlands to claim that they were still a neutral country. After all, giving up territory that was of military strategic importance to the German side in a bilateral agreement would not seem like a neutral act from an international perspective. On July 18, the German envoy responded that they simply could not comply with the request of a neutral committee, for the imperial government did not want to risk any dangerous surprises the outcome of such a neutral committee could entail. This ultimately led to the negotiations being suspended, leaving the dispute in the exact same state as it had been in before.¹¹⁰ On the 29th of July 1914, when the First World War had broken out, the supreme commander of the Dutch forces was explicitly instructed not to defend the Ems estuary, while on the 2nd of August the German navy proceeded to mine the entire estuary.¹¹¹

After the First World War, it was only in 1921-1922 that the negotiations were taken up again. Because both parties were too far apart however, these negotiations ultimately failed to lead to a satisfactory outcome.¹¹² After this, it is mentioned that from 1931 onwards, German and Dutch delegations were negotiating about their borders in several places, including the boundary in the Ems-Dollart as well.¹¹³ This shows that there were some negotiations about the Ems-Dollart area during the interbellum, but that these were by no means as close to coming to a satisfactory outcome as the negotiations before the war had been, which meant that, as André Beening put it: “both parties returned to the well tested policy of *quieta non movere*.”¹¹⁴ This is in line with the pragmatic approach the Netherlands typically had when it came to their claim in the Ems-Dollart area. The most important thing for The Hague was to maintain neutrality, something that is continuously demonstrated by the careful language being used in the aforementioned policy papers and reports being sent to and from the Dutch ambassador in Berlin. The Dutch had

109 ‘785 De minister van Buitenlandse Zaken Loudon aan de gezant te Berlijn Gevers, 8 april 1914’, C. Smit e.a. (eds), *Buitenlandse politiek van Nederland*, 3.3-GS 106, 943-944.

110 ‘829 De gezant te Berlijn Gevers aan de minister van Buitenlandse Zaken Loudon 18 juli 1914’, C. Smit e.a. (eds), *Buitenlandse politiek van Nederland*, 3.3-GS 106, 991-992.

111 Beening, ‘A Riddle of the sands’, *Tussen beeld en werkelijkheid* 44.

112 Ibidem.

113 Bob de Graaff, ‘The Dutch Border Areas 1933-1945’, in Benjamin Kaplan, Marybeth Carlson, Laura Cruz (eds.) *Boundaries and their meanings in the history of the Netherlands* (Leiden/Boston, 2009) 200.

114 Beening, ‘A Riddle of the sands’, *Tussen beeld en werkelijkheid* 44.

claimed the area using the *thalweg* principle at least since the 1822 treaty with Hanover. When the outbreak of a war kept growing more likely, the claim was only held on to very weakly, for it was clear to The Hague that they would lose any potential escalation of the conflict. Interestingly enough, the Dutch government was at some point even willing to part with the Ems, an idea that was perfectly in accordance with the politics of neutrality they were pursuing, for it was thought that a contested area of such military strategic significance to their neighbour would make it harder to remain impartial in any upcoming conflict. It is in this context of striving for neutrality that we must look for the explanation as to why the Dutch could not simply acknowledge the German claim before the First World War: towards the other North Sea powers, such a move would have seemed like a major breach of the Dutch principles of neutrality.

3.5 Conclusion

Looking back at all these centuries this dispute has remained in place, it must first be noted that Van den Broek was right that the question of the demarcation of the Ems-Dollart area cannot be answered simply by finding out whether the writ from 1464 was real or fake. This would lead to an endless debate about whether the interpolation in the writ of 1464 was intended or not, and the implications this would have for the certificate of 1558 asserting East Frysian privileges. The German as well as the Dutch side will have their own respective legal interpretations of these documents that suit their interests best either way, as can be witnessed in the dispute for almost two centuries now. Looking into the roots of this dispute by focusing on the different legal accounts has not been a useless exercise however. Not only does this illustrate how far back the dispute actually goes, it also shows an interesting dynamic: just like the East Frysians refused to comply with any rulings about the area when a legal dispute first presented itself in 1529, the side of Groningen and later the Dutch Republic did not fully comply with the outcome of the certificate of 1558 either. In addition to the comment by Van den Broek – that solely focusing on the credibility of the writs themselves is not the right approach to the question at hand – I would therefore like to add that not the legal claims themselves are interesting as the primary focus in the

historical debate, but instead the remarkable continuity of both sides to uphold their claim in practice. The historical context of the period then determines whether a side would take a more reserved stance or a bolder approach towards the predicament. From the Dutch side, this has primarily been a pragmatic approach in the form of silently holding on to their claim, which can be explained due to the lopsided relationship with their much more powerful neighbour. Along that same line, the Dutch were actively pursuing politics of neutrality in the late nineteenth and early twentieth century, when an upcoming war appeared to be inevitable. The Dutch certainly did not forget about their claim, but due to their inferior position compared to Hanover and Prussia, they were more or less forced to take this route. This inevitably led to a weakening of the legal position of the Dutch claim, which in line with the politics of neutrality even led to The Hague considering giving up the Ems estuary altogether. With the outbreak of the Second World War, this attitude of neutrality changed radically however. Already in 1942 the Dutch Minister of Foreign Affairs in exile, Eelco van Kleffens, felt that their position in the Ems-Dollart dispute was a reasonable one, and stated that the Dutch were determined to get a favourable settlement when the war was over.¹¹⁵ The next chapter will talk about the radical change in Dutch foreign policy and Dutch-German relations after the Second World War, and look into how this affected the approach from both sides to the still unresolved Ems-Dollart dispute.

115 '264 Verslag van de dertiende zitting van de Group on the Peace Aims of the European Nations van de Council on Foreign Relations te New York 16 februari 1942', C. Smit e.a. (eds), *Buitenlandse politiek van Nederland C.4 – GS 188*, 298.

4. A new framework for Dutch-German Relations: The Ems-Dollart Dispute 1945-1960

4.1 Introduction

The Second World War can be seen as a major breaking point in history. The post-war world was now divided along political lines - the capitalist Western bloc and the communist Eastern bloc - with military tension dominating relations between the two sides. Germany had lost the war completely and had been divided between the allied forces. This eventually led to two separate German states being created in 1949: the German Federal Republic who were aligned with the West, and the German Democratic Republic who became a part of the Eastern bloc.

Despite the Netherlands trying to remain a neutral country the way they had managed to during the First World War, Germany had invaded and occupied the country during the war nonetheless. Before the war, Germany and the Netherlands had already had strong economic ties, and their economies were very much interwoven.¹¹⁶ For the next chapters, liberal interdependence theories are therefore worth looking into. After the war had ended, a situation arose in which the Netherlands had lost their major trading partner, for Germany had been devastated during the war. Besides that, the politics of neutrality that had been so characteristic for Dutch foreign policy, had dramatically failed The Hague. Neutrality was therefore no longer seen as a course in foreign policy aligned with Dutch interests. These interests were still the interests of a relatively small state and minor player in the international field. In relation to this, Jeanne Hey stresses the increasing importance of transnational organisations such as the EU and NATO, for they increased small state influence due to the economic, political and security benefits these organisations gave them.¹¹⁷ Small states aligning themselves with more powerful states through international institutions was a new method for these states to pursue their interests in the international playing field. At the same time, The Hague also felt that there was now a different dynamic in relation to Germany directly after the war: the Netherlands had

¹¹⁶ Lak, *Tot elkaar veroordeeld* 10.

¹¹⁷ Hey, 'Introducing small state foreign policy' 1-2.

been on the winning side of the war, and were now neighbour to a country that had invaded their own and had then been on the losing side.

Structuration theory, in particular the role of agents and structure, is worth looking into as well at this point of the conflict. Mumme and Grundy-Warr demonstrate that Structuration Theory can be applied to territorial conflicts as well, by linking this theory to the Chamizal conflict between the United States and Mexico: a border conflict that had been in place for more than a hundred years before it was finally settled.¹¹⁸ Of particular interest is the fact that in this case there was a border dispute between a relatively small and a considerably larger state as well. Mumme and Grundy-Warr argue that Structuration Theory analyses the interplay of elements at and across different social and institutional levels: discourse politics and the rhetorical possibilities of political action play a role on both sides, but these change overtime as well due to the conflict being so long, in the case of Mexico leading to the important development of symbolic values complicating a settlement on strictly pragmatic or practical grounds.¹¹⁹ Through these examples, they come to the conclusion that “an ST perspective directs our attention to relational aspects of the exercise of the political power that are often neglected or marginalized by state-centric analysis, emphasizing careful description and keen sensitivity to effects of space and time on the social construction of human agents.”¹²⁰

In order to explain the Ems-Dollart dispute after 1945, the context in which Dutch-German relations took place is very important. A state centric approach would therefore not be enough to explain the long and arduous bilateral negotiations that ensued after the war had ended. The second paragraph will therefore explain the complicated relationship the Dutch had with Germany after the Second World War. The third paragraph will then focus on the actual arrangements that were made to resolve the issue, spanning the period between 1945 and 1960. The last paragraph will then explain the outcome of the final Ems-Dollart treaty, while taking into account international relations theory about bilateral relations between small and

118 Grundy-Warr and Mumme, 'Structuration Theory and the analysis of international territorial disputes *Political research quarterly* 51-4 969-970.

119 Ibidem 982-983.

120 Ibidem 984.

large states and liberal theory on economic interdependence.

4.2 The Framework: A new era for Dutch-German Relations

The combination of the Dutch stepping away from their politics of neutrality and their powerful neighbour Germany losing the war obviously had a major impact on Dutch-German relations. I want to distinguish three separate but interconnected discontinuities compared to the pre-war relationship. First of all, the Dutch had been traumatised by being attacked while trying to remain neutral, which is the first important change for bilateral relations. Germany had acted as an aggressor, and in addition to this Germans were still remembered as oppressors. They were therefore being treated with a certain amount of distrust, expressed by the idea that Germany should never be capable of aggressive foreign politics anymore, and aversion, embodied in the Dutch yearning for (material) compensation.¹²¹ These ideas about compensation and German guilt also found their way into bilateral relations between the two countries.

The second major change was that, before the war, the Dutch and German economies had had very strong ties. With Germany losing the war, this meant that the stricter the Germans would be punished, the more troublesome it would be for the Dutch economy to make a recovery as well. The first Dutch post-war cabinet realised this all too well, and even though public opinion was not in favour of Germany or the Germans at all, 77 percent of Dutch citizens did have the opinion that the Netherlands should reinstate trade relations with Germany again as fast as possible.¹²² This made for an interesting paradox, for the Dutch were on the one hand politically speaking in favour of punishing Germany – which entailed that they themselves would be able to annex border areas and ask for damage restitutions – whereas economically speaking they would benefit from good economic relations, which could only be realised through a ‘soft treatment’ of their neighbour. Economic relations were nonetheless quickly resumed after the war was over.

The third important change was of a systemic nature within the field of international relations. This is where liberal theories of interdependence are

¹²¹ Friso Wielenga, *Van vijand tot bondgenoot: Nederland en Duitsland na 1945* (Amsterdam, 1999) 39-40.

¹²² Lak, *Tot elkaar veroordeeld* 48-49.

worth examining: "Political, economic, sociological and sophisticated liberalism all propose the hypothesis that interdependence decreases international conflict, or at least decreases incentives for conflict."¹²³ As the literature review already pointed out, the realist antithesis of this would be that interdependence does not necessarily make conflict unlikely, but could instead lead to an asymmetric relationship. In the previous chapter, it could be noted that the Netherlands did indeed approach Germany in a pragmatic way when it came to the Ems-Dollart dispute. Arguably, power relations and the asymmetric relationship were more prevalent in this analysis when compared to the economic implications of the dispute, for the political neutrality of the Netherlands was the primary political objective. The economic dimension of the conflict was never completely ignored however. Even when both sides were talking about a bilateral agreement before the First World War, they both took into account the economic implications such an agreement would have as well. As was mentioned before, after the war was over, smaller states gradually started playing a more important role due to the economic, political and security benefits transnational organisations gave. This was a change that gradually came in the post-war era as institutions started playing a more prominent role, and affected policy-making of small states indirectly. The Netherlands and West-Germany gave up sovereignty in certain areas and were both embedded into a number of organisations that were transnational or supranational in nature: the European Coal and Steel Community in 1952, military cooperation within NATO when West-Germany joined the Western military alliance in 1954, and economic integration through the European Economic Community in 1958. Dutch-German relations were therefore now also partially embedded in the framework of these organisations.

The Second World War and the shift in opinion about Germany ensured that the Netherlands now felt that they were able to claim German territory. Germany had been on the losing side, whereas the Netherlands had been a direct victim of the Germans. In this context, The Hague made plans and actually annexed border areas, although the initial plans were much wilder than the annexation was in practice: minister Van Kleffens proposed a plan to annex 10.000 km² of German territory, whereas eventually only 70 km² were

123 Susan McMillan, 'Interdependence and conflict', *Mershon international studies review* 41-1 (1997) 35. (33-58)

actually claimed.¹²⁴ The next paragraph will go into more details about how this influenced negotiations surrounding the Ems-Dollart area. It was already noted that the Dutch government had formulated the standpoint that economic relations with Germany should be normalised as soon as possible and more or less continue the way they had been before the Second World War. The question that remains now is: how and in what framework did the political relationship between the two countries develop after the war? When it comes to determining factors in Dutch-German relations, Frits Boterman mentions four factors from the work of Andrei Markovits and Simon Reich and applies these to the Dutch-German case:

- 1) The geographical position of the Netherlands in relation to Germany: Germany, or certain German federal states more specifically, are the Netherlands' most important neighbours
- 2) Economic relations between the two countries: financial-economic interconnectedness has for a large part determined Dutch foreign politics, for the Netherlands as a coastal state provided Germany with access to the sea, whereas Germany offers the Netherlands as a transit country a large hinterland
- 3) The factor of power: Germany and the Netherlands are both part of an international system of states. The Netherlands is the lesser country, and will therefore have to take into account the will of larger countries such as Germany, although European integration does ensure that larger states are more dependent upon the approval of smaller states
- 4) The nature of historical contacts and experiences, meaning the shared history of both countries: the negative experiences of the Second World War have been 'saved' in the collective memory of Dutch citizens (and politicians), and these negative experiences will come out whenever there is an incident that could cause this collective memory to be triggered¹²⁵

When looking at the fourth factor while taking into account the first three factors as well, the political-psychological relationship as observed by Friso Wielenga comes into play. Wielenga analyses the social perceptions the

¹²⁴ Wielenga, *Partner uit noodzaak* 388.

¹²⁵ Frits Boterman, *Duitsland als Nederlands probleem: De Nederlands-Duitse betrekkingen tussen openheid en eigenheid* (Amsterdam, 1999) 11-12. See also: A. Markovits and S. Reich, *The German Predicament: memory and power in the new Europe* (New York, 1997) 77-78.

Dutch had of Germans in the post-war era, and in particular the gradual normalisation of the political-psychological relationship.¹²⁶ What exactly does he mean then by this political-psychological relationship? His point of departure is the German occupation during the Second World War, and the – in the eyes of the Dutch – limited amount of guilt the Germans felt, both of which left deep scars in the collective memory of the Dutch.¹²⁷ These scars were not completely forgotten, and inevitably led to friction and incidents on numerous occasions.¹²⁸ Directly after the war especially, this was a determining factor for the atmosphere in politics as well. The Hague had pursued politics of neutrality successfully and had not had foreign troops on their territory since the early 19th century, leading to an emphasis on international justice in combination with an antipathy for power politics, a situation the Germans had violently disrupted when occupying the Netherlands.¹²⁹

Images and perceptions are an important part of international relations. In the case of Dutch-German post-war relations especially, they cannot be ignored. Rob Aspeslagh states that the political and economic relations with Germany are proof that in the Netherlands, pragmatism influences behaviour more than perception or image however.¹³⁰ This does not mean that the complicated political-psychological view as was just explained did not have any influence of course, for it is an important factor that should be taken into account in any analysis of post-war Dutch-German relations. In 1954, both governments were involved in negotiations about a *Generalbereinigung*, a general agreement to resolve any conflicts that were still in place between the two governments.¹³¹ The political-psychological relationship became evident during these negotiations, and its importance is illustrated by the fact that these negotiations were only concluded by 1960, proving the by times complicated and arduous bilateral relations between the two governments.

126 Wielenga, *Van vijand tot bondgenoot* 285.

127 Ibidem 281, 287.

128 Ibidem 281.

129 Ibidem 287-288.

130 Rob Aspeslagh, 'Nederlands-Duitse betrekkingen: wat verrwachten wij ervan?', in R. Aspeslagh, *De stand der betrekkingen. De Nederlands-Duitse relatie nader bekeken* (Den Haag, 1996) 26.

131 Wielenga, *Partner uit noodzaak* 481.

4.3 Trying to resolve the issues: Negotiations directly after the war

The framework taking into account the political-psychological and economic relations has been established, and it is in this context that the negotiations that ensued after the war should be placed. Dutch policy regarding the negotiations was aimed at getting a compensation in the form of war reparations and the annexation of territory. A memorandum from February 1946 talks about an upcoming peace conference in London where the Dutch proposals for border corrections would be dealt with amongst other topics. The memorandum gives an interesting insight into how opinions were formed regarding the annexation of territory, in this case primarily from the perspective of the military, and therefore within a framework of national security. Regarding the military aspects of the annexation question it is first emphasised in the memorandum that, since the neutrality and independence principles from before 1940 were no longer relevant, a close relationship with the Allied Countries - the Western European powers and the USA in particular - was seen as the best way to ensure an international rule of law 'in which the Kingdom of the Netherlands would have the place it was entitled to.'¹³² The biggest dangers according to the memorandum were first of all another rise of the German Empire under Prussian rule, and second the danger from the East in the form of Russian expansion towards the west. It is then mentioned that annexation of German territory would in itself never be enough to attain security: it would only be relevant when annexation was to be part of a plan of Western powers as a safety guard from the East.¹³³ In the case of 'minimal annexation', the document mentions that the main point would be simply 'to straighten the borders', and in this context the Ems-Dollart area is mentioned as well. The bare minimum this 'minimal annexation' would have to do for the Netherlands was to 'solve the Dollart dispute'.¹³⁴ The importance of solving this dispute is again stressed in a Dutch memorandum addressed to H.M. Government of Great Britain in november 1946: "By far the most important of the latter [redress of of local anomalies] is the demarcation of the frontier in

¹³² 'Memorandum betreffende de militaire aspecten van het annexatie vraagstuk: februari 1946, afdeling 1 no. 753/45', Nationaal Archief, Den Haag, Marinestaf, *nr. 2.12.19, inv.nr. 5*.

¹³³ Ibidem 2-3.

¹³⁴ 'Memorandum betreffende de militaire aspecten van het annexatie vraagstuk', NL-HaNa, Marinestaf, *nr. 2.12.19, inv.nr. 5* 19, 27.

the Dollard and the mouth of the river Eems.”¹³⁵ Evidence that – at least the marine staff – persisted in their foreign policy regarding annexation in general, and the Ems-Dollart dispute in particular, can be found in the words of Lt. A.C.M. Neeve, who stated in an entry made aboard the Hr. Ms. Johan Maurits, that the troubles on the Ems up till July 1947 were there because the German authorities were convinced that the border and therefore the German jurisdiction stretches all the way up to the low water line of the Dutch coast, something the Dutch side disagreed with. He concludes by stating that, because the demarcation line had not been settled yet, patrols on the Ems are of particular interest to the Dutch Navy.¹³⁶ This also indicates a much bolder approach compared to first half of the twentieth century.

Joseph Luns – well known as Minister of Foreign Affairs between 1952 and 1971, though still working at the Dutch embassy in London at the time – was responsible for handling files related to the German question, while also obtaining a more autonomous role in the conferences of 1948 about the future of West-Germany.¹³⁷ A working group appointed to look into the provisional adjustments to the western frontier of Germany, came to the conclusion that a provisional agreement should be worked out between the Netherlands and the British Military occupation authorities, “facilitating the detailed study of the projected plans for the development of the Ems Estuary and for the reclamation of the Dollart [and] ensuring that no work is undertaken in the Ems Estuary, apart from normal routine dredging, without the consent of both parties.”¹³⁸ In spite of this, all the larger border corrections the Dutch delegation had proposed had been denied in 1948, including the Dollart and Ems correction. It is important to note however that the parties that were present during the negotiations about annexation, did acknowledge that there was no border in the Ems by any international treaty. Dr. Hans Hirschfeld, the responsible government commissioner, reported back to the minister that from a domestic perspective the outcome of the negotiations was highly unfavourable, and would certainly lead to ‘a number of people reprimanding the Dutch government for being too weak, rightfully pointing out that

135 ‘Dutch memorandum addressed to H.M. Government of Great Britain, 5th November 1946’, NL – HaNa, Marinestaf, nr 2.12.19, inv.nr. 5..

136 ‘Stukken betreffende noodzaak regelmatig vlagvertoon’, NL - HaNa, Marinestaf, nr. 2.12.19, inv.nr. 124.

137 Albert Kersten, *Luns: een politieke biografie* (Amsterdam, 2011) 69-70.

138 ‘Report of the working party on provisional adjustments to the western frontier of Germany, ondertekend in Parijs op 1 september 1948’, NL – HaNa, Luns, J.M.A.H., nr. 2.21.351, inv. nr 232.

Germany would not compensate the countries it had occupied whatsoever.¹³⁹

The Paris Protocol of 1948 eventually allocated 130 km² to the Benelux countries, with the Netherlands obtaining 70km².¹⁴⁰ By 1949 however, when the Big Three and the Benelux countries were finalising the border changes, the Dutch cabinet saw how troublesome such an annexation could turn out in practice. The head of the Dutch delegation, J.A. Ringers, reported how the Americans and British were primarily concerned with the psychological effect such an annexation would have on the German population, seeing no positive effects such an agreement would have.¹⁴¹ Just like Hirschfeld had sometime earlier, Ringers was emphasising how important – according to him – the annexation of territory was for Dutch public opinion. In national politics in the meantime, the annexation question led to different reactions as well. Geert Ruygers, member of parliament for the Labour Party, emphasised for example that the Netherlands should concern itself with rebuilding Germany so that they could contribute to the reconstruction of Europe, whereas the annexation question was something that should no longer be relevant. Ruygers did eventually agree to annexation, for Germany had actively protested any border corrections: renouncing the claims would therefore have been seen as yielding to the Germans.¹⁴² Here the heritage of the political-psychological relationship can clearly be seen in both the negotiations and domestic politics. Although the outcome of the negotiations must be accepted for a fact, the negotiations about a border settlement have – at least in domestic politics – surpassed the practical dimension of eliminating the ambiguous situation by reaching agreement on border areas, by adding the political-psychological element of making the outcome of these settlements into a symbol of gratification for the alleged damage of the occupation.

4.4 Negotiations about *Generalbereinigung* and the Ems-Dollart area

Between 1952 and 1956, the Netherlands had two Ministers of Foreign Affairs: head of the department was Johan Beyen, and Joseph Luns functioned as ‘minister without portfolio’ within the same department. Bilateral relations with the FRG were the responsibility of Luns. Before his appointment, the

139 ‘Aantekening voor de minister – afschrift: no 764/H/EB’, NL – HaNa, Luns, J.M.A.H., *nr. 2.21.351, inv. nr 232.s*

140 Wielenga, *Partner uit noodzaak* 390.

141 Ibidem 390-391.

142 Ibidem 391.

Netherlands initially wanted to link the Ems-Dollart question to the general annexation question that had arisen, in particular the annexation of the Elten and Tudderen areas, and tried to use the latter dispute with the FRG to bargain for a better deal in the Ems-Dollart area.¹⁴³ Bonn simply refused to link the two border questions as a point of departure for any negotiations, because they did not recognise the annexation of 1949 in the first place: recognising the Dutch annexation and using this to bargain, would in the eyes of the Germans also lead to a weakening of the legal position in areas that had been illegally annexed elsewhere.¹⁴⁴ Negotiations on this point had already been very rigid, and Joseph Luns only made an outcome along these lines more unlikely, when he made it clear in 1952 that the Netherlands had only had meagre compensations for their losses during the war, and would not part with these unless there would be very favourable conditions to do so.¹⁴⁵ In 1954, Bonn proposed to come to a general agreement on all the outstanding bilateral issues, but it was only in 1957 that negotiations about the so-called *Generalbereinigung* finally ensued, be it slowly and with a lot of difficulty.¹⁴⁶

Regarding the Ems-Dollart question, it became clear that a different treaty and therefore separate negotiations would be required to come to an agreement about the area. From the Dutch side, it was the 'Ministry of Transport, Public Works and Watermanagement' (*Verkeer en Waterstaat*, further referred to as V&W) and the 'Ministry of the Navy' that – besides Foreign Affairs – were primarily concerned with the direct outcome of these negotiations. Negotiations were led by the government commissioner for German affairs, Johan Beyen, who had been Minister of Foreign Affairs a few years before. The internal correspondence within ministries during the negotiations serves as a good example of how staff members and responsible commissioners reported to the responsible ministers, and reacted to the negotiations within their respective departments. In a report to the Minister of the Navy about the negotiations from 1957 – signed by the director-general of maritime pilotage Tichelman, deputy chief of marine staff Van der Schatte Olivier and head of legal affairs Van der Burg – the German standpoints as

143 Kersten, *Luns: een politieke biografie* 128.

144 Wielenga, *Partner uit noodzaak* 404-405.

145 Kersten, *Luns: een politieke biografie* 128-129.

146 Jürgen Heß and Friso Wielenga, 'Gibt es noch Ressentiments...? Das niederländische Deutschlandbild seit 1945', in J. Heß, *Demokratisches Engagement: Beiträge aus drei Jahrzehnten* (Münster, 2003) 254.

reported by commissioner Beyen are mentioned, and it is specified why in the opinion of the undersigned the German standpoints are unacceptable:

- a) That even though Germany lost the war, it would be the Netherlands parting with its territory by honoring old German claims that have continuously been disputed by the Netherlands
- b) That entrance to the harbour of Delfzijl would only be possible through German territory
- c) That instead of the current ambiguous - though equal - position of both parties, instead the choice would be made for a settlement primarily in the advantage of Germany
- d) That such a settlement in which the German claims would be confirmed - albeit limited by treaty - would give the Germans a very favourable position in any future negotiations in case future eventualities would arise¹⁴⁷

The language used to support the argument made under standpoint A is of importance as well: 'The Germans go as far now, so that it seems that not they but we have lost the war. In particular they now claim territorial expansion where they have no valid rights to do so.'¹⁴⁸ This demonstrates that these negotiations were still highly politicised as being an important symbol of German compensation for the war. From the side of the Navy, it was stated that the point of departure should be the *thalweg* principle, and in case this demand would not be attainable, the ministry would prefer to come to a settlement regarding shared governance of the area - the so-called *Strombauggebiete* - and leave the demarcation of the border itself undetermined.¹⁴⁹ It can be read in the Beyen report about the negotiations in december 1957, that the idea of a *Strombauggebiete* was suggested by professor Erich Kaufmann, leader of the German delegation. He suggested this due to the fact that a settlement of a political border would bring all sorts of trouble, whereas a satisfactory agreement for both parties could also be reached by leaving out the demarcation issue.¹⁵⁰

147'Nota: Eems-Dollard besprekingen, 4 december 1957', NL – HaNa, Ministerie van Defensie; Kabinet van de Staatssecretaris van Marine, *nr. 2.12.55, inv.nr. 194*.

148 Original quote: "Uiteindelijk gaan de Duitsers nu zo ver, dat het lijkt of niet zij maar wij de oorlog hebben verloren. Met name claimen zij nu eigenlijk gebiedsuitbreiding waar zij geen rechten op kunnen doen gelden." quoted from 'Nota Eems-Dollard besprekingen, 4 december 1957', *nr. 2.12.55, inv.nr. 194*.

149'Nota Eems Dollard besprekingen, 9 december 1957', *nr. 2.12.55, inv.nr. 194*.

A similar memorandum from the Ministry of V&W also recognised that the negotiations about the Ems-Dollart question basically had two aspects: a legal aspect focusing primarily on the (maritime) management of the area, and a political aspect taking into account demarcation, which would primarily be of importance for rules regarding freedom of navigation (also for warships) and the political and prestigious aspects that were tied to the outcome of the negotiations.¹⁵¹ The report by V&W approaches the dispute in a more technical manner, therefore emphasising the primary importance of the aspects of maritime management in the area. The V&W directorate sums up a number of principles that should be adhered to, in order to come to an agreement for a for both parties reasonable regime in the Ems-Dollart area. The thalweg principle would be seen as the ideal outcome of the negotiations, but the realistic prospect of the Germans not accepting the thalweg had to be taken into account as well. Instead, either the 'the western line of barrels in the main shipping channel' would have to be the border, or a demarcation agreement would be abandoned altogether and instead the focus would be on the 'strombaugebiet', in which both parties would establish a common regime. Nonetheless, the preference of the V&W directorate was however for a political border to be established, as the former option would mean a guaranteed connection from Delfzijl to the main navigable shipping lane, whereas the latter option would mean that Germany would keep its sovereignty claims on this area as well. Already in 1958, the directorate noted that this could potentially lead to trouble in the future when taking into account the potential extraction of oil.¹⁵² Although acknowledging the political components of the outcome of the negotiations, the V&W directorate already took into account a more pragmatic and practically oriented stance in an early stage of the negotiations, primarily geared towards resolving the ambiguous situation present at the time and therefore focusing on tying up the loose ends.

In practice there was still a rift in parliament as well as the council of ministers about the position the Ems-Dollart should have in the context of the

150 'Rapport inzake de besprekingen met een Duitse delegatie onder leiding van Professor Kaufmann op 9, 10, 11, 12, 13 en 14 december 1957 te Bonn', *nr. 2.12.55, inv.nr. 194*.

151 'Nota betreffende het Eems Dollard Vraagstuk, ministerie van Verkeer en Waterstaat, 30 december 1957', *nr. 2.12.55, inv.nr. 194*.

152 Ibidem 12-13.

Generalbereinigung at the end of 1957. Prime Minister Willem Drees was initially of the opinion – together with the ministers for Housing and V&W – that giving up the Dutch claims in other areas should mean that the Netherlands would at least be able to press their claim in the Ems, though on the other hand Drees did think that a fair delimitation of the ‘strombau-area’, as proposed by Kaufmann, would be enough to abandon the idea of establishing a political border.¹⁵³ Luns was still very much in favour of holding on to the idea of the thalweg principle as the outcome of negotiations, but eventually the council of ministers did agree in January 1958 to follow the advice of commissioner Beyen and take the ‘strombaugebiet’ as the point of departure in further negotiations.¹⁵⁴

4.5 The Ems-Dollart Treaty

On the 8th of April 1960, an agreement on the *Generalbereinigung* was finally reached, and the Ems-Dollart Treaty was signed as a separate treaty as well on this day. The eventual outcome of the negotiations was by no means how the responsible authorities in The Hague had envisioned it a decade earlier. The political-psychological relationship played a major role in the way negotiations unfolded, and also serves as an explanation as to why it took both parties quite long to come to a satisfactory agreement. Considering all this, it is not strange that the first article of the Ems-Dollart Treaty states that both parties take into consideration their common interest as well as the special interests of the other party, and work together in an atmosphere of good neighbourly relations.¹⁵⁵ Article 29 then established a permanent Dutch-German Ems-commission consisting of three commissioners separately appointed by either government, responsible for any questions regarding marine construction, beaconing, etc., and then reporting back to their respective governments. This did not mean that both parties had completely forgotten about their claims. Article 46.1 confirms that both parties will hold on to their respective legal claims, and article 46.2 provides both parties with the option to bring the demarcation question in front of the International

¹⁵³ Wielenga, *Van vijand tot bondgenoot* 235-236.

¹⁵⁴ Ibidem 236.

¹⁵⁵ For the full treaty, see: ‘Verdrag tussen het Koninkrijk der Nederlanden en de Bondsrepubliek Duitsland tot regeling van de samenwerking in de Eemsmonding (Eems-Dollardverdrag)’, The Hague, 8 april 1960, [<http://wetten.overheid.nl/BWBV0005343/1978-07-01>], accessed 20 December 2016.

Court of Justice (ICJ). In case of a dispute, Chapter 12 of the agreement provides both parties with the possibility to bring it in front of a special court of arbitration. Although the treaty provided a thorough and comprehensive framework for both parties, a situation soon arose in which the 1960 treaty could not provide a satisfactory outcome. An additional treaty was required to deal with the exploration and exploitation of mineral resources in the Ems-Dollart area and the continental shelf of the North Sea associated to it, which will be discussed in the next chapter.

4.6 Conclusion

After the Second World War, the Ems-Dollart dispute had become more than a regional border conflict with practical implications. Like Grundy-Warr and Mumme point out with their case study on Mexico, a simple state-centrist approach is sometimes not enough to fully explain a border dispute. Instead, the dispute should be embedded in the broader context of annexation and war reparation politics the Dutch were actively pursuing after the war, which can in turn be explained by the political-psychological relationship caused by the Second World War. The political course in bilateral relations was therefore not always a practical one, for 'public pressure' was mentioned a number of times as a factor influencing policymaking regarding the annexation of German territory. A settlement that would be satisfactory for the Netherlands, and for those negotiating in particular, was being complicated by the symbolic value that the *Generalbereinigung* and the Ems-Dollart case within that framework had obtained.

Contrary to its pre-war foreign policies, the Netherlands could now take a bolder approach after the war, which happened – though the outcome proves that they were not very effective – within the framework of negotiations about the future of Germany when it came to the annexation and settlement of disputes in border areas. Nonetheless, once West-Germany became a more powerful political player, Bonn was not of a mind to easily give in to any claims made from the Dutch side. Negotiations about the Ems-Dollart dispute inevitably led to a situation in which the involved agents – politicians as well as the negotiators – were influenced by the political-psychological relationship. The several reports from the involved ministries, and minister

Luns himself, demonstrated that it was not unusual to refer to the settlement of the Ems-Dollart within the framework of war reparations, and to try and link a border settlement in the Ems to compensation for any potential agreement about annexed areas. This basis for negotiations was not as strong as The Hague thought it would be. Germany did not want to acknowledge the Dutch claims and annexed areas, which meant that the idea to use these in order to press for the *thalweg* principle in the Ems-Dollart area were rendered ineffective. This meant that negotiations were stuck for quite some time as both sides were immobile in their respective standpoints, which was demonstrated during the first half of the 1950s. Although the negotiations proved to be arduous, the eventual outcome of the 'strombau-solution' was possible due to negotiations taking place in the framework of good neighbourly relations. The need for good neighbourly relations should be explained as a prevalence of pragmatism, inevitable due to the strong economic ties between the two countries, and due to the Western security framework both countries were a part of. The case for interdependence can be clearly made in that regard. The eventual treaty on the Ems-Dollart area was not necessarily the outcome both parties wanted, and certainly not the outcome the Dutch were demanding in 1952. Nonetheless, it was a satisfactory agreement taking into account the common as well as the individual interests of both countries, while keeping intact a framework of good neighbourly relations.

5. Law of the Sea and the joint development of the Ems-Dollart area

5.1 Introduction

In the third chapter, the way customary maritime law from before 1945 had had an impact on the Ems-Dollart dispute has been briefly discussed already. Its most important impact on claims and negotiations can be seen in the Dutch claim originating from the nineteenth century, highlighting that the *thalweg* principle – meaning that the border should follow the middle of the navigable shipping lane – should apply in the Ems estuary as well. After signing the Ems-Dollart treaty in 1960, both parties took into account their own interests as well as the common interest, and managed to come to a bilateral agreement that surpassed the need for a border agreement. Both the Dutch and German claims were therefore bypassed, while at the same time still respecting the separate claims. The maritime dimension of the dispute had primarily been taken care of as well through the signing of the 1960 treaty: beaconing, maritime border patrols and common fishing grounds had all been included.

Over the course of the years after signing the treaty, it became clear that not all eventualities had been taken into account. Developments in the maritime field, that had basically been initiated by the Truman proclamation of 1945, were rapidly accelerating over the course of the 1960s. The UN had held a conference on the Law of the Sea in 1958, resulting in treaties concerning the delimitation of the continental shelf. All states bordering the North Sea now had to figure out how to split the continental shelf between them. They wanted this to happen as quickly as possible due to the great potential for the exploration and exploitation of natural resources in their respective maritime territories. This chapter will focus on how developments in post-1945 maritime law, and within this context the delimitation of the continental shelf of the North Sea, influenced the Ems-Dollart dispute.

5.2 The Truman Proclamation and post-1945 Maritime Law

Shortly after the Second World War, Truman made his famous proclamation stating that “it is the view of the Government of the United States that the exercise of jurisdiction over the natural resources of the subsoil and sea bed of the continental shelf by the contiguous nation is reasonable and just.”¹⁵⁶ This statement was first of all influenced by the drive to find new deposits of petroleum and natural gas, secondly in order to prevent shortages due to the depletion of world stocks of natural resources after the Second World War, and thirdly to avoid becoming dependent on the import of these resources that were of a high strategic value.¹⁵⁷ This led to a fundamental change in international maritime law, for the eighteenth century law that marked the three mile limit as the standard coastal territory to be claimed by the contiguous state, differed fundamentally from the idea that the territory a state could claim extended along with the seabed of the continental shelf adjacent to it.

After Truman made the proclamation, it was for a time arbitrary as to whether states would decide to claim a part of the continental shelf, and how far they could then extend their claims off the coast. The United Nations Convention on the Law of the Sea was organised in order to structure all these claims, and to create an international legal framework within maritime law that would allow states to do so. In 1956, negotiations for UNCLOS started in Geneva, Switzerland, eventually leading to the four following treaties in 1958:

- Convention on the Territorial Sea and the Contiguous Zone
- Convention on the Continental Shelf
- Convention on the High Seas
- Convention on Fishing and Conservation of the Living Resources on the High Seas

The first two treaties were most important in providing a framework for the delimitation of the continental shelf. The ‘Convention on the Territorial Sea and the Contiguous Zone’ established the agreement that the sovereignty of a

¹⁵⁶ Harry S. Truman: "Proclamation 2667—Policy of the United States With Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf," September 28, 1945. Online by Gerhard Peters and John T. Woolley, *The American Presidency Project*, [<http://www.presidency.ucsb.edu/ws/?pid=12332>].

¹⁵⁷ Magnússon, *The continental shelf beyond 200 nautical miles* 9-10.

coastal state extends to a belt of sea adjacent to its coast described as the territorial sea, creating the rule that “the normal baseline for measuring the breadth of the territorial sea is the low water line along the coast as marked on large-scale charts officially recognized by the coastal State.”¹⁵⁸ Article 2 of the second treaty, the ‘Convention on the Continental Shelf’, established that “The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources.”¹⁵⁹ Article 6 of this treaty furthermore states that:

*Where the same continental shelf is adjacent to the territories of two adjacent States, the boundary of the continental shelf shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary shall be determined by application of the principle of equidistance from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured.*¹⁶⁰

The treaty was still vague however on when and how exactly the baseline could be used to determine the breadth of the territorial sea, which also led to trouble in determining the delimitation of the continental shelf where states were either adjacent or opposite to each other. Particularly troublesome was the silence on what was to happen in case of special circumstances.¹⁶¹ In the 1970s, negotiations about the issue of varying claims and the disputes this led to, was addressed within the framework of negotiations of UNCLOS III, a third conference on the Law of the Sea that lasted until 1982. Before this third convention ensued however, states adjacent to the North Sea had already went through the effort to claim parts of its continental shelf. The offshore industry had made some major technological advancements, leading to circumstances in which deep sea mining became a feasible way of exploiting resources from the seabed. Many states were not willing to wait for the Law of the Sea to clear up who would have the right to these resources, and instead

¹⁵⁸ ‘Convention on the Territorial Sea and the Contiguous Zone’, Geneva, 29 April 1958, entered into force on 10 September 1964. United Nations, *Treaty Series*, vol. 516, p. 205.

¹⁵⁹ ‘Convention on the Continental Shelf’, Geneva, 29 April 1958, entered into force on 10 June 1964. United Nations, *Treaty Series*, vol. 499, p. 311.

¹⁶⁰ Ibidem.

¹⁶¹ Oude Elferink, *The delimitation of the Continental shelf* 85.

opted for bilateral agreements, covering mutual respect for the mining of their respective deep sea resources in (formerly) disputed areas.¹⁶²

Denmark, Germany and the Netherlands had not taken any initiatives to delimit their respective continental shelf boundaries for some time after the Convention had been adopted.¹⁶³ When in the 1960s the North Sea states did start the delimitation of their continental shelf, article 6 proved to be a hindrance due to its earlier mentioned vague outline: the equidistance principle in combination with the establishment of a baseline was the first stumbling block. Besides this, article 12 referring to the equidistance principle from the baselines also mentioned that: “the provisions of this paragraph shall not apply (..) where it is necessary by reason of historic title or other special circumstances to delimit the territorial sea of the two States in a way which is at variance with this provision.”¹⁶⁴ The link to the Ems-Dollart dispute becomes apparent here, for due to the 1960 treaty on the Ems-Dollart, both the Netherlands and Germany were able to hold on to their respective border claims. As there was still a lack of an official border in the Ems-Dollart area, this would naturally change the outcome for the extension of the three mile limit further out to sea as well. In this special case of the Netherlands and Germany, the fact that the ‘special circumstances’ mentioned in the treaty were embedded in complex historical claims from both sides, led to diverging views on how the delimitation of the continental shelf should proceed as well.

5.3 A supplementary treaty, and the delimitation of the continental shelf of the North Sea

Already in 1959, large gas reserves had been found in Groningen, leading to the idea on the German as well as the Dutch side that more natural resources might be found in the region.¹⁶⁵ Natural resources had not been mentioned in the 1960 treaty, despite the large gas reserves that had been found in surrounding areas before the treaty had been signed. The discovery of these reserves did not only have implications for the Ems-Dollart area itself, but also

¹⁶² Ignaz Seidl-Hohenveldern, *International Economic Law. General Course on Public International Law: Collected courses, volume 198* (The Hague, 1986) 78-79.

¹⁶³ Oude Elferink, *The delimitation of the Continental Shelf* 95-96.

¹⁶⁴ ‘Convention on the Territorial Sea and the Contiguous Zone’, Geneva, 29 april 1958, entered into force on 10 September 1964. United Nations, *Treaty Series*, vol. 516, p. 205.

¹⁶⁵ ‘Noordzee – Continentaal plateau. Grens tussen Duitsland en Nederland’, ‘s Gravenhage, 7 maart 1963. NL-HaNA, Buitenlandse Zaken / Code-Archief 55-64, nr. 2.05.118, inv.nr. 3430.

for the potential that the exploration of the continental shelf could uncover. An additional treaty to the original Ems-Dollart treaty of 1960 was therefore required, which was signed on the 14th of May 1962. The treaty created a common area for the exploitation of gas underneath the Ems-Dollart estuary, which the next paragraph on the joint development of the area will go into more detail about.

Despite the 1960 treaty and the additional treaty of 1962 - both taking into account the boundary dispute within international relations, the context of maritime law, and the economic context when it came to the exploration and exploitation of resources - the Ems-Dollart dispute had not now been neutralised all of a sudden. Due to the earlier mentioned promising nature of delimiting the continental shelf, negotiations about the delimitation of the continental shelf of the North Sea had begun halfway through the 1960s as well. Already in 1963, The Hague was aware that a consortium of at least seven German companies had conducted seismic research in areas on the continental shelf. This had happened just outside the common area as it was determined by the additional treaty.¹⁶⁶ Because none of the treaties had touched upon the subject of the actual state border, there was no mutually agreeable starting point for the demarcation of the continental shelf either. Furthermore, according to the Dutch report on the situation, German authorities had strongly encouraged *Panam* to join their consortium as well. This company was known to be very aggressive, and they were therefore not only prepared to start drilling at an early stage, from the Dutch side they were also afraid that due to the American nationality of the company, this would strengthen the German position from an international perspective when it came to the border dispute.¹⁶⁷ It was therefore suggested in the report that the Netherlands would have to make clear their position to Germany as soon as possible when it came to areas of the continental shelf that could still be disputed, this in order to prevent Germany from handing out concessions using 'ignorance about the situation' as an excuse.¹⁶⁸ Minister of Foreign Affairs Joseph Luns proposed during a cabinet meeting, in May 1963, in which the issue was raised, that when it came to (state) borders in the Ems-Dollart,

166 'Noordzee – Continentaal plateau. Grens tussen Duitsland en Nederland', 's Gravenhage, 7 maart 1963. NL-HaNA, Buitenlandse Zaken / Code-Archief 55-64, nr. 2.05.118, inv.nr. 3430.

167 Ibidem.

168 Ibidem.

any form of arbitration would be rejected, a standpoint that was approved by the rest of the cabinet.¹⁶⁹ Also part of the standpoint of the government was that the so-called 'special circumstances' that were mentioned in article 6 of the Convention on the Continental Shelf, were deemed to be not applicable to the Dutch-German case of the delimitation of the continental shelf.¹⁷⁰ The lack of an agreement on the state border between the Netherlands and Germany in the Ems-Dollart area had thus become the central problem in a case about the delimitation of the North Sea, for which economic motives in the form of natural resources were the primary driving factor for both parties to want the largest possible share of the continental shelf.

When it came to the delimitation of the continental shelf near the coast adjacent to the Ems-Dollart area, a 'partial agreement' was reached fairly quickly on the 1st of December 1964. This sidelong border between the Dutch and German part of the continental shelf was determined by using the northernmost endpoint from the 1962 additional treaty.¹⁷¹ It should be noted that an agreement was reached only for the delimitation of the continental shelf. The 1982 Convention on the Law of the Sea, UNCLOS III - which had been adopted by both the Netherlands and Germany, and officially went into force in 1994 - changed the limits of the territorial sea from 3 nautical miles, to 12 nautical miles off the coast.¹⁷² This was something neither the 1962 nor the 1964 treaties had covered, leading to a situation in which the area between 3 and 12 nautical miles off the Dutch and German coast had officially been delimited by treaty as the continental shelf, but not as territorial waters.

The exploration and exploitation of the Ems-Dollart area, and the delimitation of the continental shelf in its direct vicinity, had now been taken care of. The continental shelf further out into the sea was still to be delimited however. It was the earlier described equidistance principle that led to diverging viewpoints. Again the thalweg principle was being held onto from the Dutch perspective when it came to the Ems-Dollart area in relation to the

169 'Notulen m.r. 29 mei / 1 juni 1964, 'Grens van het Nederlandse continentale plat', NL-HaNA, Buitenlandse Zaken / Code-Archief 55-64, nr. 2.05.118, inv.nr. 3430.

170 Ibidem.

171 'Verdrag tussen het Koninkrijk der Nederlanden en de Bondsrepubliek Duitsland inzake de zijdelingse begrenzing van het continentale plat in de nabijheid van de kust', Bonn, 1 December 1964. NL-HaNA, Buza / Code-archief 1965-1974, 2.05.313, inv.nr. 3059.

172 UN General Assembly, *Convention on the Law of the Sea*, 10 December 1982, available at: [<http://www.refworld.org/docid/3dd8fd1b4.html>], accessed 20 December 2016.

equidistance line.¹⁷³ In 1968, this eventually led to an ICJ court case between the Netherlands, Germany and Denmark, with both the Netherlands and Denmark claiming that the equidistance principle should be held onto, whereas Germany was contending the rule that each of the States concerned should get a “just and equitable share” of the available continental shelf.¹⁷⁴ The outcome of the dispute is not very relevant for this dissertation (the Court rejected the contention by the Netherlands and Denmark) for it did not influence the Ems-Dollart dispute, nor did the Ems-Dollart dispute further influence the delimitation of the continental shelf. It is important to note however that the court case was about the delimitation of the continental shelf, minus the initial agreement reached in 1964, meaning that both the Netherlands and Germany did not want to contend the Ems-Dollart dispute in front of the ICJ, even though the right to do so had been enshrined in the 1960 agreement. The fact that they both did not let a court decide on the predicament, but instead opted for bilateral treaties, indicates that the (economic) interests of both parties were being taken into account to such an extent that it would not be beneficial for either party to risk the uncertainty of the outcome of the court case, which could lead to a binding ruling that could turn out to be a direct threat to the interests of both parties. It could also be argued that this might mean that both parties were not as certain about their claims if they were to be brought up in front of a court, for it was in the interest of both parties to continue to deliberate and cooperate in the Ems-Dollart area within the framework initially established by the 1960 treaty.

5.4 Joint development of gas reserves in the disputed area

The legal aspects of exploiting a transboundary deposit have been outlined by William Onorato, and basically comes down to states not being allowed to unilaterally exploit a shared deposit, and the need for an agreement between two states in order to exploit the deposit, especially if they are interested in creating and exploiting a common deposit.¹⁷⁵ The Ems-Dollart dispute when it comes to the exploration and exploitation of mineral resources is a special

¹⁷³ Oude Elferink, *The delimitation of the Continental Shelf* 100.

¹⁷⁴ International Court of Justice, ‘North Sea continental shelf (Federal Republic of Germany / Netherlands)’, summary of the summary of the Judgment of 20 February 1969, available at: [<http://www.icj-cij.org/docket/index.php?sum=295&code=cs2&p1=3&p2=3&case=52&k=cc&p3=5>], accessed 20 December 2016.

¹⁷⁵ Onorato, ‘Joint development of seabed hydrocarbon resources’, *Energy* 6-11 1311-1312.

case in the sense that there was a transboundary deposit where two states disagreed on where the boundary actually was in the first place, while at the same time having already established a framework of agreements surpassing the need for a state border. Once it became clear that there could be a transboundary deposit in the disputed area, a legal framework in addition to the already existing one had to be created. The 1962 additional treaty can be seen as very practically oriented, for its intention was to substantiate a claim on the natural resources, while creating an acceptable framework to do so for both parties. The treaty proposed that on the map, a dotted line would be drawn precisely in the middle of the disputed area. The area to the west of the dotted line was determined to be the Dutch zone, and the area to the east its German counterpart.¹⁷⁶ In their respective areas, the Netherlands and Germany could give exploration and exploitation concessions within their own national legal framework, enabling both the Netherlands and Germany to extract resources without changing any arrangements when it came to the border itself, which was still officially disputed this way.¹⁷⁷ Besides this, both countries also agreed in article 5 of the additional treaty that the profit of any reserves of natural resources that were to be found would be split equally between the concessionaires.¹⁷⁸

The necessary negotiations as they were outlined by Onorato were possible by expanding the already existing legal framework created by the 1960 Ems-Dollart Treaty. This then led to the creation of a so-called 'common area': all the gas extracted in this area would have to be split between the two parties responsible for exploitation who had concessions on this common ground. In the case of the Netherlands this was the NAM, in the case of Germany this was Brigitta. Onorato mentioned in his work on joint development that practical considerations rather than legal mandates were amongst the primary reasons joint development schemes were set up in the North Sea.¹⁷⁹ This coincides with the theoretical argument made by Miyoshi, that countries need to be willing to set aside legal issues in exchange for

176 See Fig. 5.1. Concessionaires handed out on the Dutch and German sides are also pointed out on this map.

177 Mr. W.G. Benlinfante, 'Aanvullende overeenkomst bij het Eems-Dollard verdrag Nederland-Bondsrepubliek Duitsland', voor de ministerraad d.d. 27 april 1962. NL-HaNA, Justitie / Raadadviseurs, 2.09.57, inv.nr. 31.

178 'Aanvullende overeenkomst op het op 8 april 1960 voor het Koninkrijk der Nederlanden en de Bondsrepubliek Duitsland ondertekende Verdrag tot regeling van de samenwerking in de Eemsmonding (Eems-Dollard verdrag)', Bennekom, 14 May 1962. [<http://wetten.overheid.nl/BWBV0004413/1963-08-01>]

179 Onorato, 'Joint development of seabed hydrocarbon resources', *Energy* 6-11 1311-1312.

economic profit in order to come to such an agreement.¹⁸⁰ The 1962 treaty was primarily meant to foresee both the Netherlands and Germany of their own respective legal frameworks in their parts of the common area. The actual development happened within the respective countries' areas within the common area, so in the narrow sense of the concept, there was not really joint development in the sense that both countries were actively working together in developing the common area. In the case of the Netherlands and Germany, a common area was created, in which the gas found within the disputed area was to be treated as a unitary deposit. This required cooperation and coordination, which the 1960 framework had provided partially already, and the 1962 additional agreement could provide for the exploration and exploitation of mineral resources.

This framework of cooperation and coordination was not completely ironclad either. In 1966, the concessionaires NAM (Dutch) and Brigitta (German) had concluded an agreement of cooperation and a conduct of business, approved by the German and Dutch governments. In accordance with the 1962 treaty, both concessionaires were entitled to 50% of the mineral resources found in the common area. In 1991 however, it turned out that the final estimation on the amount of gas present in the area was smaller than initial estimates, and it was concluded that the NAM had provided Brigitta with an excess of 20 billion cubic meters.¹⁸¹ A court of arbitration was necessary to work out the conflict that ensued between the two parties, with which both governments were indirectly involved as well. Brigitta had to compensate the NAM, and not the Dutch State, but indirectly it would mean that the largest share paid by Brigitta would end up in the Dutch treasury either way due to the government being a stakeholder within the company.¹⁸² Nonetheless, the fact that concessionaires from both sides were able to come to a cooperative agreement on the conduct of business indicates the possibility of transnational cooperation within the common area, within a framework in which the economic interests of both sides were the primary point of departure.

¹⁸⁰ Miyoshi, 'The joint development of offshore oil and gas in relation to maritime boundary delimitation', *Maritime Briefing* 2-5 39-40.

¹⁸¹ Tweede Kamer, Kamerstuk 21 563, 'Overbelevering van gas aan Brigitta uit de Common Area van het Groningenveld', nr 6 – Brief van de Minister van Economische Zaken aan de voorzitter van de Tweede Kamer der Staten-Generaal, 's-Gravenhage, 11 juli 1996.

¹⁸² Ibidem.

5.5 Conclusion

Soon after the 1960 treaty had been signed, it proved not to be sufficient when it came to the exploration and exploitation of mineral resources located underneath the treaty area, while at the same time not providing a solid framework that could be used for the delimitation of the continental shelf further out into the North Sea. This problem again arose due to the fact that no legal agreement had been reached on where the state border runs in the Ems-Dollart area, with the treaty enabling both the Netherlands and Germany to hold on to their respective claims. The predicament therefore played a role within the framework of the Law of the Sea as well. Driven by the economic benefits the exploitation of the area could potentially entail, while taking the standpoint that the state border itself should again not be tempered with, an additional agreement to create a common area for exploration and exploitation was quickly reached. From the Dutch side, the fear that not tying loose ends would lead to a weakening of the legal position in the area played a role as well, for this could potentially endanger the current situation which left the border undetermined but took into account the interests of both parties as well. Taking into account the 'common goal' of the extraction of gas, benefiting both parties, was possible due to the continuation of good neighbourly relations, a context within which the initial 1960 agreement had been reached as well, again on pragmatic grounds primarily driven by more direct economic interests this time.

This compromise was not self-evident however. The delimitation of the continental shelf of the North Sea shows how the lack of a border in the Ems-Dollart area still played a major role in an initially bilateral and later - with the inclusion of Denmark who had a similar issue with Germany - trilateral dispute about how the continental shelf should be divided. This led to a court case to be brought in front of the International Court of Justice, within which adhering to the equidistance principle was the primary standpoint for both the Netherlands and Denmark. The Ems-Dollart area itself was not included in this court case. Neither the Netherlands nor Germany decided to trigger the article in the 1960 treaty that enabled them to make the Ems-Dollart dispute subject to arbitration in front of an international court. The fact that they did not do this, points out that the interests of both parties were being taken into

account in the agreement they had reached already, but also indicates that both The Hague and Bonn were not as sure of their border claims, and would prefer to keep the bilateral framework the treaty provided rather than trying to settle the dispute through arbitration. This meant that inside the Ems-Dollart area there was a framework and continued possibility of bilateral negotiations. Both the Netherlands and Germany decided to safeguard their respective interests in the Ems-Dollart itself by not putting the predicament in front of the International Court. Outside the common Ems-Dollart area however, a zero-sum game of territorial delimitation had unfolded: due to the economic promises of said territory, all the North Sea countries wanted to claim the largest possible share.

The common area provided the concessionaires on both sides with a legal framework. This did not mean that there were no disputes anymore, and the NAM vs Brigitta case of the 1990s is a good example of this. It did ensure however, that whenever a conflict would arise, it would have to be resolved within this legal framework, therefore safeguarding the economic interests of both states, while not tinkering with the sovereignty claims themselves.

6. Finding solutions for a predicament left unresolved

6.1 Introduction: A dispute amidst a framework of cooperation

The fifth chapter took into account economic pragmatism, which resulted in the joint development of a common area. The fourth chapter had already concluded that economic relations – though very important – were not the only dimension of Dutch-German relations. The Hague and Bonn were also part of the same Western military alliance NATO. It has been demonstrated that, due to the border predicament, the strategic importance of the Ems had been a subject of contention during the two World Wars. By the 1960s, its strategic importance had not changed, and neither had the fact that the boundary was still disputed. NATO as a framework for military cooperation did require Bonn and The Hague to come to an agreement about the military coordination of operations in the Ems estuary however. The agreement this eventually led to in 1966, acknowledged that “due to the interdependence that exists (..) concerning the cooperation of forces in the area near the border (..) and because of the particular circumstances that prevail in the Ems Estuary, there must, at all times be the closest cooperation and coordination in defence planning and wartime operations between the two commands.”¹⁸³ In practice, NATO local command headquarters were established on the German Waddensea island Borkum, which lies in front of the mouth of the Ems estuary. Within the Ems estuary then, the responsibility for operational aspects came to lie with this so-called LCHQ, which ensured that there was coordination from one command structure for military operations both countries had to participate in. This also ensured a clear division of tasks, as the German navy was for example appointed to be responsible for ‘mine counter measures’ in the area.¹⁸⁴

By 1966 then, the situation in the Ems-Dollart that had been a predicament for 500 years, had led to cooperation and coordination in the economic as well as the military sphere within the area. The central question

¹⁸³ ‘Secret Agreement between Befehlshaber der Seestreitkräfte der Nordsee (BSN) and Admiral Netherlands (Adm.NL) on co-ordination of operations in Ems Estuary’, Sengwarden, 27 september 1966. NL-HaNA, Marine na 1945, 2.12.56, inv.nr. 2981.

¹⁸⁴ Ibidem.

for this chapter then, will be to examine how and why both sides resolved the issues at hand without solving the actual question of demarcation, and what this means for the present day state of the conflict.

6.2 A key region for economic development?

From the Dutch side, the northernmost region of the Netherlands, and in particular the region around the Ems, was planned to become a key area for economic development. This was due to the Dutch government expecting a continuation of the development and growth of the capital intensive and energy intensive 'sea harbour industry'.¹⁸⁵ The Ems harbour was built in accordance to this expectation as well, with construction starting in 1968 and the harbour being fully realised in 1973. The oil crisis of this year fundamentally changed compared to the 1960s prospects however, and the expected (petrochemical) industrial developments in the region never took off.¹⁸⁶ On the German side, plans for the 'Dollarthafen-projekt' had developed over the course of the 1970s. Central to this project was the development of a large harbour and industrial area that would divert the course of the Ems more to the south, and take an area as large as 10% of the Dollart estuary.¹⁸⁷ From the Dutch as well as the German side, there were voices raising the environmental implications such projects would have. Already in the period 1969-1970 for example, environmental issues were raised in the context of negative implications this would have for the disputed estuary. The dumping of wastewater in the Ems estuary without purifying it first had become the subject of deliberations between Dutch and German delegations in 1970, where the German delegation expressed its concerns regarding the Dutch stance on this pollution.¹⁸⁸ The environmental implications of industrial development for the estuary had not been taken into account in any of the treaties. Despite this, the Ems-Dollart cooperation treaty was signed in 1984. Article 2 of this treaty formed the legal basis for the Federal Republic of

¹⁸⁵ Andries Nentjes, 'Economische ontwikkeling Eems-Dollard', *Waddenbulletin* 17 (1982) 68. (67-70)

¹⁸⁶ Ibidem.

¹⁸⁷ Sytze Brandenburg and Henk Reenders, 'Eems Dollard nog steeds bedreigd!', *Waddenbulletin* 17 65-66. (65-66)

¹⁸⁸ 'Kort verslag van de Duits-Nederlandse bespreking, betreffende de voorgenomen lozing van ongezuiverd industrieel [sic] afvalwater op het Eems-Dollard estuarium'. NL-HaNA, VROM / Milieubeheer, 2.15.5326, inv.nr. 479.

Germany to start constructing the Dollarthafen.¹⁸⁹ Chapter VI of the treaty also created a 'conciliation committee', charged with the further promotion of cooperation within a framework of good neighbourly relations, on terrains related to economic and environmental questions.¹⁹⁰ This treaty was never officially ratified on the Dutch side however, and in July 1991, the Netherlands and (a reunified) Germany both decided to withdraw the cooperation agreement.¹⁹¹ This due to the fact that the plans for the Dollarthafen project had never been realised in the meantime in the first place, and in the Netherlands, its contents had led to opposition within the Senate as well. The environmental agreement had therefore never been ratified either, meaning that this was still an unresolved area serving as a grounds for contention. When it came to the environmental shortcomings in the Ems-Dollart area, both The Hague and Berlin were still willing to come to an agreement which would cover these outstanding issues, and reached an agreement on this in 1996, in which both parties agreed to cooperate in the area of the protection and conservation of nature and water in the Ems-Dollart estuary.¹⁹²

6.3 1990s Ems-Dollart Region

From both the Dutch and German side, the economic development of the region was seen as something that could be transboundary in nature as well. A 1968 report also involving private parties, saw that cooperation between regions across the boundary was possible within the framework of the European Economic Community both countries were a part of.¹⁹³ National governments and the EEC tried to transform peripheral positions of border

189 'Verdrag tussen het Koninkrijk der Nederlanden en de Bondsrepubliek Duitsland inzake de samenwerking in het gebied van de Eems en de Dollard, alsmede in de aangrenzende gebieden (Samenwerkingsverdrag Eems-Dollard)', Emden, 10 september 1984. *Tractatenblad van het Koninkrijk der Nederlanden, jaargang 1984, nr. 118*.

190 'Samenwerkingsverdrag Eems-Dollard', *Tractatenblad 1984-118*.

191 Tweede Kamer, Kamerstuk 19 343, 'Goedkeuring van het op 10 september 1984 te Emden tot stand gekomen Verdrag tussen het Koninkrijk der Nederlanden en de Bondsrepubliek Duitsland inzake de samenwerking in het gebied van de Eems en de Dollard, alsmede in de aangrenzende gebieden, (het Samenwerkingsverdrag Eems-Dollard) met Bijlagen, Slotprotocol en brieven (Trb. 1984, 118)', Brief van de Minister van Buitenlandse Zaken houdende intrekking van het voorstel van de wet, Den Haag, 19 juli 1991.

192 'Aanvullend Protocol bij het op 8 april 1960 ondertekende Verdrag tussen het Koninkrijk der Nederlanden en de Bondsrepubliek Duitsland tot regeling van de samenwerking in de Eemsmonding (Eems-Dollardverdrag), tot regeling van de samenwerking met betrekking tot het waterbeheer en het natuurbeheer in de Eemsmonding (Eems-Dollardmilieuprotocol)', Delfzijl, 22 August 1996. *Tractatenblad van het Koninkrijk der Nederlanden, jaargang 1996, nr 258*.

193 J.D. de Boer, drs. J.K.T. Postma, Universiteit Groningen in samenwerking met de Kamer van Koophandel en Fabrieken voor de Veenkoloniën en Oostelijk Groningen te Veendam, 'Over de mogelijkheden van samenwerking tussen Noord-Nederland en Noordwest-Duitsland', 1 november 1968.

regions into economically and politically more important centers. The first such 'action programme' was for the Ems-Dollart region.¹⁹⁴ In April 1978, the first 'transboundary programme for the Ems-Dollart Region' had been drafted, initiating the better coordination of governance on both sides of the border, and contributing to necessary economic cooperation within the European Economic Community.¹⁹⁵ There were indeed initiatives crossing the boundary to come to a common framework for economic development, but also taking into account social, cultural, and environmental benefits of such cooperation.

The Emscommission had already been in place since the signing of the 1960 treaty, but previously only been used as a body in which representatives from both governments could deliberate about the area. The Ems Dollart Region was founded in 1977 and included a much broader array of parties besides the State with an interest in the region. Within the EEC framework of 'Euregions', which had been established by signing the 1980 'European Outline Convention on transfrontier co-operation between territorial communities or authorities', the 1991 Treaty of Anholt made the Ems Dollart Region function as a so-called 'transboundary public body'.¹⁹⁶ This body encompasses a much larger region than the Ems-Dollart estuary alone, and has as its goal to promote common interests on terrains as diverse as spatial planning, infrastructure, economic development and culture.¹⁹⁷

6.4 Present day dispute

This chapter so far has described a convergence of interests in the region, culminating into closer 'transboundary cooperation' in a lot of areas. Every time something would come up which was potentially in contention with the sovereignty claims of both the Netherlands and Germany, the issue it concerned would be fixed by amending existing treaties on the area. Chapter 5 showed how changes in maritime law had affected the dispute before, and

194 James Scott, 'Transborder cooperation, regional initiatives, and sovereignty conflicts in Western Europe: the case of the Upper Rhine Valley', *Publius* 19-1 (1989) 149. (139-156)

195 'Concept grensoverschrijdend programma Eems-Dollard-Regio 1981', 30 Juni 1981. NL-HaNA, CRM, 2.27.19, inv.nr. 1636.

196 'Overeenkomst tussen het Koninkrijk der Nederlanden, de Bondsrepubliek Duitsland, het Land Nedersaksen en het Land Noordrijn-Westfalen inzake grensoverschrijdende samenwerking tussen territoriale gemeenschappen of autoriteiten', Isselburg-Anholt, 23 May 1991. *Tractatenblad van het Koninkrijk der Nederlanden, jaargang 1991, nr. 102*.

197 Eems Dollard Regio (EDR), [<http://www.edr.eu/nl/site/organisatie>], accessed 20 December, 2016.

how several treaties and amendments were required in order to cover the situation in such a way that the interests of both countries would – at least in the common area – be safeguarded, while leaving the very core of the predicament unresolved. Environmental issues when it came to pollution of the estuary and sovereignty claims when the development of an industrial harbour was on the cards, are examples of this after the dispute had been embedded in many legal frameworks already in the form of treaties and other frameworks of cooperation, such as NATO and the European Union.

After UNCLOS III had been concluded in 1982, the Netherlands changed the boundary of its territorial sea from 3 to 12 nautical miles on the 9th of January 1985, this in accordance with the rules as they had been set out in the convention. In front of the mouth of the Ems this happened as well, which again led to a dispute due to changes within maritime law. Therefore, negotiations had ensued between the Netherlands and the Federal Government of Germany regarding the question where the territorial boundary should be drawn now that it had been extended up to 12 nautical miles off the coast, resulting in a concept treaty.¹⁹⁸ From the German side there were a number of demands when it came to the delimitation of this new territorial boundary between the two states, demands that came forth from the historical claims the Germans claimed to have in the region:

a) The FRG demanded that the contended area would be expanded, whereas the Netherlands wanted to stick to the demarcation line following the continental shelf

b) The FRG demanded that outside the contended area, the Netherlands would not be able to take any decisions when these decisions would have consequences for maritime traffic headed for the mouth of the Ems¹⁹⁹

These conditions were unacceptable for The Hague, for they would be a direct impediment on the sovereign rights of the Netherlands even outside the disputed area. Instead, a ‘period of reflection’ was proposed, where both sides could rethink their standpoints on the demarcation issue of the extended territorial sea. It was anticipated from the Dutch side that a possible German reaction could be to bring the case in front of an international court, which would mean that the Germans could also effectively contend Dutch

198 DG Rijkswaterstaat, ‘Nota: Grens territoriale zee met BRD’, 27 juni 1991. NL-HaNA, VW / DG Scheepvaart, 2.16.111, inv.nr. 1116.

199 Ibidem.

sovereignty over the complete Ems-Dollart area, meaning that the framework of cooperation currently present would be dissipated.²⁰⁰ The report then continued stating that this was highly unlikely, for it would not be in the German interest to end the current regime, as they had themselves emphasised the good working framework of cooperation within the Ems committee.²⁰¹ It is therefore contentious as to whether the German government has ever seriously considered this possibility.

The introduction started with the most recent case of contending sovereignty over the territorial sea surrounding the Ems-Dollard area: the construction of the offshore wind farm Riffgat. This was a direct consequence of lack of agreement on the territorial delimitation, for which negotiations had been initiated, but not concluded in a satisfactory way, so that this eventuality had not been covered. Another treaty was then required. This bilateral treaty on the use and administration of the territorial sea between 3 and 12 nautical miles, was eventually signed on 24 October 2014. Article 1 of this treaty again highlighted that the treaty parties will, in the territorial sea, take into account the common interests and special interests of the other party, and work together in the spirit of good neighbourly relations.²⁰² In practice it was again a treaty that ensured that the problem at hand could be solved – in this case the construction of a wind park and rules regarding cooperation and coordination when it comes to maritime traffic between the 3 to 12 nautical miles limit – without touching upon the core of the predicament: the actual delimitation of the boundary in the Ems-Dollart area.

6.5 Conclusion

Since the 1960 treaty, it is important to note that neither government has made any serious attempt to try and solve the issue of boundary delimitation itself, instead continuously choosing the solution of bilateral agreements every time an issue comes up that is usually a direct consequence of both states claiming sovereignty in an overlapping area. One could ask whether this

200 DG Rijkswaterstaat, 'Nota: Grens territoriale zee met BRD', 27 juni 1991. NL-HaNA, VW / DG Scheepvaart, 2.16.111, inv.nr. 1116.

201 Ibidem.

202 'Verdrag tussen het Koninkrijk der Nederlanden en de Bondsrepubliek Duitsland betreffende het gebruik en beheer van de territoriale zee van 3 tot 12 zeemijlen', on the Ems, 24 October 2014. *Tractatenblad van het Koninkrijk der Nederlanden, jaargang 2014, nr. 182.*

method of 'resolving without solving' is despite good neighbourly relations, or only possible because of them. Healthy Dutch-German relations have been of importance in the sense that the framework of cooperation as it exists nowadays would not have been possible without this emphasis on good neighbourly relations. This chapter has demonstrated that the cooperation between both parties since it was initiated by the 1960s treaties has only deepened, and at the same time broadened itself. The idea that the spatial planning, and infrastructural and economic development of the area could also be looked upon in a different way than a solely state centrist approach, resulted in groups cooperating within the framework of a transboundary organisation: the Ems Dollart Region. In that sense, joint development was not strictly limited to the exploitation of joint reserves of natural resources.

Interdependence as it was outlined in the fourth chapter continues to form another important aspect of Dutch-German relations when it comes to the Ems-Dollart area. Nye and Keohane saw interdependence as "situations characterized by reciprocal effects among countries or among actors in different countries. (..) Where there are reciprocal (..) costly effects of transactions, there is interdependence."²⁰³ This literally came up as playing a role during and after negotiations related to the delimitation of the territorial sea. It can be seen in all the disputes that have come up since the 1960 treaty, that the disputed boundary delineation of the Ems-Dollart itself was never called into question. When German voices during these negotiations about the territorial sea mentioned bringing up the delineation dispute itself in front of a court, it was a considered but easily dismissed possibility in the Dutch report. After all, Germany had stressed the good framework of cooperation established in the area. Bringing the sovereignty question itself in front of a court would be costly, for it would put the current regime of joint development in which both parties saw their interests governed at risk. The situation in the estuary was very much of a reciprocal nature in that sense, hence stressing the importance of good neighbourly relations surrounding any negotiations regarding the area.

This brings up the present day state of the dispute. The downside of this situation of resolving without solving, is that both Germany and the Netherlands still have a sovereign claim on the area. Despite all treaties,

²⁰³ Keohane and Nye, *Power and interdependence*, 4th edition (2011) 7-8.

treaty amendments, additional treaties and even an organisation that takes into account regional interests that are transboundary in nature, there have still been disputes directly related to the respective claims of sovereignty. Within these disputes – some bigger and with larger consequences than others – both countries take into account the interests of the State first, and only second come the interests of the neighbouring country or the transboundary developments in the region itself. Again the bilateral negotiations between 1985 and 1991 are a good example of this: the German side made hard claims when it came to the delimitation of the territorial sea, the Netherlands saw these as a direct threat to its sovereignty, leading to a situation in which bilateral negotiations were required to govern the interests of both countries in the region. Since the 1960 treaty has been signed, it can be concluded however that within the region, the processes of deepening and widening show that despite the odd contention related to this sovereignty question, the framework of good neighbourly relations has always remained intact, which has so far always led to a bilateral solution in which the interests of both countries are again secured.

7. Conclusion

7.1 Historical claims, a pragmatic reality

When it comes to the pre-war dispute, the discussion of sovereignty primarily centered itself on the historical claims of Germany and its predecessors. A remarkable continuity in upholding these claims, while the Dutch never explicitly acknowledged them, can be witnessed in this dispute that has been in place for over 500 years. Depending on the period, it was the historical context that determined whether a side would take a reserved or a more direct stance towards the predicament. The Dutch side can primarily be characterised by its politics of neutrality, a pragmatic stance that was required considering it was up against more powerful states throughout most of the conflict. These politics of neutrality were able to change into a more bolder approach after World War II however. Germany had lost the war, and the Netherlands tried to use their role as a victim of the German occupation, in order to strengthen their position in not only this border dispute, but an annexation of German territory as well. Despite the strong economic ties between the two countries, The Hague took a less pragmatic course when it came to the *Generalbereinigung* in general, and the Ems-Dollart predicament in particular. Public pressure due to the troublesome political-psychological factor has been cited as an important explanation in that regard, making for long and arduous bilateral relations. The eventual 'strombau-solution' then, was not the outcome either state had wanted beforehand. It was in that sense a very pragmatic approach, inevitable due to the strong economic ties between the two countries, and due to the Western security framework both countries were a part of. The pragmatic solution for setting rules in a joint setting regarding the strategic command in the area within a NATO framework serves as a good example of this.

The Second World War thus can be seen as a breaking point, explaining the discontinuity when comparing pre-war and post-war Dutch-German relations. With the 1960 treaty on the Ems-Dollart, a continuation in the pragmatic stance when it comes to the region can also be seen however, albeit due to different circumstances. The context of the conflict changed, demonstrated by The Hague trying to get the upper hand in negotiations

about the area by assuming the role of war victim. A pragmatic solution within a framework of good neighbourly relations was eventually reached however, all the more due to the economic and strategic interdependence in post-war relations. The historical claims, primarily from the German side, were therefore not in any way disproven or no longer valid, but were rendered ineffective due to the nature of this agreement

7.2 The Law of the Sea, a lingering dispute

The Truman proclamation of 1945 ushered in a new era for maritime law. The 1960 treaty alone had proven insufficient to cover the changes that came about through the 1958 United Nations Conference on the Law of the Sea, especially when it came to the delimitation of the continental shelf of the North Sea. Simultaneously, gas had been found in Groningen in 1959, making the delimitation of the continental shelf a promising economic venture, while making the disputed Ems-Dollart area all the more interesting due to the high likelihood that exploration would point out more gas reserves being located underneath it. When it came to the area itself, an additional treaty regarding the exploration and exploitation of natural resources had to be signed in 1962, this due to the fact that the 1960 treaty had left the core of the predicament unresolved, preventing both states from the exploration and exploitation of the area if they could not reach an agreement first. A pragmatic compromise was made in the form of making the reserves unitary and splitting any resources that would be found. This was due to the promising economic interests that were present for both parties, and again only possible due to the framework of good neighbourly relations, which made it possible to not touch upon the legal aspects of both border claims. That it is the combination of both that led to the agreement, is demonstrated by the delimitation of the continental shelf of the North Sea further out into the sea: this led to long and arduous negotiations, and eventually required arbitration and a ruling by the International Court of Justice before an agreement could be reached.

In the Ems-Dollart area itself a common area had been established. This common area provided a legal framework for the concessionaires involved, guaranteeing the practical sides of exploitation of the area while at the same time covering the interests of both states. This did by no means mean that

there were no disputes anymore, as these have still been present inside as well as outside the field of joint exploitation since then. The case between the NAM and Briggata in the 1990s serves as a good example for this. Either way, cooperation between both parties since the 1960s treaties can be seen as having deepened as well as broadened. Spatial and infrastructural planning and economic development being looked upon from a transboundary perspective in the form of the Ems-Dollart Region was the result of looking past the solely state centrist approach, possible due to and nurtured by the EEG framework supporting regional development. Joint development of the area was most certainly not limited to the exploitation of the common area through the extraction of natural resources anymore. Interdependence can still be pointed out as a factor of continuity as well: even though the predicament gave rise to a number of disputes directly related to contended sovereignty, the interests both countries had in the region and in the continuation of good neighbourly relations can be seen as so far always having ensured a solution within the framework created by the 1960 treaty, instead of contending the core question of sovereignty itself.

7.3 Conclusion: Why was the Ems-Dollart dispute never resolved?

In order to explain why the Ems-Dollart dispute was never resolved after 1945, it is first important to recognise the importance of a non-state centric approach. Applied to international relations it allows for territorial disputes to be placed in a much broader context. At the same time it acknowledges the existence and interplay of different frameworks, within as well as outside the more classical state centrist approach. The Ems-Dollart predicament is a territorial dispute that has been in place for over 500 years: despite numerous changes in its historical context, it has firmly remained in place as such a dispute throughout all these years. This thesis has searched to incorporate different historical contexts and frameworks in order to explain the rigid status of the predicament.

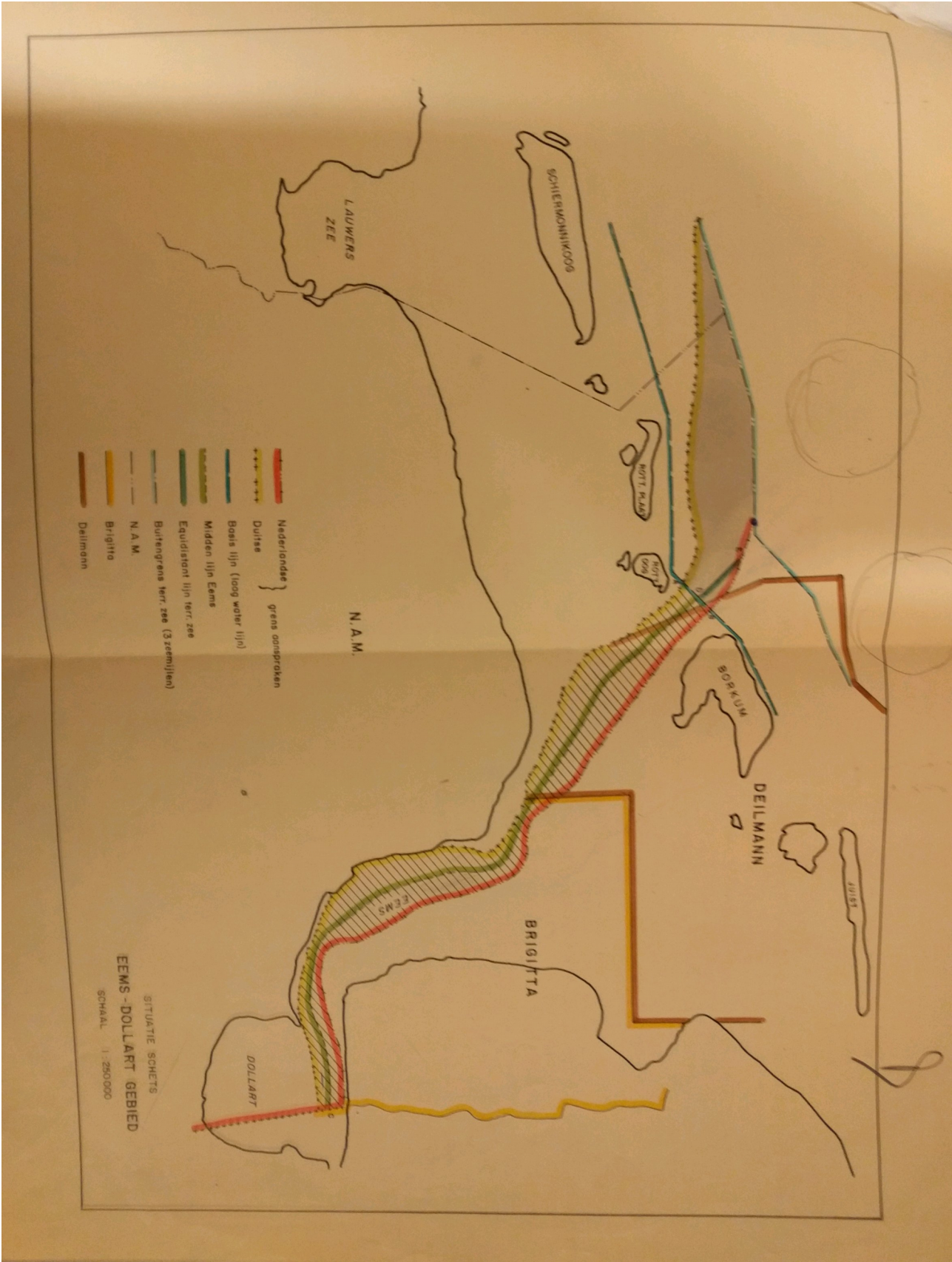
Before the Second World War, it was primarily power projection governing the interests from the German side - who used the argument of being supported by an historical claim - whereas from a Dutch perspective the pragmatic politics of neutrality prevented The Hague from a bolder approach

to the dispute. After the Second World War then, new frameworks of cooperation emerged that both states were a part of: NATO and the EEG, but also the UNCLOS convention. The traditional relationship between a small and a big state as it had been before the Second World War had thereby been diminished. Whereas before Germany being the larger neighbour required a stance of neutrality for The Hague in order to maintain its interests, after the War, the playing field became much more level due to this changed context, thus enabling the Netherlands to take a bolder approach. In practice this also meant that The Hague tried to secure and push their interests in the wake of the Second World War. The political-psychological relationship as an inheritance of the Second World War played a major role in this, as can be witnessed by the fact that only in 1960 a general agreement settling post-war issues was agreed upon. This due to the symbolic value the negotiations had in the context of the political-psychological relationship with the Germans after the Second World War. Nonetheless, when considering the outcome it was economic interdependence that still played a major role however, necessitating pragmatic solutions, which in turn led to joint development of the area in an economic sense, and eventually growing out into the Ems-Dollart Region surpassing state boundaries.

Any issues that arose after the establishment of the 1960 treaty framework, were resolved by securing the most important interests through bilateral agreements, while at the same time keeping the boundary dispute itself unresolved. This was only possible due to good neighbourly relations, which can be seen as being stressed as highly important for both parties continuously after 1960. It would neither be in the Dutch, nor German interest, to bring the delimitation itself in front of an international court of arbitration, as long as the interests of both parties can be maintained through these bilateral treaties. This also serves as an explanation as to why the historical claims themselves do not play a role in the current dispute anymore. These would only become relevant again if The Hague or Berlin would decide that its interests are better secured when the sovereignty question is indefinitely settled. Due to good neighbourly relations, both parties have always managed to reach a satisfactory agreement so far however, making the hypothetical option of arbitration by an international court a highly unwanted course of action. Either way, as long as the core of the predicament itself, the

delineation of the Ems-Dollart estuary, has not been resolved, bilateral solutions will always be required in case any more eventualities arise in the future.

FIG 5.1, 'Situatieschets 1963'. NL-HaNa, Code-Archief 55-64, nr. 2.05.118, inv.nr. 3430.



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