A New Treaty Regime for the Ems–Dollard Region

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1. Introduction

The determination of the maritime boundary in the Ems estuary has been a burdensome problem in Dutch-German relations for centuries. Together with the Dutch-Belgian dispute concerning the maritime boundary in the Wester Schelde area with respect to the Wielingen, the Ems–Dollard controversy constitutes one of the remaining maritime delimitation problems of the Netherlands.

The growing importance of the harbour of Delfzijl† and the expansion of the old harbour of Emden, the expanding economic and geo-political interdependence and the increasing transboundary pollution problems of the Ems–Dollard region, made it necessary to adjust the existing treaty regime of 1960–62, which had left the boundary issue unresolved.

Therefore, at the initiative of the Federal Republic of Germany, the two riparian states started negotiations, in order to settle the outstanding problems and to evaluate recent developments. The talks ended in 1984 with the conclusion of the Treaty of Co-operation concerning the Ems–Dollard Region.‡ Germany ratified the Treaty in 1985. The Netherlands has initiated the constitutionally required ratification procedures. The 1984 Treaty is presently being examined by the Second Chamber of the House of Parliament. The expectation is that the Dutch Government will be able to ratify the Treaty in 1987.

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† The new Dutch “Eems Harbour” situated close to the navigable Doeksgat is, for reasons of convenience, considered as part of the Delfzijl harbour complex.
‡ Verdrag tussen het Koninkrijk der Nederlanden en de Bondsrepubliek Duitsland inzake samenwerking in het gebied van de Eems en de Dollard, alsmede in aangrenzende gebieden (10 September 1984). Tractatenblad (Netherlands Treaty Series 118 (1984)).
2. Historical background

Situated between the coasts of the Dutch Province of Groningen and the German coast of Ost-Friesland the Ems estuary consists of rather shallow waters, delimited on the seaward side by a chain of islands such as Schiermonnikoog-Rottum-Memmert. Inland, the Ems is bordered by the Dollard, of which approximately 80 per cent belongs to the Netherlands. This area is important not only for the possibility of land reclamation, but also as a safeguard against the possible deterioration of the condition of the eastern navigable channel of the Ems, which connects the German harbour of Emden, and, indirectly also Delfzijl, with the high seas. This channel reaches the North Sea through the Oosfriese Gaatje, Eemshorngat, Randselgat and Western Ems. The western channel, which reaches the North Sea via the Bocht of Watum, Doekegat, Oude Westereems and Hubertsgat, faces serious siltting problems in the Bocht of Watum.

Therefore, the Dutch have always maintained that the maritime boundary should be the thalweg of the eastern (principal) navigable channel. According to the Dutch Government, this claim has a sound base in general international law. With respect to bays or bay-like situations, the existence of a navigable river running into a bay and/or the relative geographical and geological factors determining the courses open to navigation to the sea, demonstrated that states indeed did show a considerable interest in maintaining their navigational possibilities in the nineteenth and early twentieth century. Thus, in these circumstances, states almost always delimited their territorial sea boundary by application of the thalweg principle.\(^2\)

Germany, on the other hand, holds that navigational interests are outweighed by virtue of an asserted historical title to the whole Ems estuary. This claim is based on a (forged) Bill of Enfeoffment of 1464, which allegedly gave the Count of East Frisia exclusive authority over the entire Ems estuary. However, the extremely important words "auch dem Wasser die Embse" were added to later versions of the Bill, which itself was backdated to 1454.

The abovementioned clause never formed part of the original version of the Bill of Enfeoffment.\(^3\) The claim is backed up by the effective German exercise of sovereignty over the estuary, demonstrated over long periods of time. The Dutch, however, never acquiesced in this extreme claim.

The medieval practice of unilaterally claiming extensive maritime areas gradually disappeared during the eighteenth and nineteenth century. With respect to the Ems, this is demonstrated by the Judgments of the British Prize Court in the De Twee Gebroeders Cases (1800 and 1801). The first case concerned a Dutch ship which was taken near the German coasts in 1799. The British Prize Court held that

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\(^3\) For an historical overview see W. von Bippen, *Historische Zeitschrift* (1880) Vol. 44, pp. 299 et seq.